

Selected Essays on

International Arbitration

Michael Hwang S.C.



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INTERNATIONAL ARBITRATION

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*This book is dedicated to
my wife and sons
for their love and support
and
the MH Alumni
for their enduring friendship.*

FOREWORD BY DR MICHAEL PRYLES*

The Singapore International Arbitration Centre is delighted to publish this volume of essays written by Michael Hwang to celebrate his 70th birthday. It brings together in one convenient format a number of the significant articles and chapters of books he has previously published on aspects of international arbitration.

Michael Hwang is an institution in arbitration, but, more than that, he is an accomplished lawyer, advocate, judge and diplomat as well as arbitrator. He has had a most distinguished career. It may not be widely known, but Michael was born in Sydney, Australia. To me this perhaps accounts for his enormous energy and success. His family had fled to Australia during the Second World War as the Japanese approached Singapore. After completing school Michael read law at Oxford University and then returned to Sydney where he taught at the Law Faculty in the University of Sydney. However, the pull of Singapore was strong and in due course he returned to his family roots. Throughout his career Michael has always been strongly supported by his charming wife, Laura, who has been a pillar of strength.

In Singapore, Michael joined the firm of Allen & Gledhill, becoming Head of the Litigation Department. In 1997, he was appointed one of the first 12 Senior Counsel of the Supreme Court of Singapore. He retired from the firm at the end of 2002 to establish an independent practice as a Barrister and Chartered Arbitrator.

Michael has also held judicial office, having been appointed a Judicial Commissioner of the Supreme Court of Singapore in 1991 and, more recently, Chief Justice of the Dubai International Financial Centre Courts. His other appointments have included Vice Chairman of the International Chamber of Commerce International Court of Arbitration and President of the Law Society of Singapore.

* President, Singapore International Arbitration Centre Court of Arbitration.

The focus of Michael's activities in recent years has been arbitration. He has acted as counsel and arbitrator but has also explored many interesting issues in published papers. A number of these are found in this book. Overall there is a heavy emphasis on practice and procedural matters. This underscores Michael's very considerable expertise as a litigator and advocate as well as an arbitrator.

The sixth essay examines the broad and important question of the recognition and enforcement of arbitral awards. Others deal with discrete technical issues of importance including confidentiality, the definition of an "investment", the true seat of an arbitration, egregious errors and issue conflict. Procedural matters and advocacy are apparent in "Ten Questions Not to Ask in Cross-examination in International Arbitration" (Essay 9), an essay which deserves to be studied by all aspiring advocates. Advocacy is an art and many arbitrators can attest to the sometimes dearth of skill shown by counsel in conducting in cross-examination. Other matters covered include "Trial by Issues" (Essay 10), a procedure gaining great popularity in arbitrations today. "Witness Conferencing and Party Autonomy" (Essay 11) explores another important aspect of arbitral procedure. One of the undoubted advantages of arbitration is the flexible procedure which it permits. Witness conferencing has developed as a common and, many would say, superior procedure for elucidating the opinions of expert witnesses and, indeed, also witnesses of fact.

Ethics in international arbitration is assuming ever greater importance and two of the essays in this book deal with ethical issues. The eighth essay explores "Claims against Arbitrators for Breach of Ethical Duties" and the 15th essay looks at "Corruption in Arbitration – Law and Reality".

This book is a potpourri of important issues of arbitration law and procedure. It is written by one of the masters in the field. We are all in Michael's debt and join in extending our best wishes to him on the occasion of his 70th birthday and wish him many rewarding, productive and happy years ahead.

November 2013

FOREWORD BY NEIL KAPLAN CBE, QC, SBS*

It is a pleasure and an honour to have been invited to write a foreword to the publication of Michael Hwang's collection of articles on the occasion of his 70th birthday.

I first met Michael in the early 1990s when he attended, in Hong Kong, a course on international arbitration which I was running. It was soon clear that he was a star participant and this was not surprising given that he had enjoyed a long career at Allen & Gledhill and had just finished a stint as a Judicial Commissioner in Singapore.

We soon became friends and I followed his subsequent career with interest. We have sat several times together.

My overwhelming impression of Michael is one of perseverance to the task before him and an abiding love of the law. Michael can ferret out legal points of which no one else has dreamed. He has become one of the leading arbitrators of his generation, a prolific author, an inspiring teacher and a frequent speaker. All this is in addition to his role as Chief Justice of the Dubai International Financial Centre.

One of the other great qualities he possesses is dedication. As a scholar from Singapore to Oxford he dedicated his time to study and then taught in Australia. He has enthusiastically devoted himself to the practice of law in its various manifestations and at the same time he has committed himself to his lovely family. One of the joys of sitting with Michael (in a congenial place) is that there is a chance that Laura will accompany him, thus adding greatly to the enjoyment of the trip.

For anyone who has sat with him they will know the preparation he puts into choosing the right restaurant and the correct wine pairing menu – often months in advance of the occasion! Michael does nothing by halves!

* Former Chairman, Hong Kong International Arbitration Centre; Former President, Chartered Institute of Arbitrators.

He is always very helpful to counsel. I have seen him raise a point and when uncertainty crosses the mind of the advocate he volunteers his latest article which, of course, is dead on point!

This collection of articles is, I suspect, just the tip of the iceberg. It covers a wide range of topics and is evidence of his love of the law which he is so generous in sharing. I was delighted that he accepted my invitation to give the first non-eponymous Kaplan lecture, which I am pleased to see has found its way into this collection.

Even on the holidays which I have shared with Michael and Laura he approaches sightseeing with the same military planning and precision that he devotes to his work.

I have often wondered whether the law would have been richer had Michael stayed on the Bench and advanced in the Singapore judicial hierarchy. This is a tough call. However, I feel that by becoming an international arbitrator, lecturer, teacher, author, part-time judge and regular speaker, he has added more to the law and its dissemination than if he had remained on the Singapore bench.

This birthday is simply a biblical milestone and fortunately Michael shows no sign of letting up; thus, we all hope that the practice of law will be enlivened for years to come by Michael's continuing contribution and enthusiastic devotion to the subject he so much loves.

Happy birthday, my friend!

November 2013

FOREWORD BY DR MICHAEL J MOSER*

It gives me great pleasure to have this opportunity to write a few words by way of introduction to this book of essays in celebration of Michael Hwang's 70th birthday.

The occasion – a time for recollection and for looking ahead – calls to mind a verse from the Confucian Analects:

*“The Master said:
‘At 15, I set my heart on learning.
At 30, my character was formed.
At 40, I no longer experienced doubt.
At 50, I knew the will of Heaven.
At 60, my moral sense was well attuned.
At 70, I follow my heart's desire ...”*

– The Analects, 2.4

In the Analect cited above, Confucius set out the milestones of attainment for the life of the classical Chinese *junzi*, or gentleman scholar. Education, moral development, self-confidence, a firm grasp of principle – these are the achievements which together – at age 70 – culminate in a kind of intellectual liberation.

The essays collected in this volume amply demonstrate Michael's stellar progress along the Confucian path. They evidence the broad sweep of his intellect and learning, his firm self-conviction and character, and his undoubted devotion to high moral principle.

Given Michael's infectious enthusiasm for the world of international arbitration, it should come as no surprise that his essays on the topic are wide-ranging. They encompass arbitration in Asia, corruption,

* Honorary Chairman, Hong Kong International Arbitration Centre.

confidentiality, ethics, investor-state arbitration and a variety of other topics.

Michael's work is always elegant, scholarly and marked by the thoroughness that is a sign of conviction. Yet his essays are also commendably down to earth. They are full of innovative and "real life" ideas and provocations. In particular, I have long believed that his essays on "Ten Questions Not to Ask in Cross-examination in International Arbitration" (Essay 9) and "Trial by Issues" (Essay 10) should be required reading for all counsel in international commercial arbitrations.

But Michael is not just an author. His essays are fertilised by a wealth of experience as both counsel and, more recently, as a full-time arbitrator.

It has been my great privilege to have the opportunity to sit with Michael in a number of cases over the years. Each encounter has been a master class in the practice of the arbitrator's art. He is careful, polite, learned and principled. Once he has formed his views, having looked at the problem from various vantage points, he is firm in his convictions but never dogmatic. Here, too, the Confucian virtues shine through.

It would be foolhardy, of course, to judge a book by its cover. Likewise, Michael is much more than the wonderful essays set out in this book. Apart from being a scholar, writer and eminent arbitrator, Michael is a dedicated gourmand, an irrepressible vinophile, a ballet enthusiast, a student of French, roving ambassador, sometime dancer – and an esteemed colleague and much valued friend.

But one must start somewhere. And this book is a fine place to begin.

Having tread so successfully along the Confucian path, Michael is now, at 70, free to "follow his heart's desire". No doubt that will mean that the business of writing articles – and arbitrating cases – and much more – will long continue!

November 2013

PREFACE

This volume is a 70th birthday present from myself to myself, but it is also a present I would like to share with my many friends and colleagues in the universe of international arbitration, both in Singapore as well as in the many countries that I have visited in the course of my work in arbitration.

In this volume I have included a selection of the speeches and papers (which I will call essays) that I have delivered and written over the years and which I think are of some lasting interest and value. They have all been updated as at the end of July 2013 and (where necessary) corrected by two current associates in my chambers, Eunice Chan and Elaine Lim, who re-researched the references in the essays to ensure that they were still current and represented the present law and practice. They are in fact co-editors with myself of this volume. Without them this publication would not be possible, and I owe them my grateful thanks.

I am also grateful to the Singapore International Arbitration Centre for supporting this venture by agreeing to be the publisher, and for the personal interest its Chief Executive Officer, Lim Seok Hui, has taken in this project. Many thanks are also due to the Singapore Academy of Law for their painstaking and practical assistance in translating my vision into reality by providing all the necessary technical expertise in editorial management to enable this volume actually to be printed. I must reserve a special word of appreciation to Elizabeth Sheares and Clarice Ting for their devotion to this project and for their advice to me on all editorial matters of style and language (including correcting my infelicities).

I will have to recognise each of the co-authors of my various essays later in this volume, but for now I wish to say “thank you and well done” to each one of them for the effort they put into the research for those essays. Without them there would probably have been much fewer (and certainly not as fully researched) essays, so the value of my essays is due to the value which they have added.

I also have to express my appreciation to the authors of the three forewords to this volume. I have chosen them for two reasons: (a) they are my closest collaborators in arbitration, having sat with me on several occasions, and therefore fully aware of my arbitral experience and philosophy; and (b) they are also dear friends of mine, and I knew that they would write from their hearts as well as from their heads.

Before I invite readers to read, mark and inwardly digest the essays that follow, I have set out, in an introductory chapter, some musings on my origins in arbitration and some thoughts on a few current issues which might prove of interest to readers, particularly those thinking of starting a career in this field.

Michael Hwang SC
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November 2013

CO-AUTHORS OF ESSAYS

I would like to extend my sincere gratitude to all my co-authors, without whom these essays would not have seen the light of day. The following is a brief introduction to all my co-authors in alphabetical order.

Charis Tan (research assistant for “Ten Questions Not to Ask in Cross-Examination in International Arbitration”)

Charis graduated from the National University of Singapore with a Bachelor of Laws in 2007 and joined my Chambers as a pupil and later as an associate. After she left my Chambers, she joined Eversheds LLP Singapore. She is admitted as an Advocate and Solicitor of Singapore, an Attorney and Counsellor-at-Law of the State of New York and a Solicitor of England and Wales.

Darius Chan (co-author of “Determining the Parties’ True Choice of the Seat of Arbitration and *Lex Arbitri*”)

Darius graduated from the National University of Singapore with a Bachelor of Laws in 2007 as the best graduating student of his cohort. Thereafter, he joined the Supreme Court of Singapore as a Justices’ Law Clerk from 2007 to 2009. In 2008, he was concurrently appointed an Assistant Registrar. Following his clerkship, he served as a legal intern with the Open Society Justice Initiative in Phnom Penh and thereafter joined my Chambers as a pupil and then an associate in 2009. After he left my Chambers, he acquired a Master of Laws with distinction from New York University and joined the disputes team of Wilmer Cutler Pickering Hale and Dorr LLP in London. He is now with the disputes team of Freshfields Bruckhaus Deringer LLP in Singapore. He teaches international arbitration at Singapore Management University and National University of Singapore. He is admitted as an Advocate and Solicitor of Singapore, an Attorney and Counsellor-at-Law of the State of New York and a Solicitor of England and Wales.

Jennifer Fong Lee Cheng (co-author of “Claims against Arbitrators for Breach of Ethical Duties” and “Definition of ‘Investment’”)

Jennifer graduated from the National University of Singapore with a Bachelor of Laws in 2006 and joined my Chambers as a pupil and later as an associate. After she left my Chambers, she joined the disputes team of Baker & McKenzie.Wong & Leow as an associate. She is admitted as an Advocate and Solicitor of Singapore, an Attorney and Counsellor-at-Law of the State of New York and a Solicitor of England and Wales.

Joshua Lim (co-author of “How to Draft Enforceable Awards under the Model Law”)

Joshua graduated *summa cum laude* from the Singapore Management University in 2011, with degrees in law (Bachelor of Laws) and business management (Bachelor of Business Management). He then served in the Supreme Court of Singapore as a Justices’ Law Clerk. In 2013, he joined my Chambers as an associate. He is admitted as an Advocate and Solicitor of Singapore.

Katie Chung (co-author of “Claims against Arbitrators for Breach of Ethical Duties” and “Defining the Indefinable – Practical Problems of Confidentiality in Arbitration”)

Katie graduated from the London School of Economics with a Bachelor of Laws in 2006 and joined my Chambers as a pupil and then later as an associate. After she left my Chambers, she joined the dispute resolution team of Norton Rose Fulbright (Asia) LLP in Singapore as an associate. She is admitted as an Advocate and Solicitor of Singapore and a Solicitor of England and Wales.

Kevin Lim (co-author of “Issue Conflict in ICSID Arbitration” and “Corruption in Arbitration – Law and Reality”)

Kevin graduated from the National University of Singapore with a Bachelor of Laws in 2010 and joined my Chambers as a pupil and later as an associate. While in my Chambers, he authored (on his own) a major article on the consequences of corruption in investment arbitration, which I helped him get published in the Yearbook of International Investment Law 2011/2012. After he left my Chambers, he joined the International

Arbitration group of King & Spalding (Singapore) LLP as an associate. He is admitted as an Advocate and Solicitor of Singapore.

Nicholas Thio (co-author of “A Contextual Approach to the Obligation of Confidentiality in Arbitration in Singapore: An Analysis of the Decision of the Singapore High Court in *AAV v AAZ*” and “A Proposed Model Procedural Order on Confidentiality in International Arbitration: A Comprehensive and Self-governing Code”)

Nicholas graduated from University College London with a Bachelor of Laws in 2008 and joined my Chambers as a pupil and later as an associate. After he left my Chambers, he joined Norton Rose Fulbright (Asia) LLP in Singapore, where he continues to practise international arbitration. He represented the National University of Singapore as oralist at the 16th Willem C Vis International Commercial Arbitration Moot in Vienna, where his team was ranked within the top five out of over 220 teams worldwide in the General Rounds of argument and was given Honourable Mention for the Pieter Sanders Award (Best Memorandum for Claimant). Besides the articles on confidentiality in arbitration, he has also co-authored with me articles on contemporary issues and challenges in investment treaty arbitration in Asia as well as on trust law. He is admitted as an Advocate and Solicitor of Singapore.

Su Zihua (co-author of “Egregious Errors and Public Policy – Are the Singapore Courts too Arbitration Friendly?” and research assistant for “Ten Questions Not to Ask in Cross-Examination in International Arbitration”)

Zihua graduated from the National University of Singapore with a Bachelor of Laws in 2008 and thereafter spent her pupillage studying corporate law before joining my Chambers in 2009. Despite her corporate law background, she adapted well to the demands of a different discipline. After completing her time with me, she joined my old firm, Allen & Gledhill LLP, but returned to her first calling in their Mergers & Acquisitions Department. She is admitted as an Advocate and Solicitor of Singapore.

Yeo Chuan Tat (co-author of “Recognition and Enforcement of Arbitral Awards”)

Chuan Tat graduated from the National University of Singapore with a Bachelor of Laws in 2005 and joined my Chambers as a pupil and later as an associate. After he left my Chambers, he joined the disputes team of Norton Rose Fulbright (Asia) LLP in Singapore as an associate and acquired a Master of Laws from Columbia University in 2012. He is admitted as an Advocate and Solicitor of Singapore and a Solicitor of England and Wales.

CONTENTS

	Page
<i>Foreword by Dr Michael Pryles</i>	vii
<i>Foreword by Neil Kaplan CBE, QC, SBS</i>	ix
<i>Foreword by Dr Michael J Moser</i>	xi
<i>Preface by Michael Hwang SC</i>	xiii
<i>Co-authors of Essays</i>	xv
Introduction Musings on International Arbitration	1
Essay 1 Why Is There Still Resistance to Arbitration in Asia?	20
Essay 2 Egregious Errors and Public Policy: Are the Singapore Courts Too Arbitration Friendly?	38
Essay 3 Defining the Indefinable: Practical Problems of Confidentiality in Arbitration	90
Essay 4 A Proposed Model Procedural Order on Confidentiality in International Arbitration: A Comprehensive and Self-governing Code	158
Essay 5 A Contextual Approach to the Obligation of Confidentiality in Arbitration in Singapore: An Analysis of the Decision of the Singapore High Court in <i>AAZ v AAZ</i>	209
Essay 6 Recognition and Enforcement of Arbitral Awards	237
Essay 7 How to Draft Enforceable Awards under the Model Law	304
Essay 8 Claims against Arbitrators for Breach of Ethical Duties	340
Essay 9 Ten Questions Not to Ask in Cross-examination in International Arbitration	373
Essay 10 Trial by Issues	397

	Page
Essay 11	Witness Conferencing and Party Autonomy 403
Essay 12	Definition of “Investment” – A Voice from the Eye of the Storm 409
Essay 13	Issue Conflict in ICSID Arbitrations 471
Essay 14	Determining the Parties’ True Choice of the Seat of Arbitration and <i>Lex Arbitri</i> 545
Essay 15	Corruption in Arbitration Law and Reality 564
Essay 16	Arbitration for Trust Disputes 740
<i>Reviews in Legal Directories</i>	749

**INTRODUCTION:
MUSINGS ON INTERNATIONAL ARBITRATION**

Michael HWANG SC

How did it all begin for me?

It all started in 1991. I was then a Judicial Commissioner (contract judge) at the Supreme Court of Singapore. The establishment of the Singapore International Arbitration Centre (“SIAC”) was announced in the middle of that year. All the judges and Judicial Commissioners of the Supreme Court were invited for a tour of the SIAC and briefed on what was expected under the new international arbitration regime in Singapore. That gave me my introduction to what international arbitration was about and eventually led to my serving as a member of the first Advisory Council of the SIAC, where we had periodic meetings to discuss various aspects of the SIAC’s growth and development.

At the end of 1992, I left the Bench and returned to my old firm, Allen & Gledhill LLP, as head of its Litigation Department. The then Managing Partner, C J Chen, felt that international arbitration was a promising new field of practice and that, with my judicial experience, I should get into it. So I set out to learn all about international arbitration. I enrolled in the Fellowship course organised by the Chartered Institute of Arbitrators and passed the examination in 1993 that conferred on me the title “Fellow of the Chartered Institute of Arbitrators”. The Singapore Institute of Arbitrators was kind enough to recognise my experience as sufficient qualification to offer me in 1996 a Fellowship of its institute without undergoing a formal course or examination. The Chartered Institute of Arbitrators further honoured me in 2005 by conferring on me the title of “Chartered Arbitrator” by interview alone. I went to Paris to attend a course on international arbitration organised by the International Chamber of Commerce (“ICC”) and was exposed for the first time to civilian notions of arbitration theory and practice. I went to Hong Kong for

another course on international arbitration where some of my tutors eventually became close friends in the arbitration universe, in particular Neil Kaplan, who became my friend and mentor over the next couple of decades. The essential lesson I learnt was that I could not assume that I could apply all that I had learnt as a judge to the practice of being an arbitrator; indeed, I had to learn that certain principles of arbitration trumped basic principles of litigation. To that extent I had to unlearn some (but not all) of what I had been practising for the last 25 years at the bar.

I also attended a number of conferences on international arbitration and was fortunate enough to be invited to speak at several of them. Because I had done my “getting up” on the principles and practice of international arbitration, I was able to discuss points with other speakers on the same wavelength and gain their recognition and eventually their respect.

All this led to a number of appointments, starting with the ICC, which appointed me as sole arbitrator in a number of small cases. I was also appointed as chairman of tribunals where at least one of the arbitrators on the panel had got to know me at a conference or knew about me from a third party who knew me and who had recommended me to the other co-arbitrator for appointment.

I also developed my contacts with the other major arbitration institutions like the London Court of International Arbitration (“LCIA”), American Arbitration Association and Hong Kong International Arbitration Centre (“HKIAC”) by attending conferences organised by them and meeting their principal officers, and was eventually rewarded with appointments from them.

It also helped that I was from Singapore and was able to take advantage of the “halo effect” of the goodwill that a Singaporean can generate just from being from this country. Singapore is the confluence of East and West, known for the quality of its human capital, its neutrality in international affairs, its reputation for integrity and freedom from corruption, Asian enough to be able to understand Asian cultures and practices, yet international enough to appreciate international commercial and business culture and practices. All of these attributes make a Singaporean an attractive choice as an international arbitrator.

So, by a combination of study, writing, speaking and networking (as well as being of the right nationality), I was able to develop some international recognition as an arbitrator.

What have I achieved?

My career in international arbitration has led to many international appointments and experiences that I could never have imagined. I set out below some of the high points of my career (in no particular order, either of chronology or importance):

- (a) Being appointed over the years to sit on tribunals hearing disputes involving more than 30 territories and holding arbitration hearings in over 21 cities, under more than 20 different national laws.
- (b) Being appointed to the tribunals of various International Centre for Settlement of Investment Disputes (“ICSID”)¹ cases, which opened up to me the new world of investment treaty arbitration. When I had served as a national judge in Singapore, I may have had occasional instances of presiding over cases where the Government (or a government agency) was a party, but to be in a position to decide on the outcome of a dispute involving a foreign sovereign State was beyond my imagination before I embarked on my career in international arbitration.
- (c) Being appointed to the editorial boards of various arbitration journals too numerous to name individually, as well as the advisory boards of the two great Asian arbitral centres, the SIAC and the HKIAC.
- (d) Being invited to share my knowledge and experience of international arbitration at numerous conferences (in more than 40 cities in more than 30 countries) and in diverse journals (published in ten countries).
- (e) Being selected as one of seven shortlisted candidates for the “Global Arbitration Review Arbitrator of the Year” Award for 2011.
- (f) Being selected as one of eight shortlisted candidates for the “Global Arbitration Review Arbitration Lecture of the Year” Award for 2012.

¹ An offshoot of the World Bank based in Washington DC.

- (g) Being appointed in 2000 as a member of the United Nations Compensation Commission (“UNCC”) based in Geneva, whose task was to assess claims for damage suffered by individuals and companies against Iraq arising out of its illegal invasion of Kuwait in the First Gulf War. It was a new experience sitting on a panel assigned to assess claims from the energy sector and essentially deciding on questions of quantum, but sometimes of legal principle. One important principle developed as part of UNCC jurisprudence was the doctrine of set-off, which meant that any claimant which alleged that it had suffered loss also had to disclose whether or not the First Gulf War had made it possible for that claimant to benefit in a tangible way that it would not have had if the war had not occurred. Thus, in one memorable hearing in which I participated at the UN complex in Geneva (known as the Palais des Nations in Geneva), we discovered that one oil company which was claiming many millions of dollars for the loss of several of its refineries destroyed in the war had actually been making extra profits during the period of the First Gulf War because the immediate cutting off of oil supplies from Kuwait and Iraq meant a spike in oil prices which benefited the claimant oil company to such an extent that its extra profits exceeded the value of its refineries which had been destroyed in the war. We therefore awarded nil damages or (in the words of Claimant’s counsel, who saw me shortly after our decision was released) “a big fat duck’s egg”.
- (h) Being appointed as Singapore’s Non-Resident Ambassador to Switzerland in 2004 at least in part because of my frequent visits to Switzerland in the course of my duties as UNCC Commissioner.
- (i) Being appointed in 2004 to the governing body of the Dubai International Arbitration Centre, a phoenix rising out of the ashes of the old Dubai Chamber of Commerce arbitration centre to be a new and revitalised body with modern institutional rules and a governing body made up of a mix of arbitration practitioners from the Arab world and the rest of the world, with myself being the only Asian (ex-Gulf) practitioner on the body.
- (j) Being appointed in 2007 as a Council Member of the International Council of Arbitration in Sport, which opened up the whole world of

sports arbitration to me, overseeing the work of the Court of Arbitration for Sport (“CAS”). The CAS heard cases from all the major sports on a permanent basis, but had the special honour of dispatching a team of about a dozen arbitrators to hear all disputes arising from the Summer and Winter Olympic Games, and convening a panel to hear the case within 24 hours of the complaint and dealing with it within approximately the same period. I was fortunate to have been chosen to be one of the observers of the work of the special panel of arbitrators chosen for the Beijing Olympics in 2008, and to see how these specialist arbitrators could convene and hear disputes within such a short period and still deliver a quality award which could withstand a subsequent challenge. My duties also extended to being the supervisor of the panel of arbitrators for the Delhi Commonwealth Games in 2010, where I had to scrutinise an award composed in less than four hours, and which was so well written with cogent arguments supporting its findings that I had no problem in passing it.

- (k) Being appointed in 2003 as a member of the Court of Arbitration of the ICC (“the ICC Court”), the most prestigious and respected arbitration institution in the world, and then being appointed as a Vice Chairman of the ICC Court in 2006. That gave me insights into the way that top-class arbitrators think and, in particular, how they criticise other arbitrators’ awards at their monthly sessions when all awards are submitted for review by the court. It was (and continues to be) a unique learning experience of the highest echelons of arbitral thinking when seriously experienced arbitrators from all over the world gather to discuss awards and to critique them. Another important aspect of the ICC’s work is to promote reforms in arbitral practice by periodic reports on proposed reforms by the ICC Commission (of which I have also been a member).
- (l) Being appointed in 2006 to the governing body of the LCIA, one of the most famous international arbitration centres with a global reach, and being involved in its plans for development of its branch offices in India, Dubai and elsewhere, as well as in their plans for changes in the practices and procedures of the court, for example in

- deciding (in contrast to the ICC Court) to give reasoned decisions for all cases of challenges to tribunal members.
- (m) Being elected in 1998 as a member of the International Council of Commercial Arbitration (“ICCA”), the Holy Grail of all international arbitrators, where its members may be compared to the Cardinals of the Catholic Church in their standing in the arbitration community. It was an even greater honour in 2002 when I was appointed as a Vice President of the ICCA. There were traditionally three Vice Presidents: one representing Europe, one representing the USA and the third representing the rest of the world. No prizes for guessing which region I represented. It gave me the opportunity in 2004 to co-organise the ICCA Congress for that year in Beijing and to send out invitations to our chosen speakers to deliver papers on subjects we had chosen for them. I have organised many conferences, but this was unique in that I have never before (nor since) had the experience that everyone I invited accepted with alacrity and without any quarrel over the topic assigned; such was the awe in which every arbitration practitioner viewed an invitation to speak at an ICCA Conference or Congress.
 - (n) Being appointed in 2001 as a Vice Chairman of the arbitration committee of the International Bar Association (“IBA”) and, in the same year, as a member of the IBA’s Working Party to draft what became known as the IBA Guidelines on Conflicts of Interest in International Arbitration.²
 - (o) Being appointed as Deputy Chief Justice of the Dubai International Financial Centre Courts in 2005 (and later as Chief Justice in 2010) at least in part because of my reputation as an international arbitrator.
 - (p) Being conferred the status of Adjunct Professor in arbitration at the National University of Singapore in 2005 and being recently informed that the University of Sydney (where I started my legal career) will be conferring on me the degree of Doctor of Laws (*Honoris Causa*) next year.
 - (q) Being able to preside over a tribunal in 2013 in an arbitration under the auspices of the Permanent Court of Arbitration (“PCA”) at the

² 22 May 2004.

Peace Palace in The Hague, where my late maternal grandfather, Dr Hsu Mo, had served as one of the pioneer cohort of judges on the International Court of Justice from 1946–1956. It was an emotional moment to find myself performing the same role as he had in the sense of dispensing justice in a case involving one or more nation states, in the same building as he had worked, and possibly in a room in which he had held hearings.

How has international arbitration developed in Singapore?

When I was assigned my first arbitration case (which happened to be a domestic one) I started to read up on what procedures applied in arbitration which were different from the litigation cases to which I was accustomed. Almost the first thing I discovered was that most of the provisions of the Evidence Act did not apply to arbitration. This made me feel like a rudderless ship in a storm and I phoned my opponent and asked him if he was aware of this provision. He was equally shocked to discover this and we agreed to write in a procedural agreement between our respective clients that we would apply all the provisions of the Evidence Act to our arbitration. That episode is laughable in retrospect, but at that time (probably in the 1970s) the Singapore legal profession knew relatively little about arbitration and was unaware that one of the basic features of arbitration was to allow the arbitrator the freedom to decide matters of evidence and procedure largely by reference to what he³ felt was correct and appropriate for the case in hand, rather than applying detailed mandatory rules relating to the reception of evidence and other procedural matters.

Things have changed a lot since then. As mentioned above, all the major Singapore law firms are now arbitration-savvy from their participation in SIAC arbitrations (and indeed outside of Singapore as well to a certain extent) and understand well the basic principles and techniques of international arbitration, so much so that a few of our firms have been

³ Despite my use of the masculine gender, I fully recognize that whatever I say about arbitrators generally will apply equally to both sexes.

ranked in the top tier of international arbitration practitioners and the Singapore bar certainly has more collective arbitration expertise than any other Asian bar (excluding offshore firms which are not comparable because of their greater history of arbitration practice and their greater global manpower resources). International arbitration is not just the flavour of the month in Singapore; it is the flavour of the decade (and beyond). As other arbitration centres grow in the region (notably in Kuala Lumpur and Seoul), they will contribute to the greater awareness of arbitration among the business community in Asia and hopefully increase the arbitration pie for all players instead of simply redistributing the current caseload over a greater range of centres and law firms without any increase in total volume.

Strangely, while I was progressing as an international arbitrator, I recall very few cases where I was instructed to act as counsel in an international arbitration throughout the 1990s and the early years of this millennium, probably reflecting the relative slow growth of international arbitration in Asia. This has changed dramatically in the last five years, at least in Singapore, since the spike in caseload at the SIAC over this period. With the greater number of cases heard at the SIAC, the number of local Singapore firms representing parties in such arbitrations have also increased exponentially. At present, in my experience of hearing cases in SIAC arbitrations, at least one (if not both) of the parties will usually be represented by a Singapore law firm, and not necessarily one of the Big Four (Allen & Gledhill LLP, Drew & Napier LLC, Rajah & Tann LLP and WongPartnership LLP), but by medium-sized firms and even boutique practices. This representation by Singapore firms was recently confirmed to me by a reliable source as 75% of all SIAC cases. So the pie has grown in Singapore and the share of Singaporean law firms of that larger pie has also grown. Whether or not this phenomenon will be reflected in the rest of Asia is a matter for speculation.

How does acting as an arbitrator differ from acting as a judge?

I believe I have some credentials to answer this question given my judicial experience on the Supreme Court of Singapore as well as my current position as Chief Justice of the Dubai International Financial Centre (“DIFC”)

Courts. There are many differences (and also some similarities) between the role of a judge and that of an arbitrator. Both are required to apply the law equally strictly; contrary to popular speculation, arbitrators do not try and apply “palm tree justice” according to their own notions of fairness and equity – they are tasked to apply the provisions of the agreement in dispute (particularly the arbitration agreement contained therein) and will do so with the same intellectual rigour as a judge. If a case came before me today as a judge, I would come to the same decision on merits as I would if that case had come before me as an arbitrator. I might reach that conclusion by a different route in terms of procedure and evidence, having regard to the different rules of procedure and evidence applicable to the two modes of dispute resolution. However, I cannot think of any case I have decided as an arbitrator which would have reached a different outcome than if it had been tried before me as a judge because my role in wearing each hat would still demand that I apply the applicable law strictly to the facts as I find them.

That said, there are things that I can do as an international arbitrator that I cannot do as a judge.

- (a) I can ignore all national rules of evidence and procedure (except for those provisions of the procedural law of the seat which are mandated to apply to arbitrations). It is true that most modern international arbitrators will pay close attention to the IBA Rules on the Taking of Evidence in Arbitration⁴ (“IBA Rules”) but they normally do not bind themselves to apply the IBA Rules as if they were mandatory law, but rather as guidelines as to best practices which can be modified or disapplied if circumstances require another fairer or more efficient solution.
- (b) The corollary of the first proposition is that I can make any procedural order I consider appropriate subject only to the constraints of the mandatory procedural laws of the seat of the arbitration. In particular, all jurisdictions which have adopted new arbitration legislation since the introduction of the United Nations Commission of International Trade Law Model Law on International

⁴ 29 May 2010.

Commercial Arbitration (“Model Law”) in 1985⁵ will have in their arbitration laws a provision to reflect Article 18 of the Model Law, which states:

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case ...

This provision has been referred to as “the golden rule of arbitration” and is the beacon that guides all international arbitrators in the exercise of their discretion in relation to procedural matters. It is reinforced by Article 19 of the Model Law, which provides (in effect) that, unless the parties specifically agree on a procedure for conducting the arbitration, the tribunal may conduct the arbitration in such manner as it considers appropriate.

Coupled with the provisions mentioned above is the common adoption by arbitrating parties of the rules of popular institutions like SIAC and the ICC. The SIAC Arbitration Rules 2013⁶ contain a rule which is common to some other modern institutions (subject to variations of wording), *viz*, Article 16.1, which provides:

The Tribunal shall conduct the arbitration in such manner as it considers appropriate after consulting with the parties to ensure a fair, expeditious, economical and final determination of the dispute.

The combination of these three provisions is what gives the modern international arbitrator his beacon and compass, because the arbitrator is tasked to so organise his arbitration as to arrive at a just outcome by the most cost efficient measures that he finds appropriate consistent with procedural fairness. That is not so far from some commercial courts, which are likewise so tasked, but without the liberating provision of ignoring the rules of evidence. The gold standard of commercial courts is the practice of the English Commercial Court in London (on which my DIFC Courts are modelled) which exhorts judges and parties to observe, above all

⁵ Model Law on International Commercial Arbitration 1985 (UN Doc A/40/17) Annex I (21 June 1985).

⁶ 5th Ed, 1 April 2013.

priorities, the overriding objective, which is defined as dealing with cases justly. That definition is expanded to include factors such as ensuring equality of arms and an expeditious and fair disposition of the case; saving expense; dealing with the case in a manner proportionate to its monetary value, importance and complexity, as well as the financial position of each party; and the appropriate allocation of the courts' resources. Nevertheless, however speedily a court may wish to proceed, there are still some procedures that the Rules of Court dictate which will result in delay (sometimes considerable), particularly in the area of discovery. It is for this reason that my DIFC Courts, when we based our Rules of Court on the English Civil Procedure Rules, deliberately replaced the English order relating to discovery with the guidelines relating to document disclosure set out in the IBA Rules, which are widely regarded as being more appropriate for international arbitration (and therefore also for the DIFC Courts where our lawyers come from mixed legal traditions) where civil law lawyers are accustomed to greatly different rules for disclosure and production of documents than are common law lawyers.

- (c) On the other hand, there are things that I can achieve as a judge that may be more difficult for an arbitrator to achieve effectively. A judge, being an agent of the State, sits with the authority of the State behind him. He therefore commands more respect from counsel and parties by virtue of his office and his directions are therefore usually more strictly complied with than directions issued by an arbitrator. For example, directions from an arbitrator as to filing documents by a certain date are often ignored by one party or the other, whereas that is less likely to occur in litigation because parties know that failure to meet filing deadlines can result in sanctions being imposed.
- (d) Also, a judge can impose sanctions on counsel personally for failure to meet the standards of ethics and competence required of all lawyers admitted to practice in his court. Such sanctions include the power to impose costs orders against the offending lawyer personally as well as contempt proceedings for more egregious conduct. This is one of the major drawbacks of international

arbitration which is currently the subject of hot debate at conferences and in journals – how do we enforce standards of professional ethics and competence in arbitration? The arbitrator has no inherent authority over counsel's behaviour in the conduct of the arbitration except when counsel's behaviour threatens the integrity of the arbitration, which is a relatively rare occurrence. Accordingly, the arbitrator's only remedy is to visit the consequences of counsel's lapses on the party he represents, either by costs orders or adverse inferences or (in exceptional cases) by denial of relief, but the offending counsel will live without penalty to fight another day in another arbitration in the same way. As a judge, I would have the power to report sanctionable conduct by counsel to his bar association for disciplinary action to be taken against him. That option is not open to me as an arbitrator because of the obligation of confidentiality imposed on all arbitrators and there is no recognised exception that would permit an arbitrator *sua sponte* to disclose to a third party any information about his arbitration (except possibly where the facts come within the scope of anti-money laundering or similar legislation which mandates all persons to report to the appropriate authority any reasonable belief they may have of the commission of a reportable criminal offence).

What are some of the problems an international arbitrator will face?

Apart from having to deal with difficult counsel as discussed above, there are problems which arise simply from differences in culture, not only with counsel and their clients, but also with fellow members of the tribunal. If an arbitrator is content simply to stay in his home base and hear cases with Singapore counsel arguing his cases, perhaps less surprises are likely to arise. However, the more extensive the arbitrator's international practice, the more he will have to learn to adjust to possible variations in arbitration practice. For example, in several Middle Eastern countries, all oral evidence must be given on oath and the usual practice of taking witness statements as the basic evidence of the witness is legally unacceptable unless the witness specifically affirms his written evidence

on oath. The awarding of legal costs against the losing party may also not be acceptable in certain Gulf countries. Accordingly, the arbitrator will have to learn that he cannot use his standard “Procedural Order No 1” without checking with his local co-arbitrators or counsel whether all his standard orders can be adopted. This in turn leads to what should be the appropriate approach for a presiding arbitrator to adopt towards his co-arbitrators, assuming that they are from different countries and sometimes from different legal traditions. Does he try and play the senior partner by virtue of his seniority and possibly greater international experience, and therefore follow his own practices and procedures paying only lip service to consulting his fellow arbitrators for their views (which he does not intend to follow anyway)? Or should he go out of his way to try and make his co-arbitrators feel that he is always mindful of their views, even if he eventually does not adopt them? I have once or twice acted a little presumptively, that is to say I have assumed that my draft letters and procedural orders sent to my “wing men” (as co-arbitrators are called) for approval, are self-explanatory as to their correctness and found some rather hurt responses from one or other of my co-arbitrators who felt that I was taking their agreement for granted. This has taught me that, where different cultures and legal traditions are involved, one has to exercise what I call an “ambassadorial” or “diplomatic” arbitration technique whereby I go the extra mile to explain to those who may think differently from me exactly why I propose certain orders or documents for their concurrence. I have to pay due respect to their views and also take the trouble to explain my thinking for any significant step along the way.

Beyond the differences in arbitration laws and practices of different countries, there is also the perennial problem of witnesses giving evidence in languages other than English. There are difficulties with the choice of interpreter. Unlike in litigation where the interpreter is normally court appointed, there is usually no approved roster of competent interpreters in most countries, even in developed arbitration centres like Singapore and Hong Kong. Parties are thus left to choose their own interpreters and to negotiate with the other side for agreement as to the use of a common interpreter. I have had to intervene more than once to break a deadlock over the choice of a common interpreter. The best solution is

that adopted by Korean practitioners, who will each engage their own interpreter for their own witnesses, who will also act as checker of the other side's interpreter for correctness of translation. If there is a challenge as to correctness, the arbitrator will stop the proceedings for a short break while the two interpreters then discuss professionally what the best translation for the phrase or word in question is, and, both being professional interpreters (often experienced in legal translation), they usually arrive at an agreed conclusion. More challenging is the situation where counsel or witnesses are speaking in English, which is not their native language, and the arbitrator has difficulty in understanding their accent or their phraseology. There is a strong temptation for an arbitrator to take the easy way out and to ignore or discount what has been said and instead to base his findings on the evidence and submissions of the other side. I have encountered this problem at least twice. Once was in a case which was governed by Macau law and was argued by counsel from Portugal on the one side and a Singaporean lawyer on the other. I had great difficulties with understanding the way in which the Portuguese counsel spoke and the way they presented the case in a civilian way, while I had obviously no difficulty with understanding the oral presentation of the Singaporean lawyer both as to language as well as substance. It would have been easy for me to have found for the Singaporean lawyer's client. However, I went back to the verbatim transcript (the most important tool an arbitrator has), reviewed again what the Portuguese counsel had said and re-read their arguments twice before I finally came to a full appreciation of what their arguments were, and ultimately found in their favour. In another case, the key witness for one side was a Russian whose English accent was incomprehensible, coupled with a rapid-fire delivery that had the transcribers in tears. However, the transcribers did a magnificent job but, even after reading the transcript and understanding the actual words he had spoken, I had to take extra care in making out what the Russian actually meant (as his English, even when understood, was eccentric in syntax). Eventually, enlightenment came upon me and that led me to agree with his evidence, resulting in victory for his side. So the moral of the story is that an arbitrator cannot allow himself to be prejudiced by unfamiliarity with participants who speak (and sometimes think) differently from himself,

but must bend over backwards to try and understand what their evidence and arguments are in order to arrive at a fair and just result.

What is the role of a tribunal assistant?

When I started my sole practice as an international arbitrator in 2003, I engaged one full time associate to assist me, mainly in my litigation cases as Senior Counsel. However, having practised as a Senior Counsel for many years and, by definition, working on all my cases in my old firm with the assistance of junior associates (and sometimes even with other partners) I had become used to both the cost efficiency and (more importantly) the better work product that a team could deliver to the client as opposed to acting as a Lone Ranger (without Tonto). I saw no reason why I should modify that methodology for practising as an arbitrator. There is nothing inherently wrong with arbitrators getting assistance from others to enable him to do his job faster and more efficiently without significantly increasing the overall cost to the parties. In several famous arbitral institutions (the ICSID, China International Economic and Trade Arbitration Commission and the PCA come readily to mind), the institution assigns a qualified lawyer to be the secretary to the tribunal and that secretary is in some ways the most important person on that tribunal after the presiding arbitrator. This is because he is the glue that keeps the whole show on the road by organising the tribunal and the parties, reminding the tribunal of the next steps to be taken and even preparing drafts of notices which need to be sent out, as well as checking or researching anything which the tribunal may require of him.

This is much in keeping with my philosophy, and my standard terms of appointment include a term that I may appoint a legal assistant to assist me in my duties as arbitrator. The reason for calling this person a “legal assistant to the arbitrator/tribunal” is that I call a spade a spade and try to avoid future misunderstandings about what are the tasks assigned to that assistant are (compared to the usual terms of appointment of an administrative secretary which connotes that he will do no legal work as such). I reproduce below my standard explanation to the parties of the duties of the assistant to the tribunal (and the need and rationale for such an appointment).

Scope of duties

- (1) To handle all secretarial and administrative matters in the absence of an institution.
- (2) To communicate with the parties under the supervision of the Tribunal (through its Chairman).
- (3) To proof-read procedural orders and award(s) that may be rendered by the Tribunal.
- (4) To check on legal authorities cited by Counsel to ensure that they are up to date and most relevant to the subject matter of Counsel's submissions (any new cases unearthed by the Legal Assistant will be referred to the Parties for their comments).
- (5) To assemble or locate relevant factual materials from the record as instructed by the Tribunal.
- (6) To prepare a first draft of the formal or uncontroversial parts of any decision or award that may be rendered by the Tribunal (*eg*, procedural history and chronology of events).

Reasons for appointing Legal Assistant to the Tribunal

The reasons for the appointment of a Legal Assistant to the Tribunal are the advantages that such an appointment will secure for the arbitral proceedings. The main advantages lie in the economy of time and money in entrusting to the Legal Assistant all tasks which it would be uneconomical for the Tribunal to undertake, or which the Tribunal could do itself, but would do quicker with the assistance of a Legal Assistant.

These savings of time and money become even more compelling in proceedings where the Tribunal's fees are calculated on an hourly basis.

The duties of the Legal Assistant described in points (1)–(3) above are fairly uncontroversial. Indeed the Legal Assistant can be invaluable in assisting the Tribunal in coming to a speedy decision on interlocutory matters by assembling all the relevant papers for the Tribunal's consideration especially if some members are travelling. The duties of the Legal Assistant to the Tribunal can include

points (4)–(6) without compromising the mandate of the Tribunal for the following reasons.

- (a) By defining the points of law and/or issues in dispute as well as specifying the areas of factual inquiry, the Tribunal will be retaining control of the decision-making process. The Tribunal will thus restrict the Legal Assistant to highly structured and closely supervised tasks.
- (b) The Tribunal will also retain control of the decision-making process by subjecting the Legal Assistant's output to critical review.
- (c) The Tribunal's reliance on the Legal Assistant's work product is acceptable so long as the Tribunal does not forgo its review of the parties' written submissions and the evidence.
- (d) The Tribunal will retain the ultimate responsibility for the Award since the Legal Assistant will only be asked to prepare an early draft of the formal and uncontroversial parts of any decision or award made by the Tribunal, which draft will be subject to the final approval of the Tribunal.

Costs of the Legal Assistant

If the parties agree to the appointment of the Legal Assistant, it follows that the costs of the Legal Assistant should be borne by the parties rather than out of the Tribunal's fees since the use of a Legal Assistant will be to improve the efficiency of the arbitral proceedings, as well as to effect costs savings for the parties.

In nearly all cases where I have had the opportunity to explain to the parties why I propose engaging a legal assistant and his scope of work, parties have responded positively and in fact appreciate having a point of contact which enables a party to communicate directly with the tribunal for clarification on administrative or logistical matters without the spectre of an unauthorised *ex parte* communication with the tribunal members themselves.

In terms of substance, while they will provide substantial assistance to me in the preparation of the award in drafting the non-contentious sections, the discussion section is invariably my own product and the conclusions

my own after careful review of all the arguments and evidence. Those who think that such assistants end up drafting the whole award are mistaken; they no more draft the reasoning section than the Justices' Law Clerks of the Singapore Court of Appeal (who are the nearest equivalent to my legal assistants) write the judgments of that court. As the scope of work set out above makes clear, their responsibility is to assist, not replace, the arbitrator. They usually prepare bench memos in the same way as Justices' Law Clerks do in the Singapore Supreme Court, but the ultimate decisions on liability and quantum will be taken by the arbitrator alone (or in conjunction with his co-arbitrators).

However, whatever my philosophy may be, it is only applicable in cases where I am not subject to the overriding rules of an arbitral institution which do not permit such an animal to exist but only an administrative secretary with no legal duties at no extra charge. This is certainly the position under the ICC Rules and (to a less strict extent) the SIAC, where arbitrators' fees are charged on a scale based on the value of the sums in dispute with no add-ons. Since the bulk of my caseload consists of SIAC and ICC cases, the legal assistant is therefore more an exception than the rule in my practice and most often used in *ad hoc* arbitrations without an administering institution, where the need for support services for the arbitrator is more obvious.

The MH Alumni

Nevertheless, given the number of arbitration cases I have at any given time, my need for assistance has grown from one assistant in 2003 to four assistants in my Chambers over the last few years. Many of them have assisted me in writing various papers for conferences and journals, which will explain the not always consistent writing style of the different writings in this volume. I have been fortunate in having extremely bright young talents join me over the years (several of whom are cleverer than I was at their age), but they seek intensive exposure to international arbitration, which they will only find in my Chambers (at least for now), and I have been even more fortunate to have built up a strong personal relationship with each of my associates even after their departure from my Chambers. They have even established an informal association known

as the “MH Alumni” and we gather together from time to time for me to keep in touch with them as they do with each other, as virtually all of them have gone on to start a promising career in international arbitration.

Such is their loyalty to me that I am obliged to reveal one secret. Some may know that there is a book prize awarded by the Singapore Management University Law School to the best student in the International Arbitration course. That prize is known as the “Michael Hwang Book Prize” and the common assumption is that I have financed this prize. I have to confess that this assumption is incorrect. That book prize was funded by a number of lawyers who have worked with me, either in my old law firm or in my Chambers after I established my own practice, or whom I have mentored. So the main beneficiary of the book prize is myself, which impels me to acknowledge their kindness to me and their tangible appreciation of what I have meant to them, for which I will eternally be grateful.

Many of the MH Alumni will play an important role in the future of international arbitration in Singapore, and to them this volume is dedicated.

Background to Essay 1

The origin of this paper is a talk I gave in London to the International Arbitrators Club in the early 2000s. Later, I was invited to submit a chapter for the *Liber Amicorum* for Robert Briner, the Chairman of the International Chamber of Commerce (“ICC”) Court of Arbitration on his 70th birthday. I then expanded my notes for my speech in London into a full chapter. This paper is possibly the best known of my writings internationally, as I am credited with introducing a new taxonomy of arbitration resisters, *viz*, arbitration guerillas, arbitration agnostics, arbitration skeptics and arbitration wannabes. I am told that some non-Asian law firms which are sending their lawyers to do an arbitration in Asia for the first time instruct their lawyers to read my article as preliminary education in the cultural attitudes towards arbitration in Asia. It also gains prominence when there are conferences and publications on guerilla tactics in arbitration.

Although most people access this article in the Robert Briner *Liber*, there is actually a revised edition (which is reproduced in this book) where I added the additional category of “arbitration wannabe” and which was published in *Table Talk*, the journal of the International Arbitration Club (where I first gave my lecture).

I wish to extend my thanks to the ICC for kindly granting me permission to republish this paper in this book.

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WHY IS THERE STILL RESISTANCE TO ARBITRATION IN ASIA?*

Michael HWANG SC

* An earlier version of the paper was originally published in *Global Reflections on International Commercial Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner* (Gerald Aksen et al eds) (ICC, 2005). The revised version was published in *Table Talk* (22 October 2006).

Contents

I.	Terrorists or arbitration guerillas	21
A.	How does the tribunal deal with arbitration guerillas?.....	26
II.	Conscientious objectors or arbitration atheists	27
A.	How does a tribunal deal with arbitration atheists?	27
III.	Skeptics or arbitration agnostics.....	30
IV.	Neophytes or arbitration wannabes.....	31
A.	Matters of style.....	31
(1)	How should tribunals address this problem?.....	31
B.	Matters of substance	33

1 This paper addresses a question which is based on the unproved assumption that there is still anecdotal evidence to assert that assumption as a proposition of fact. I therefore consider it a worthwhile exercise to attempt an analysis of the kinds of resistance that arbitrators in Asia are likely to encounter, disclaiming any intention to declare this anything more than a subjective, unscientific and generalised overview.¹

2 My central thesis is that there are four classes of resisters, who are for the most part respondents:

- (a) terrorists or arbitration guerillas;
- (b) conscientious objectors or arbitration atheists;
- (c) skeptics or arbitration agnostics; and
- (d) neophytes or arbitration wannabes.

I. Terrorists or arbitration guerillas

3 These are respondents who are not interested in playing the game by the rules, usually because they have a bad case. They will try and exploit the procedural rules for their own advantage, seeking to delay the hearing and (if they get any opportunity) ultimately to derail the arbitration so it becomes abortive or ineffective.

4 Their first strategy will be to try and find a technical objection to the tribunal's jurisdiction so that, hopefully, they will be able to get the tribunal to self-destruct by declaring that it has no jurisdiction over the

¹ See Edna Sussman, "All's Fair in Love and War – Or is it? The Call for Ethical Standards for Counsel in International Arbitration" (2010) 7(2) TDM for a surveyed view. In this paper, the results of a survey showed that 66% of the responders (81 in total), as counsel in an arbitration or as an arbitrator, said that they had been subjected to or had witnessed guerilla tactics.

dispute. If the jurisdictional objection does not work, then they will take their case to a court (usually their own local court rather than the court of the seat) to seek to establish the jurisdiction of that court in place of that of the tribunal. Such applications to court often include a prayer against the claimant from further prosecuting the arbitration. If the claimant is incorporated or carrying on business in the same country as the respondent and therefore subject to the jurisdiction of that local court, the claimant will be bound, under pain of contempt of court, to obey any order that local court may make even if it is not the court of the seat.² Even if the claimant were not otherwise subject to the jurisdiction of the local court, it will be mindful of its need ultimately to go back to that court for enforcement of the tribunal's award, so it will usually feel the need to appear in that local court to prevent any order being made which would pre-empt a subsequent enforcement application.

5 Assuming that these jurisdictional objections and applications for anti-arbitration injunctions fail, these respondents will then adopt a campaign of guerilla warfare, trying to delay the arbitration hearing indefinitely and, if that proves unsuccessful, adopting provocative measures designed to produce over-reaction by the tribunal, hoping that the tribunal will take one or more mis-steps so that the subsequent award becomes capable of challenge, either in setting aside or enforcement proceedings.

6 These arbitration guerillas will rely on the provisions that are applicable to most international arbitrations:

- (a) the rule that each party must be treated fairly;
- (b) the rule that each party must be given a full or reasonable opportunity of presenting its case; and
- (c) the rule that each party is entitled to a hearing if it so requests.

7 Exploiting these rules, they will (among other things):

² A new variation I recently came across has combined an attack on the jurisdiction of the tribunal with an implied attack on the members of the tribunal personally. A respondent not only filed a challenge in its local court to the jurisdiction of the tribunal, it also filed an action against the claimant for the tort of "wrongful arbitration" claiming enormous damages and a conservatory order seizing the assets of the claimants. I was a member of this tribunal, and had some difficulty in persuading the other members (who were both from the jurisdiction of the local court) to make any orders while these court proceedings were pending, as they were fearful that any action taken by the tribunal to advance the hearing would result in similar court proceedings being taken against the members of the tribunal.

- (a) fail to comply with the tribunal's procedural orders in a timely fashion or at all;
- (b) fail to pay deposits, leaving the other party to make advances on their behalf;³
- (c) discharge their lawyers and then apply for a postponement of the hearing because they need time to brief new lawyers;⁴
- (d) ask for adjournments of hearing dates at the last minute on a variety of grounds (missing witnesses, local festivals, political events) when they know that the tribunal's and counsel's commitments will prevent an early re-fixing of the hearing; and
- (e) make a series of unmeritorious applications to the tribunal, which are dismissed, and then mount a challenge to the tribunal on the grounds of bias (in extreme cases they will even dismantle the tribunal by revoking the appointment of their own party-appointed arbitrator⁵).

8 The reasons that they will give for their actions or inactions will include (just as a sampling, since there is no limit to the ingenuity of respondents):

- (a) They cannot file their witness statements on time because their witnesses (who are expatriates) have gone back to their home countries owing to the danger of working in Muslim countries after 9/11, and their Muslim lawyers cannot travel to see the witnesses because of immigration restrictions imposed on Muslim visitors to

³ Under the Rules of the Indonesian Board of Arbitration ("BANI") the party who appoints an arbitrator is solely responsible for that arbitrator's expenses. I was once a member of a BANI tribunal where the party appointing me refused to pay for my expenses, and BANI had no power to order the other party to advance my travel expenses, with the result that no physical hearing between the arbitrators could be held in Jakarta, the seat of the arbitration.

⁴ I was once counsel for a party who discharged me a month before the hearing because he felt that he needed an adjournment of the hearing as he did not want an award against him at that point in time. He therefore needed a reason to apply to the tribunal for an adjournment, and the engagement of new counsel seemed the best course in the circumstances. Interestingly, the tribunal (composed of three experienced Singapore lawyers) refused the adjournment.

⁵ I was chair of a tribunal where the respondent walked out on the grounds of alleged bias (which were subsequently dismissed by the International Chamber of Commerce when a subsequent challenge was made). The twist in this case was that the respondent not only left, but took its party-appointed arbitrator with it, leaving me with a truncated tribunal.

- Western countries (in shipping cases, the story is usually that a key witness is on a voyage somewhere and not expected to return anytime soon).
- (b) They cannot comply with their discovery/disclosure obligations because their documents are kept at the plant which is very far from the head office, and there are logistical difficulties in transporting so many documents from the plant to the head office (and in any event they are short of human and financial resources to comply with extensive discovery/disclosure orders).
 - (c) They have no counsel on record (when it is clear that correspondence in their name has been drafted by external counsel); alternatively, they have just engaged new counsel, who needs more time to get up to speed (and he is a sole practitioner with little experience in international arbitration and with little back-up assistance).⁶
 - (d) They need more time for compliance with procedural orders because of long religious holidays over the period specified for compliance (one month each for *Ramadan* and *Aidilfitri* for their Muslim staff, two weeks for Chinese New Year for their Chinese staff, two weeks for Christmas for their Christian staff, plus, for good measure, a week for Thanksgiving for their US counsel).

9 Arbitration guerillas know that tribunals will be anxious to be seen to be fair and properly appreciative of cultural differences, and they will therefore try and test this accommodating attitude to the utmost by asking for all kinds of indulgences, particularly in requests for more time. In local litigation, counsel for the other party can often comment on the validity or otherwise of the reasons given in support of the applications for various procedural indulgences, and the local court itself can also

⁶ In *Hrvatska Elektroprivreda, dd v Republic of Slovenia* [Order Concerning the Participation of a Counsel] ICSID Case No ARB/05/24 (6 May 2008) ("*Hrvatska*"), the tribunal rejected a proposed inclusion of the respondent's counsel (who worked at the same chambers as the presiding arbitrator, thus raising justifiable doubts about conflicts of interest) on the basis of its duty to protect the integrity of the proceedings. In *Rompertrol Group NV v Romania* [Decision on the Participation of a Counsel] ICSID Case No ARB/06/3 (14 January 2010), the tribunal read the *Hrvatska* decision as a sanction on the conduct of the respondent's counsel for its last minute disclosure of the new counsel and its refusal to make disclosure as to when the new counsel was retained and the new counsel's role in the arbitration. The tribunal also refused to recuse the claimant's counsel, making it clear that the impartiality or independence of arbitrators should be tackled directly by making a challenge to the arbitrator involved instead of challenging a party's counsel.

judge the validity of these reasons from their own knowledge. It is much more difficult for non-Asian counsel and arbitrators to decide on the truth or otherwise of the reasons advanced by Asian parties for their applications. Even if they have suspicions about the validity of these reasons, if they cannot substantiate those suspicions in a manner that can speak for itself in their award, they would still be fearful of a challenge or defence based on a breach of Article 18 of the United Nations Commission of International Trade Law Model Law on International Commercial Arbitration⁷ or Article V(1)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”).⁸

10 Arbitration guerillas also know that tribunals do not usually have the power to make “unless” orders, *ie*, orders taking away the right of defending the claim from respondents who do not comply with procedural orders, even if they default on timelines for filing documents⁹ and do not pay their deposits.¹⁰ They can usually be prevented from proceeding with

⁷ UN Doc A/40/17, annex I; UN Doc A/61/17, annex I (21 June 1985; amended 7 July 2006).

⁸ 330 UNTS 3 (10 June 1958; entry into force 7 June 1959).

⁹ However, the tribunal may possess other powers which, to some extent, could deter arbitration guerillas from resorting to guerilla tactics. Articles 9(5) and 9(6) of the 2010 International Bar Association Rules on the Taking of Evidence in International Arbitration (29 May 2010) (“IBA Evidence Rules 2010”) allow the tribunal to draw an adverse inference if the production of evidence was ordered by the tribunal but was not complied with without satisfactory explanation. Moreover, under Art 9(7) of the IBA Evidence Rules 2010, the tribunal may take the failure of one party to conduct itself in good faith into account in its assignment of the costs of the arbitration. Institutional rules, such as s 53(4) of the Hong Kong Arbitration Ordinance (Cap 609), also provide that an arbitral tribunal may make a pre-emptory order to effect a sanction for a party’s failure to act in compliance with a direction given by the tribunal, *eg*, draw an adverse inference from the failure to comply. On a related note, in *Victor Pey Casado v Republic of Chile* [Award] ICSID Case No ARB/98/2 (8 May 2008), the tribunal awarded costs on grounds of delays, and consequential additional costs incurred on account of one party’s “case strategy”, pursuant to its wide discretion under Art 61(2) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into force 14 October 1966): at [729].

¹⁰ Section 56 of the Hong Kong Arbitration Ordinance (Cap 609) gives the tribunal power to order a claimant to give security for the costs of the arbitration.

their counterclaim, but that would not stop them from relying on their counterclaim as a set-off and hence as a defence.

11 Finally, as mentioned above, the true guerilla will stalk the tribunal, looking for ways to give the respondent an opportunity to challenge the propriety of the arbitration in setting aside or enforcement proceedings on the grounds of lack of fairness or lack of opportunity to present its defence and actively provoking the tribunal into making orders that will give the respondent an excuse to walk out of the proceedings on one or other of these grounds.

A. *How does the tribunal deal with arbitration guerillas?*

12 There is no easy answer to this. The tribunal has to be aware from an early date that the respondent is a guerilla, *ie*, a party who is not really interested in the ultimate verdict of the tribunal on a dispassionate basis, but one who needs to deny the claimant an award by any means.

13 The tribunal will need to be on constant guard. It cannot presume on the goodwill of counsel and the parties, and will need to be aware that every decision taken by it will need to be justified on the face of the record. Where the tribunal is about to deny an application (or overrule an objection) by an arbitration guerilla, it should take care to record its reasons for so doing somewhere in the record, either by reading it into the transcript or by a separate letter to the parties.

14 The tribunal will have to mind its language, taking care that nothing in the transcript can be used by the respondent to make a case that the tribunal demonstrated bias against it. Arbitrators who are used to making jokes at the expense of counsel will have to rein in their levity and arbitrators who practice the art of Socratic dialogue with counsel or witness questioning by the tribunal will have to take care that such intervention does not appear to demonstrate any prejudice against the case of the respondent.¹¹

15 In short, the tribunal needs to practise “defensive arbitration”. It must take extreme care at all times not to give any excuse to the arbitration guerilla to make a challenge or an application to a court for an anti-suit injunction against the tribunal or similar relief. One may

¹¹ In such cases, it will be the responsibility of the chair of the tribunal to exercise control over the other arbitrators who might be in danger of over-exuberance in their discourses with counsel or the witnesses.

pre-empt the use of dilatory tactics by explicitly stating in the procedural orders that parties are to honor the time limits set by the tribunal and to include a penalty for missing a deadline.¹²

II. Conscientious objectors or arbitration atheists

16 These are commonly local lawyers who do not wish to fight foreign lawyers before a foreign tribunal. They are not out to sabotage the arbitration because their clients have no defence, but they sincerely believe that their clients will get a better deal before a local court for the following reasons.

- (a) They are inexperienced in international arbitration and do not know how the game is played.
- (b) They feel that their clients may be at greater risk of liability because they are less capable of predicting the outcome.
- (c) They believe that their clients' witnesses may be better believed by a local court rather than a tribunal composed of at least a majority of foreigners.

17 So they will try and fight the arbitration before, during and after the tribunal has commenced its work.

- (a) They will apply to their local courts for an anti-arbitration injunction regardless of the seat of the arbitration.
- (b) They will challenge the tribunal halfway through the hearing if they think there are grounds for removal.
- (c) Ultimately, if there is an award against the respondent, they will resist enforcement in the court of the respondent's home country.

A. How does a tribunal deal with arbitration atheists?

18 Tribunals should realise that they are not dealing with arbitration saboteurs, but conscientious objectors to arbitration who are sincere in their opposition, but none the less dangerous for that.

19 This is a long term problem. When a nation accedes to the New York Convention, it sometimes does not follow up by appropriate

¹² See Barbara Helene Steindl, "Procedural Tactics of a Guerrilla Nature & Suggestions for Counsel How to Counter & Employ (From the Perspective of Counsel before Commercial Tribunals)" (2010) 7(2) TDM at para 2.12 for further suggestions on deterring the use of dilatory tactics.

legislation to implement the enforcement procedure¹³ or by educating its judges as to how they should approach enforcement cases. The record of Asian courts (other than in Singapore and Hong Kong) in relation to international arbitration cases is spotty, to say the least.¹⁴ This may not always be the local judges' fault if they have not received special training in principles of international arbitration. Tribunals cannot control what happens in the local courts, but they can try and do their best to ensure that the record of their arbitration indicates clearly the reasons for every significant step taken by them in the proceedings, so that, hopefully, their exemplary conduct of the arbitration will persuade a local court in a respondent's home country that the foreign tribunal is giving the respondent a fair and unbiased hearing.

20 Hong Kong has got it right by appointing a dedicated arbitration judge who hears all cases dealing with arbitration.¹⁵ Singapore has recently followed suit. The body of arbitration jurisprudence from these two jurisdictions will undoubtedly contribute to the growth of understanding and acceptance of arbitration in Asia. Ultimately, judges (and hopefully lawyers) in Asia will understand that they should not intervene in any arbitration unless they are the court of the seat of the arbitration. Otherwise, they should simply refrain from intervention even if their own nationals are a party to the arbitration unless and until it comes before them as the enforcing court.¹⁶ Judges must further be

¹³ Countries where there has been a significant gap between accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959) and the enactment of implementing legislation include Indonesia, the Philippines and Bangladesh.

¹⁴ See Neil Kaplan, "The Good, the Bad and the Ugly" (2004) 70(3) *Arbitration* 183 at 188–190 for some examples of questionable decisions by Asian courts in the field of arbitration. See David Williams QC, "Defining the Role of the Court in Modern International Commercial Arbitration" Herbert Smith Freehills SMU Asian Arbitration Lecture, Singapore (2012) for examples on how courts in Asia, especially Singapore and Hong Kong, have taken a firm pro-arbitration approach and refrain from setting aside awards too easily.

¹⁵ There is also a specialist list in the Court of First Instance called the Construction and Arbitration List which deals with applications under the Hong Kong Arbitration Ordinance (Cap 609).

¹⁶ The Indian Supreme Court has, in *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc* Civil Appeal No 7019 of 2005 (6 September 2012), recognised that it should refrain from interfering with arbitrations seated outside India. The Supreme Court concluded that Pt 1 of the Indian Arbitration
(continued on next page)

educated that they must pay regard to Article II(3) of the New York Convention¹⁷ and grant stays of court proceedings as a matter of course where there is an operative arbitration agreement between the parties. Finally, they need to be educated not to deny enforcement of an award under the New York Convention save in truly exceptional circumstances.¹⁸

and Conciliation Act (No 26 of 1996) only applies to arbitrations seated in India, thereby reversing its earlier decisions in *Bhatia International v Bulk Trading SA* (2002) 4 SCC 105; 2002(2) SCR 411 and *Venture Global Engineering v Satyam Computer Services Ltd* (2008) 4 SCC 190; 2008(1) SCR 501.

¹⁷ Article II(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959) reads:

The Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article [*i.e.*, an arbitration agreement in writing] shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

¹⁸ Asian courts are increasingly taking a pro-arbitration stance in enforcement proceedings made pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959) (“New York Convention”).

Hong Kong, Singapore, Japan and Korean courts are generally considered to interpret the grounds for refusal of enforcement under the New York Convention narrowly: see Trends of the various 2012 country reviews at Global Arbitration Review Know-How: Commercial Arbitration <<http://globalarbitrationreview.com/know-how/topics/61/commercial-arbitration>> (accessed 24 July 2013). In a recent speech, Judge Song Jianli of the Supreme People’s Court of China noted that foreign arbitral award enforcement in China started becoming effective in 2000, at which time the Chinese Supreme People’s Court issued a notice demanding that it be informed of all lower court refusals of foreign arbitral awards so that higher-level judges specialising in arbitration could review each refusal. Judge Song further stated that the Supreme People’s Court has upheld only 24 of 64 refusals reported to them by the intermediate courts, remanding the other cases back to the lower courts to be enforced: see <https://www.law.columbia.edu/media_inquiries/news_events/2013/february2013/chinese-arbitral-awards> (accessed 10 May 2013). India has taken positive steps towards favouring the enforcement of foreign awards in *Penn Racquet Sports v Mayor International Ltd* 2011(1) Arb LR 244 (Delhi). The Delhi High Court refused a challenge to the enforcement of a foreign award by narrowly interpreting the ground of “public policy”. It held

(continued on next page)

21 The task of educating judges is a slow one. The International Council of Commercial Arbitration (“ICCA”) has taken on itself this task in conjunction with its biennial conferences and congresses. In 2000 a judicial colloquium was organised in India for Indian judges in conjunction with the ICCA Conference in New Delhi, and a further judicial colloquium was organised in China in 2004 for Chinese judges in conjunction with the ICCA Conference in Beijing. However, much more needs to be done on a continuing basis in the other Asian countries if more dramatic progress in judicial attitudes is to be made.

III. Skeptics or arbitration agnostics

22 These are persons who are not instinctively anti-arbitration, but whose experience of international arbitration has not left a good taste in their mouths. They will not automatically derail or attack an arbitration, but they will give the process an evaluation of three out of ten and will dissuade clients and other respondents from agreeing to arbitration as the preferred method of dispute resolution in their contracts.

that the mere fact that the award was against the interest of an Indian company did not amount to the award being contrary to the public policy of India. The Indian Supreme Court in *Fuerst Day Lawson v Jindal Exports* (2011) 8 SCC 333 held that a letters patent appeal cannot be maintained against an order enforcing a foreign award, because s 50 of the Indian Arbitration and Conciliation Act 1996 (No 26 of 1996) only provides for an appeal against an order refusing to enforce a foreign award.

However, there are still Asian countries with a less pro-enforcement stance. For instance, Vietnam and Indonesia interpret the public policy ground in Art V(2)(b) of the New York Convention broadly to allow errors of law to constitute a violation of public policy. In *Tyco Services Singapore Pte Ltd v Leighton Contractors (Vietnam)* (21 March 2003), enforcement was refused by the People’s Supreme Court of Ho Chi Minh City because the contractor failed to obtain the requisite construction permit as required under Vietnamese law. In *Bankers Trust Co and Bankers Trust International plc v PT Mayora Indah Tbk* No 02K/Ex’r/Arb Int/Pdt/2000 (5 September 2000), the Supreme Court of Indonesia held that where there is a conflicting arbitral award and judgment of the Indonesian District Court, it would not enforce the award since this would be contrary to “public order” or public policy.

IV. Neophytes or arbitration wannabes

23 These are persons who are new to international arbitration and are prepared to be open minded about their reactions but who need guidance and persuasion, not unreasoned decisions based on the assumed wisdom of the tribunal. These are also likely to be people facing experienced arbitrators and opposing counsel who may proceed with the proceedings in what experienced arbitration practitioners would consider to be an efficient and business-like manner, which may yet seem an unexplained mystery to the uninitiated.

24 Why do arbitration agnostics and wannabes not support arbitration? Their objections can be broadly divided into:

- (a) matters of style; and
- (b) matters of substance.

A. Matters of style

25 They are put off by what they perceive as aggressive or arrogant behaviour of Western parties' counsel, particularly in cross-examination. If such behaviour is tolerated by the tribunal, then they will believe that the tribunal is sympathetic to such aggression and arrogance and is biased against their Asian clients. This feeling may be accentuated by the out-of-hearing conduct of the tribunal, *eg*, if its Western arbitrator only chats with the Western counsel during coffee breaks.

26 Asian counsel not from a common law jurisdiction may also not be used to the Socratic dialogue, so beloved of common law judges, which may be perceived as so interrogative in nature and manner as to indicate a prejudiced mind.

27 Some Asian counsel and witnesses may not be as fluent in English as their Western counterparts and may feel disadvantaged as a result.

(1) How should tribunals address this problem?

28 Tribunals dealing with disputes between Western and Asian parties should take extra care to make parties and witnesses feel at ease and to believe that there is a level playing field regardless of differences of language and culture.

29 For those counsel and witnesses unused to "robust" cross-examination, the tribunal should make it clear that the silence of

the tribunal during such cross-examination does not necessarily mean that the tribunal is supporting counsel in his cross-examination and that the tribunal will be keeping an open mind and neutral position throughout the proceedings.

30 Allowance must be made for witnesses and counsel who are not native speakers of English. Extra care should be taken to make sure that witnesses and counsel are given full opportunity to express themselves in a manner that can be understood by the tribunal and the tribunal itself must ensure that it does understand what such witnesses and counsel are trying to say, however imperfect their English.¹⁹

31 In short, tribunals should practise “ambassadorial arbitration” by taking pro-active steps to make the agnostics and the wannabes feel at home, or at least comfortable, in what (for them) would be strange environment. A tribunal should aim, not only to do justice according to the merits of the case, but to make both parties (or at least their counsel) feel that they have had a fair deal and that there has been relative

¹⁹ I was co-arbitrator in an arbitration where the English chair allowed US counsel to cross-examine European witnesses “robustly” for more than a day without comment. While the witness’s English was perfectly competent for normal conversation, he was obviously at a disadvantage trying to cope with a skilled cross-examiner who was a native English speaker constantly on the attack, and was unable to do justice to himself by his answers. When I interjected during one exchange to seek clarification of one answer from the witness, he was so relieved to hear a question from a friendly (or at least neutral) voice that he openly expressed his gratitude at finally hearing someone who did not question the good faith of his every answer. If a bilingual European felt difficulty linguistically in being able to cope with cross-examination, one can imagine how an Asian would feel.

On another occasion, I was sole arbitrator where counsel appearing before me were Singapore counsel for the claimant and Portuguese counsel for the respondent. All my instincts were to attune myself to the Singapore counsel’s arguments simply because I had no problem understanding his common law approach and his linguistic presentation. I had much more difficulty in understanding the Portuguese counsel’s civil approach and linguistic presentation. Yet I persevered, and bent over backwards to try and understand what the Portuguese counsel was trying to say. While I started off the case almost ready to give Singapore counsel everything he asked for, after I had finally understood what the Portuguese counsel’s case really was, I allowed the Portuguese defence and counterclaim to a substantial extent so as to reduce the claimant’s claim.

transparency in the process that has led to the ultimate verdict, even if unfavourable to one of the parties.

B. Matters of substance

32 Ultimately, arbitration agnostics and skeptics will say that their client was unhappy with the result, not just because they lost the arbitration, but because of the way in which they lost.

33 Here the problem goes beyond process into substance.

34 Asian contractual relationships depend on factors other than the letter of the law. Law and contracts as written are insufficient to maintain a commercial relationship. So when disputes arise, an Asian may not be satisfied with any solution that looks to the literal words of the contract to resolve that dispute.

35 In Asia, a contract is not the conclusion of the deal, but rather the beginning of a commercial relationship. As such, matters such as personal goodwill and the need to look at changed circumstances matter more than the words of a contract. Asians expect the subordination of law and contracts to evolving circumstances and relational values.

36 Most Chinese and Japanese contracts have a clause requiring parties to sit down and negotiate in good faith if any dispute arises. This would clearly be unenforceable under common law²⁰ and probably under civil law as well, but such clauses are taken seriously in the civil law countries of the Far East. Asian parties, particularly those not schooled in Western business traditions, view contracts as dynamic and evolving documents rather than fixing obligations in an immutable and static manner. The contract is therefore a source of guidance rather than determinative, and subordinate to other values such as the preservation of the relationship and the accommodation of the other parties' legitimate business concerns.

37 Nevertheless, there is a gap between Asian expectations and Asian laws. For example, to my knowledge, the Asian Financial Crises of 1997 to 1998 have not been found to be a legal excuse for non-performance of any contractual promise in any Asian country. This is because all major Asian systems are derived from Western models. So, where any national

²⁰ See *Walford v Miles* [1992] AC 128.

law is the governing law, it is likely that strict standards of frustration and *force majeure* will be applied, whatever its composition.²¹

38 Civil law systems also pay greater attention to the concept of good faith than common law systems, but this concept is generally limited in its application to assisting with the interpretation or implication of contract terms. It is not used as a means of modifying the contract or as a means of subordinating the contract to other values affecting the commercial relationship. So this concept falls short as a vehicle of adjusting contractual obligations in the context of an East-West commercial relationship.

39 An argument could of course be made that the Asian approach to contractual provisions may be outmoded thinking and Asian businessmen need to be brought into line with contemporary Western business practices.²²

40 However, if it is thought that they have a point, what then is supposed to be done?

41 As a starting point, parties should avoid using a national law as the governing law because few national laws can accommodate the expectations of Asians described above.

42 Parties should then consider using an international convention, such as the Convention on International Sale of Goods.²³ However, this is Western inspired, and may be interpreted in accordance with the strict standards of any Western law.

²¹ This paper does not address the situation of Bilateral Investment Treaty (“BIT”) arbitrations where countries are respondents. In this connection, there is an interesting ongoing debate among international scholars whether certain defences available in public international law (*eg*, necessity and *rebus sic stantibus*) Art 62 of the Vienna Convention on the Law of Treaties (1155 UNTS 331) (23 May 1969; entry into force 27 January 1980)) could be invoked in BIT arbitrations by countries which are unable to fulfill their financial obligations.

²² A possible exception is the 1992 Dutch Civil Code, where Art 6:248(a) provides that “rule binding upon the parties as a result of the contract does not apply to the extent that, in the given circumstances, it would be unacceptable according to criteria of reasonableness and equity”. See Phillip McConnaughay, “Rethinking the Role of Law and Contracts in East-West Commercial Relationships” in *International Commercial Arbitration in Asia* (Philip McConnaughay & Thomas Ginsburg eds) (Juris Publishing, 1st Ed, 2002) at paras 12-42–12-43.

²³ 1489 UNTS 3 (11 April 1980; entry into force 1 January 1980).

43 Parties may, as an alternative, consider using a system of law that allows for adjustments of strict legal rights according to concepts of fairness and equity. Article 3.2.7 of the 2010 International Institute for the Unification of Private Law Principles of International Commercial Contracts²⁴ provides:

(1) A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gives the other party an excessive advantage. Regard is to be had, among other factors, to

(a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill, and

(b) the nature and purpose of the contract.

(2) Upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to take it accord with reasonable commercial standards of fair dealing.

(3) A court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that that party ignores the other party of its request promptly after receiving such notice and before the other party has reasonably acted in reliance on it. The provisions of Article 3.2.10(2) apply accordingly.²⁵

44 Despite it being a relatively untested provision, this would seem to have the best opportunity of being widely accepted as a means of establishing a contract adjustment mechanism.²⁶

45 Parties may also consider using:

- (a) general principles of equity;
- (b) *aequo et bono*;
- (c) *amiable composition*;
- (d) *lex mercatoria*.

²⁴ 3rd Ed, 10 May 2011.

²⁵ Article 3.2.10(2) of the International Institute for the Unification of Private Law Principles of International Commercial Contracts (3rd Ed, 10 May 2011) provides: "After such a declaration [of willingness to perform the contract] or performance the right to avoidance is lost and any earlier notice of avoidance is ineffective."

²⁶ These ideas are developed further in Phillip McConnaughay, "Rethinking the Role of Law and Contracts in East-West Commercial Relationships" in *International Commercial Arbitration in Asia* (Philip McConnaughay & Thomas Ginsburg eds) (Juris Publishing, 1st Ed, 2002).

46 What practical problems arise from such a process?

47 First, much more importance will now attach to the decision maker than to the criteria for the decision.

48 Second, some institutional rules do not allow this (the International Chamber of Commerce Arbitration Rules²⁷ and the Model Law do not allow the arbitral tribunal to assume powers of an “*amiable compositeur*” or decide “*ex aequo et bono*” unless the parties have agreed to give it such powers or expressly authorised it to do so. Articles 22.3 and 22.4 of the London Court of International Arbitration Rules²⁸ require decisions in accordance with “rules of law” and the arbitral tribunal can only apply to the merits of the dispute principles deriving from “*ex aequo et bono*”, “*amiable composition*” or “honourable engagement” where the parties have so agreed expressly in writing).

49 Third, parties should consider using a national law blended with one of the equitable systems of law quoted above; this would give a national law some basis for predictability, but allow for modifications of the national law by the application of general principles of fairness and due faith.

50 Another method is to abandon the parol evidence rule for arbitrations so as to allow evidence of what the Asian party’s expectations were of the contractual relationship to be received in evidence and given due weight.

51 Another aspect of change that should be considered is to allow arbitrators to also act as mediators:

- (a) This is permitted by Singapore and Hong Kong legislation.²⁹
- (b) It is positively encouraged by China and Japan.
- (c) However, the danger is that this may go against some legal traditions in countries which are used to different ideas of arbitrator neutrality.

52 Ultimately, parties and their counsel will have to decide whether some or all of these measures would solve their problems. However, parties who complain that the Western model of arbitration does not adequately address Asian concerns should realise that the solution

²⁷ Entry into force 1 January 2012.

²⁸ Effective 1 January 1998.

²⁹ International Arbitration Act of Singapore (Cap 143A, 2002 Rev Ed) s 17; Arbitration Ordinance of Hong Kong (Cap 609) s 33.

(whatever it may be) lies in their own hands. All arbitration is a product of contract and ultimately the parties to the contract are responsible for determining what terms govern their relationship.

Background to Essay 2

This is a favourite topic of mine, as I have always challenged the mantra of the Singapore courts that the courts will never question the merits of an award under review, whether for error of fact or of law. So when I was asked to deliver a paper during the 2011 Singapore Academy of Law Conference for the periodic five-year review of the decisions of the Supreme Court, I chose to update my previous articles on the subject into a review of the approach of the Supreme Court to the question of errors made by arbitral tribunals. In short, my thesis was (and is) that there must be some cases where the error is so egregious that public policy demands that it must be corrected. This paper had to be delivered before a large audience in the Supreme Court Auditorium a day after I had fallen and broken my wrist, giving me the opportunity to tell the audience that I was therefore unable to use the lawyer's usual escape clause about the correctness of his opinions because I could no longer say "on the one hand, and on the other hand". Su Zihua was my co-author and she did a masterly job of re-writing and updating my earlier articles on this subject.

I wish to extend my thanks to the Singapore Academy of Law for kindly granting me permission to republish this paper in this book.

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EGREGIOUS ERRORS AND PUBLIC POLICY: ARE THE SINGAPORE COURTS TOO ARBITRATION FRIENDLY?*

Michael HWANG SC[†] and SU Zihua[‡]

Contents

I.	Introduction.....	39
II.	Singapore's regime on setting aside and refusal of enforcement.....	43

* A paper presented at the Singapore Academy of Law Conference 2011 on 24 February 2011.

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A.	Setting aside and refusal of enforcement under the IAA.....	44
B.	Setting aside and refusal of enforcement under the AA.....	46
III.	The Singapore position on errors.....	47
A.	<i>John Holland Pty Ltd v Toyo Engineering Corp (Japan)</i>	47
B.	<i>PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA</i>	51
C.	<i>VV v VW</i>	54
D.	<i>Dongwoo Mann+Hummel Co Ltd v Mann v Hummel GmbH</i>	56
E.	<i>Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd</i>	58
IV.	Errors of law and fact in other jurisdictions.....	61
A.	Canada.....	61
B.	Zimbabwe.....	66
C.	Hong Kong.....	68
D.	India.....	70
E.	Singapore, England and New Zealand.....	73
V.	Rehearing on grounds of error in jurisdiction or finding of illegality, fraud or corruption.....	77
VI.	Proposed solution.....	81
VII.	Conclusion.....	88
VIII.	Postscript.....	89

I. Introduction

1 It is not in doubt that the Singapore courts have adopted a consistently pro-arbitration approach aimed at protecting the sanctity of the arbitral award, the arbitral tribunal's jurisdiction and facilitating the process of arbitration.¹ The landmark case of *Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rusf*² (“*Mitsui Engineering*”) is perhaps the best testimony to our pro-arbitration approach.

2 In *Mitsui Engineering*, a party to an arbitration, disgruntled with the partial award issued by the arbitrator, launched a challenge against the arbitrator. The disgruntled party also applied for an interlocutory injunction to restrain the arbitrator, Easton, from “continuing or assisting in the prosecution or further prosecution or taking any further step” in the arbitration pending the intended application to remove him and set aside the partial award.

3 The application went before Woo Bih Li J in the High Court who held that the court did not have the jurisdiction to grant the

¹ See Michael Hwang SC & Su Zihua, “The Role of the Court in Arbitration Proceedings and Enforcement of Awards”, a paper for presentation at the 15th Malaysian Law Conference at Kuala Lumpur (29 July 2010).

² [2004] 2 SLR(R) 14.

interlocutory injunction and dismissed the injunction. More significantly, Woo J highlighted the presence of the oft-neglected Article 5³ of the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on International Commercial Arbitration 1985 (“Model Law”),⁴ which provides that “no court shall intervene except where so provided in this Law [*i.e.*, the Model Law]” in his judgment, and subsequently, in rejecting one of the disgruntled party’s arguments as to why the court had jurisdiction, argued that the granting of an interlocutory injunction pending the determination of a setting aside application would be

³ Although see *Vale do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd* [2000] 2 Lloyd’s Rep 1 (“*Vale*”) where Art 5 of the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on International Commercial Arbitration 1985 (UN Doc A/40/17) annex I (21 June 1985) (“Model Law”) was discussed and applied. In *Vale*, an issue arose as to whether the court had jurisdiction to determine whether there was a binding agreement to arbitrate since this was a matter regulated by Pt I of the English Arbitration Act 1996 (c 23) which gave the jurisdiction to the arbitral tribunal. Thomas J concluded that the UK equivalent of Art 5 in the English Arbitration Act 1996 required the court to approach the issue of whether the court had jurisdiction on the basis that it should not intervene except in the circumstances specified in the relevant part of the English Arbitration Act 1996 and considered that “the general intention was that the Court should usually not intervene outside the general circumstances specified in Part I of the Act”: see *Vale* at [48]–[52]. See also *Carter Holt Harvey Ltd v Genesis Power Ltd* [2006] NZHC 114 (“*Carter*”) in which Randerson J, applying *Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush* [2004] 2 SLR(R) 14 and *Vale*, held that:

Article 5 prohibits the intervention of the court except where so provided in the Schedule [which is the part of the New Zealand Arbitration Act 1996 (1996 No 99) which set out the Model Law] ... Although it does not say so explicitly, I am satisfied Article 5 was intended to mean that where the Court is permitted to intervene, it may only do so in the manner provided in the Schedule.

See *Carter* at [54]. Thus, an application for a stay was dismissed, as the circumstances were outside of those provided for in Art 8 of the Model Law. See also *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 in which the Court of Appeal affirmed that the purpose of Art 5 of the Model Law was to “satisfy the need for certainty as to when court action is permissible”: at [36]. Accordingly, the court’s jurisdiction to interfere with an arbitral award is circumscribed by what is expressly provided for in the Model Law.

⁴ UN Doc A/40/17, annex I (21 June 1985). Applicable in Singapore by virtue of s 3(1) of the International Arbitration Act (Cap 143A, 2002 Rev Ed).

“contrary to the overall scheme of minimum court intervention”.⁵ The arbitration was thus able to proceed. This reference to the need to protect the “overall scheme of minimum court intervention” is significant because it highlights the applicability of Article 5 of the Model Law and is the first local case to enunciate the presence of a “scheme of minimum court intervention”.

4 More recently, the Court of Appeal in *Tjong Very Sumito v Antig Investments Pte Ltd*⁶ has pronounced that “[a]n unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore”,⁷ adding further that “the role of the court is ... to support, and not to displace, the arbitral process”.⁸ One month later, the Court of Appeal emphasised the point by noting, in *Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd*,⁹ that:¹⁰

... it is ... clearly established that the courts will endeavour to do their level best to facilitate and promote arbitration between commercial parties whenever possible.

5 A jurisdiction which seeks to promote arbitration should adopt a pro-arbitration policy. The thorny issue is how best to balance a pro-arbitration policy and the need to ensure that justice is served. For instance, where a tribunal has clearly misapplied or failed to apply the relevant law, should the courts allow the award to be set aside or refuse to enforce it? What happens if a tribunal commits a blatant error of fact or calculation? On the one hand, to protect the sanctity and finality of the arbitration award, a court should not easily allow awards to be set aside or refused enforcement. As Scrutton LJ starkly put it:¹¹

If the arbitrator whom you choose makes a mistake in law, that is your look-out for choosing the wrong arbitrator; if you choose to go to Caesar you take Caesar’s judgment.

⁵ *Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush* [2004] 2 SLR(R) 14 at [40].

⁶ [2009] 4 SLR(R) 732 at [28].

⁷ *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [28].

⁸ *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [29].

⁹ [2010] 1 SLR 25.

¹⁰ *Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd* [2010] 1 SLR 25 at [61].

¹¹ *African & Eastern (Malaya) Ltd v White, Palmer & Co Ltd* (1930) 36 LI L Rep 113 at 114.

On the other hand,¹² a categorical refusal to set aside or refuse enforcement of clearly and grossly erroneous awards may be an injustice which arguably cannot be tolerated in any mature and developed legal system. This may also undermine public confidence in arbitration and even the international reputation of Singapore as an international arbitration centre.

6 The traditional position under English arbitration law and the old Singapore arbitration regime¹³ was that misconduct by an arbitrator provided grounds for setting aside an arbitral award,¹⁴ and errors of fact and law committed by the tribunal were subsumed within “misconduct”.

7 Under the current Singapore arbitration regime, however, misconduct is no longer a ground for setting aside. Instead, the new arbitration regime, based on the Model Law and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”),¹⁵ provides an exhaustive list of grounds for setting aside or refusing to enforce an arbitral award and, in the context of international arbitrations, the grounds for setting aside or refusing enforcement do not include “error of fact or law”. What this means is that, if the grounds for setting aside or refusal of enforcement are read restrictively, errors

¹² A phrase the principal author was unable to use during the oral presentation of this paper, owing to his fractured left wrist.

¹³ Arbitration Act (Cap 10, 1985 Rev Ed).

¹⁴ Section 17(2) of the Arbitration Act (Cap 10, 1985 Rev Ed) provides that:
Where an arbitrator or umpire has *misconducted himself or the proceedings*, or an arbitration or award has been improperly procured, the court may set aside the award. [emphasis added]

¹⁵ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959) (“New York Convention”) provides for exhaustive grounds upon which jurisdictions which are signatories to the New York Convention may set aside a foreign arbitral award. Indeed, the Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) provisions on setting aside and grounds upon which enforcement can be refused mirror, and were modelled on, the grounds upon which enforcement can be refused under the New York Convention. However, s 24 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) establishes two further grounds for setting aside that are not available under the New York Convention. The grounds are that (a) an award may be set aside for fraud or corruption; and (b) there has been a breach of the rules of natural justice in connection with the making of the award by which the rights of any party have been prejudiced.

of fact and law on the merits of the case may never (or rarely) be redressed even if such errors are clear and egregious. In the normal case where the tribunal has committed an error, this may be acceptable as a submission to arbitration is based on an acceptance of the principle that he who goes to Caesar must live by Caesar's judgment. However, in cases where a blatant or obvious¹⁶ error or some other form of egregious error (*ie*, an error so shocking that to leave it unrectified would hold the judicial system up to censure, or an error so abysmal that it would arouse mockery, or even outrage in the eyes of an objective observer) is committed by the tribunal, the authors take the view that it would be a travesty to leave such errors uncorrected. Singapore case law, however, appears to have taken a bright-line approach and rejected the notion that an international arbitral award may ever be set aside on grounds of error of fact or law by the tribunal.

8 In this paper, we will first examine the present regime for the setting aside and refusal of enforcement of international arbitral awards. We will then review the approach taken by the Singapore courts with regard to errors of fact or law in the context of international arbitrations. This will then be followed by an examination of the positions taken towards errors of fact and law by other jurisdictions, comparing them with our own, followed by an analysis on how the courts currently already allow for re-hearings of certain errors made by the tribunal. Finally, we will attempt to offer our opinion on how a more measured approach to this question might be achieved.

II. Singapore's regime on setting aside and refusal of enforcement

9 Two parallel systems make up the present Singapore regime on arbitration. International arbitrations¹⁷ with Singapore as the seat are

¹⁶ "Obviously wrong" is used in s 49(5)(c)(i) of the Arbitration Act (Cap 10, 2002 Rev Ed) as one of the requirements for appealing a point of law (as part of the test) so this is a well-known concept in arbitration law.

¹⁷ Under s 5(2) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"), an arbitration is "international" if:

- (a) at least one of the parties to an arbitration agreement, at the time of the conclusion of the agreement, has its place of business in any State other than Singapore; or
- (b) one of the following places is situated outside the State in which the parties have their places of business:

(continued on next page)

governed by the International Arbitration Act¹⁸ (“IAA”) while domestic arbitrations seated in Singapore are governed by the Arbitration Act¹⁹ (“AA”).²⁰

A. Setting aside and refusal of enforcement under the IAA

10 The IAA allows arbitral awards to be set aside under section 24 and Article 34 of the Model Law. Section 24 of the IAA provides:

Court may set aside award

24. Notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if —

- (a) the making of the award was induced or affected by fraud or corruption; or
- (b) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

Section 5(1) of the IAA also allows parties to a domestic arbitration to opt to apply the Act by written agreement.

¹⁸ Cap 143A, 2002 Rev Ed.

¹⁹ Cap 10, 2002 Rev Ed.

²⁰ Note, however, that s 5(1) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (“IAA”) also allows parties to a domestic arbitration to opt to apply the IAA by written agreement. The Arbitration Act (Cap 10, 2002 Rev Ed) (“AA”) does not prevent parties from opting out of the AA regime since under s 3 of the AA, the AA applies to “any arbitration where the place of arbitration is Singapore and where Part II of the [IAA] does not apply to that arbitration”.

Article 34 of the Model Law provides:

Article 34. Application for setting aside as exclusive recourse against arbitral award

- (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.
- (2) An arbitral award may be set aside by the court specified in Article 6 only if:
 - (a) the party making the application furnishes proof that:
 - (i) a party to the arbitration agreement referred to in Article 7 was under some incapacity; or 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 this State; or
 - (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
 - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
 - (b) the court finds that:
 - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
 - (ii) the award is in conflict with the public policy of this State.

Enforcement of an arbitral award may be resisted on the grounds set out in section 31 of the IAA, which reflect the grounds for setting aside found in Article 34 of the Model Law.²¹

11 It is clear from section 24 of the IAA and Article 34(1) of the Model Law, as well as section 31(1) of the IAA, that the grounds for setting aside and refusal of enforcement under the IAA are exhaustive. Indeed, it was confirmed in *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd*²² that the grounds in the IAA were the exclusive means of challenging an international arbitral award.²³

B. Setting aside and refusal of enforcement under the AA

12 Section 47 of the AA²⁴ prohibits judicial review of an arbitral award (*ie*, a court may not confirm, vary, set aside or remit an award) with two exceptions.

13 First, the court may set aside an award on the grounds provided in section 48 of the AA, which reflect the grounds upon which an

²¹ More precisely, s 31 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (“IAA”) reflects the grounds for refusal of enforcement set out in Art V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959) which Art 34 of the Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) has adopted as grounds for setting aside. Note that the grounds for refusal of enforcement under s 31 of the IAA, however, do not include the grounds for setting aside found in s 24 of the IAA, *viz*, (a) the making of the award was induced or affected by fraud or corruption; and (b) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced. Nevertheless, it is generally accepted that an award induced by fraud or corruption or which involves a breach of the rules of natural justice will fall within the rubric of being “contrary” to the public policy of Singapore.

²² [2010] 3 SLR 1.

²³ *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at [19].

²⁴ Section 47 of the Arbitration Act (Cap 10, 2002 Rev Ed) provides that “[t]he Court shall not have jurisdiction to confirm, vary, set aside or remit an award on an arbitration agreement except where so provided in this Act” and ss 48 and 49 set out the exclusive grounds for judicial review in the Act.

international arbitral award may be set aside as reflected in section 24 of the IAA and Article 34 of the Model Law.

14 Second, under section 49 of the AA, a court may hear an appeal made on a question of law arising out of an award made in the proceedings. Leave to appeal will only be granted by the court if (as prescribed under section 49(5) of the AA):

- (a) the determination of the question will substantially affect the rights of one or more of the parties;
- (b) the question is one which the arbitral tribunal was asked to determine;
- (c) on the basis of the findings of fact in the award —
 - (i) the decision of the arbitral tribunal on the question is obviously wrong; or
 - (ii) the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt; and
- (d) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the question.

15 While the AA explicitly allows for the setting aside of an arbitral award on appeal on a question of law where, on the basis of the findings of fact of the award, the decision of the tribunal is “obviously wrong” or “open to serious doubt” (subject to the fulfilment of other conditions), the IAA makes no mention of setting aside or refusing enforcement on the basis of error (whether of fact or law) by the tribunal. The issue of whether an international arbitral award may be set aside for error, however egregious, thus turns on whether the grounds for setting aside in section 24 of the IAA and Article 34 of the Model Law and the grounds for refusal of enforcement in section 31 of the IAA can be and are interpreted to include errors by the tribunal. A review of the grounds for setting aside and refusal of enforcement leads to the conclusion that the ground of “public policy” in Article 34(2)(b)(ii) of the Model Law and section 31(4)(b) of the IAA is the only one capable of interpretation so as to allow egregious errors to be a ground for setting aside and refusal of enforcement. Singapore case law, however, has decided otherwise.

III. The Singapore position on errors

A. John Holland Pty Ltd v Toyo Engineering Corp (Japan)

16 The genesis of the Singapore judicial position on errors of fact and law may be found in *John Holland Pty Ltd v Toyo Engineering Corp*

(Japan)²⁵ (“*John Holland*”). In *John Holland*, there was an application by John Holland Pty Ltd (“JHPL”) to set aside an arbitration award given in favour of the respondent, Toyo Engineering Corp (“TEC”). Various grounds of setting aside were relied on, one of which was section 24(b) of the International Arbitration Act²⁶ (“IAA (1995)”), *viz*, setting aside on grounds of “a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced”. JHPL also relied on section 17(2) of the Arbitration Act²⁷ (“AA (1985)”), *viz*, an award may be set aside on the ground of misconduct. (It was also an area of dispute in *John Holland* as to whether the IAA (1995) or AA (1985) governed the arbitration and related proceedings.)

17 One of the issues in the arbitration was whether a certain contract, executed between the parties on 5 April 1995, was binding, and the tribunal answered this question in the affirmative. Article 5 of the contract provided:

TEC shall, after all the requirements for effectuation of the CONTRACT set forth in Clause 1.4 ‘EFFECTUATION OF CONTRACT’ of the GENERAL TERMS AND CONDITIONS shall have been fulfilled yet subject to the relevant proviso therein, issue to the [JHPL] the NOTICE OF EFFECTUATION OF CONTRACT, and upon issuance by TEC to [JHPL] thereof, the CONTRACT shall be made effective and valid and come into force.

18 It was not disputed that there was no notice of effectuation. Before the court, counsel for JHPL argued that, as JHPL had not been permitted to argue that there was no contract by reason of the omission in issuing the notice of effectuation, section 24(b) of the IAA (1995) applied, and the award should be set aside. Alternatively, if the AA (1985) applied, the arbitrators had misconducted themselves in finding that the contract was binding when made on 5 April 1995 even though there had been no notice of effectuation, thereby committing a basic error which experienced arbitrators ought not to have made. Choo Han Teck JC (as he then was) found that the tribunal had considered the issue of formation of contract; accordingly, there was no issue of natural justice having been breached. JHPL’s argument under section 24(b) of the IAA (1995) and section 17(2) of the AA (1985) was also rejected by Choo JC who found that the true substance of JHPL’s complaint was that the

²⁵ [2001] 1 SLR(R) 443.

²⁶ Cap 143A, 1995 Rev Ed.

²⁷ Cap 10, 1985 Rev Ed.

tribunal had committed a “plain error of law, or of mixed fact and law”.²⁸
In Choo JC’s words:²⁹

... I find that there is no room whatsoever to manoeuvre JHPL’s case within any of the features required under s 24(b) of the IAA. The complaint, if valid, reveals no more than a plain error of law, or of a mixed fact and law. That is not only outside the ambit of s 24(b) of the IAA, but also outside the ambit of s 17(2) of the AA. I am of the view that an error of this nature does not amount to misconduct. It is also my view that although the misconduct envisaged under s 17(2) is not necessarily conduct of the wilful sort, it must nonetheless, be of a serious nature that one can plainly see that justice was not done. ...

Reverting to s 24 of the IAA and s 17(2) of the AA, I think that the Legislature intended that it will require more than an error of law or fact (or both) to set aside an arbitration award. In their attempt to describe what extra features were contemplated by the Legislature, [Counsel for JHPL] and [Esteemed Counsel for TEC] alluded to the allegorical illustration of how an elephant might be identified – the ‘you know it when you see it’ approach. It is probably fair to say that this may only be said of cases in the penumbra. In my view, the cases clearly in the definable limits are not difficult to describe. A mistaken view of the application of *Hadley v Baxendale*, for example, is an error of law that cannot be challenged. A mistaken calculation of the number of days of delay is a mistake of fact which cannot be challenged. On the other hand, if an arbitrator shows his draft award to one party without showing it to the other before publication, that would, in my view, be misconduct within s 17(2) of the AA and also a breach of the rules of natural justice under s 24(b) of the IAA. In my view, the complaints of JHPL against the award are clearly in respect of errors of law or mixed fact and law.

...

[With respect to another of JHPL’s arguments that the tribunal made another error of law] ... an error or omission on the part of the arbitrators in this regard cannot be described as more than an error or omission in law which is subject to an appeal³⁰ (where an appeal

²⁸ *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443 at [18].

²⁹ *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443 at [19], [20] and [22].

³⁰ *Je*, appeal on a point of law, only available under the previous and current domestic arbitration regime (*ie*, Arbitration Act (Cap 10, 1985 Rev Ed) and Arbitration Act (Cap 10, 2002 Rev Ed) and not the previous and current
(continued on next page)

process is prescribed) but not to be set aside on any of the statutory grounds reviewed above.

[emphasis and footnote added]

19 It was also argued by JHPL that the arbitrators' actions constituted a breach of Article 34(2)(b)(ii) of the Model Law: the public policy provision. This argument was similarly dismissed, Choo JC commenting:³¹

Thirdly, [Counsel for JHPL] relied on Art 34(2)(b)(ii); the public policy provision. No particular policy has been identified, however, as having been embarrassed by the award. The contention that public policy covers situations in which there has been a 'fundamental irregularity in respect of the law' is, with respect, not very helpful. *A fundamental irregularity in itself cannot render an award bad.* A public policy must first be identified, and then it must be shown which part of the award conflicts with it. [Counsel for JHPL]'s submission on this ground, therefore, also fails. [emphasis added]

20 *John Holland* thus suggests that (whether under the IAA or the AA) (a) a plain error of law; and (b) a mistake of fact by an arbitrator does not constitute a breach of natural justice or a breach of public policy to render an award bad and capable of being set aside. It also suggests that the threshold for the setting aside of an arbitral award is a very high one – the mistake complained of must be such that “one can see plainly that justice was not done”. In the authors' view, this was a fair statement to make. Indeed, an error or fundamental irregularity by an arbitrator in his rendering of an award does not in itself necessarily justify the setting aside or refusal of enforcement of an award. This is because it was the parties' bargain to have their dispute settled by that arbitrator in the first place and, like everyone else, they must live with the consequences of their choice. However, where the error is such that “one can see plainly that justice was not done”, it should be possible for the court to step in (and indeed, justice so requires) to rectify that error and *John Holland* is correct to the extent that it suggests a court can step in when it was plain that justice would otherwise not be done.

international arbitration regime (*ie*, International Arbitration Act (Cap 143A, 1995 Rev Ed) and International Arbitration Act (Cap 143A, 2002 Rev Ed).

³¹ *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443 at [25].

B. PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA

21 The *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA*³² (“*PT Asuransi (HC)*” and “*PT Asuransi (CA)*”) cases involved an issuer of certain notes (“PTA”) and a holder of those notes (“DB”). PTA sought to restructure the notes and this was approved at a noteholders’ meeting. DB commenced arbitration against PTA and an award was awarded in DB’s favour (“Previous Award”). DB then commenced a second arbitration against PTA. An award on preliminary issues was rendered (“Award”) and PTA sought to set aside the Award under the IAA on various grounds, one of which was that the Award was in breach of Article 34(2)(b)(ii) of the Model Law, *ie*, breach of public policy. It was argued by PTA that certain “critical” findings in the Award were directly contrary to the findings made in the Previous Award and, to that extent, the critical findings were in conflict with the public policy of Singapore that findings in arbitral awards are “final and binding”, the public policy being encapsulated in section 19B of the IAA.³³ Counsel for DB argued that finality of arbitration was not a matter of public policy but a matter of law and, since no public policy had otherwise been identified to be breached, Article 34(2)(b)(ii) could not apply. Further, counsel for DB also argued that PTA’s contention was no different from that in *John Holland*, where the contention was that there had been a fundamental irregularity in respect of the law, and that contention had been rejected as a ground on which the award could be set aside.

³² [2006] 1 SLR(R) 197 (HC); [2007] 1 SLR(R) 597 (CA).

³³ Section 19B of the International Arbitration Act (Cap 143A, 2002 Rev Ed) provides:

Effect of award

19B.—(1) An award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties and on any persons claiming through or under them and may be relied upon by any of the parties by way of defence, set-off or otherwise in any proceedings in any court of competent jurisdiction.

(2) Except as provided in Articles 33 and 34(4) of the Model Law, upon an award being made, including an award made in accordance with section 19A, the arbitral tribunal shall not vary, amend, correct, review, add to or revoke the award.

(3) For the purposes of subsection (2), an award is made when it has been signed and delivered in accordance with Article 31 of the Model Law.

(4) This section shall not affect the right of a person to challenge the award by any available arbitral process of appeal or review or in accordance with the provisions of this Act and the Model Law.

22 The High Court in *PT Asuransi (HC)* agreed with counsel for BD and denied the application to set aside on grounds of public policy. In Judith Prakash J's words:³⁴

Having considered the arguments, I find myself in agreement with the contention that the attack on the Award as being contrary to the Previous Award is an attack that has its foundation in a dissatisfaction with the way in which the legal principles encapsulated in s 19B of the Act seem to have been ignored, rather than an attack founded on the ground of public policy. Whilst I do not doubt that a matter of public policy may be expressed in a legal provision, *ie*, the public policy may be given legislative effect by being enacted as a law, this does not mean that every law has to be regarded as public policy so that if it can be shown that any finding in an arbitration award constitutes a breach of such law, that arbitration award would have to be set aside on the ground of public policy. *If I were to make such a holding, it would prove such a fertile basis for attacking arbitration awards as to completely negate the general rule, at least in so far as international arbitrations covered by the Act are concerned, that awards cannot be set aside by reason of mistakes of law made by the tribunal. ...*

From my perspective, the purpose of s 19B(1) is to make it clear and beyond dispute that each party to an international arbitration is bound by the award made by the tribunal and cannot challenge it except on the limited grounds set out in the Act and the Model Law. *This means that even if the tribunal has made a mistake of fact or of law, there is no recourse against that decision and the parties are bound by it.* The finality given to an award by s 19B(1) also ensures that such award would be enforceable by the successful party as, generally speaking, enforcement of judgments or awards can only be carried out when the same are final and not provisional or subject to appeal. The corollary to an award being final and binding on a party is that that party cannot reopen the same issue in further arbitration or court proceedings. ...

[emphasis added]

23 What is significant is that Prakash J appears to be setting out a strict rule that “there is no recourse” against “a mistake of error or fact” made by the tribunal. While the authors agree that “recourse” against “a mistake of error or fact” should certainly be limited to prevent there being “fertile basis” to challenge the finality of the arbitration award,

³⁴ *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] 1 SLR(R) 197 at [29].

a statement to the extent that there will never be any “recourse” against “a mistake of error or fact” may be taking the matter too far. In the interests of justice to the parties and the preservation of public confidence in the judicial and arbitral system, the authors take the view that some room should be left to allow for the setting aside and refusal of enforcement of an arbitral award tainted by egregious and shocking error.

24 On appeal, in *PT Asuransi (CA)*, the Court of Appeal agreed with Prakash J’s views on the effect of section 19B(1) of the IAA,³⁵ and presumably, that one of the effects of section 19B(1) which was that “even if the tribunal has made a mistake of fact or of law, there is no recourse against that decision and the parties are bound by it”. The Court of Appeal then went on to comment that:³⁶

... the IAA ... gives primacy to the autonomy of arbitral proceedings and limits court intervention to only the prescribed situations. The legislative policy under the Act is to minimise curial intervention in international arbitrations. *Errors of law or fact made in an arbitral decision, per se, are final and binding on the parties and may not be appealed against or set aside by a court except in the situations prescribed under s 24 of the Act and Art 34 of the Model Law.* While we accept that an arbitral award is final and binding on the parties under s 19B of the Act, *we are of the view that the Act will be internally inconsistent if the public policy provision in Art 34 of the Model Law is construed to enlarge the scope of curial intervention to set aside errors of law or fact. For consistency, such errors may be set aside only if they are outside the scope of the submission to arbitration. In the present context, errors of law or fact, per se, do not engage the public policy of Singapore under Art 34(2)(b)(ii) of the Model Law when they cannot be set aside under Art 34(2)(a)(iii) of the Model Law.*

...

Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, it should only operate in instances where the upholding of an arbitral award would ‘shock the conscience’ ...

³⁵ *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 (CA) at [55]. See *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] 1 SLR(R) 197 (HC) at [30].

³⁶ *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [57] and [59].

or is 'clearly injurious to the public good or ... wholly offensive to the ordinary reasonable and fully informed member of the public' ... or where it violates the forum's most basic notion of morality and justice...

[emphasis added]

25 The Court of Appeal thus held that errors of fact or law can only be set aside if they are outside the scope of the submission to arbitration, and the implication is that an error of fact or law would otherwise never be a justification for setting aside. Further, the court stated that "errors of law or fact, *per se*, do not engage the public policy of Singapore under Article 34(2)(b)(ii) of the Model Law when they cannot be set aside under Article 34(2)(a)(iii) of the Model Law". To the extent that the court's comments suggest that an error, even if egregious, will not be set aside unless it was outside the scope of submission, the authors respectfully disagree with the decision. In the authors' view, for reasons already given, one fundamental element of public policy must be that egregious errors are unacceptable to any reviewing court, and the presence of an egregious error must engage public policy to justify the setting aside of the egregiously erroneous award.

C. *VV v VW*

26 In *VV v VW*,³⁷ it was alleged that public policy had been violated due to excessive costs being awarded by an arbitrator and that the award should therefore be set aside under the IAA (while not reported in the judgment, this was presumably an attempt to set aside under Article 34(2)(b)(ii) of the Model Law, which is part of the IAA). The application was refused by the High Court.

27 In the arbitration, the plaintiffs had submitted a claim worth approximately \$927,000. The defendant raised two defences and ten counterclaims which amounted to \$20m. The arbitrator eventually decided that the plaintiffs' claims failed, and he did not have jurisdiction over the defendant's counterclaims. Nonetheless, the arbitrator proceeded to award the defendant a total of \$2.8m (including disbursements) for its legal costs.

28 The plaintiffs applied for the costs award to be set aside on the basis that it was in conflict with the public policy of Singapore as the quantum

³⁷ [2008] 2 SLR(R) 929.

was wholly disproportionate to the amount at stake in the arbitration, and breached the principle of proportionality.

29 Judith Prakash J refused to set the costs award aside, remarking that:³⁸

Any party to an international arbitration who seeks to set aside the award made in that arbitration on the ground that the same is in breach of the public policy of Singapore has a difficult task. As the Court of Appeal explained at [59] of its judgment in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ('the *Asuransi* case') the concept of public policy of the State under the [IAA] encompasses a narrow scope. Chan Sek Keong CJ went on to state:

In our view, [public policy] should only operate in instances where the upholding of an arbitral award would "shock the conscience" ... or is "clearly injurious to the public good or ... wholly offensive to the ordinary reasonable and fully informed member of the public" ... or where it violates the forum's most basic notion of morality and justice ...

30 She then held that it was not part of Singapore's public policy to ensure that costs incurred by parties to the arbitration are assessed on the basis of any particular principle, including the proportionality principle. This was because no amount of costs awarded by an arbitrator (however unreasonable) could ever be considered injurious to the public good or shocking to the conscience.

31 Prakash J then further commented:³⁹

I do not think that the amount of costs awarded by an arbitrator to a successful party in an arbitration proceeding could ever be considered to be injurious to the public good or shocking to the conscience no matter how unreasonable such an award may prove to be upon examination. The courts adhere to the policy of party autonomy embodied in the Act and reflected by the limited grounds on which they may interfere in the arbitral process. *The prevailing public policy being that substantive arbitral awards are inviolable notwithstanding mistakes of fact or law*, it would be odd for the courts to be able to justify interfering with the quantum of costs awarded by an arbitrator by invoking public policy. [emphasis added]

³⁸ *VV v VW* [2008] 2 SLR(R) 929 at [17].

³⁹ *VV v VW* [2008] 2 SLR(R) 929 at [31].

32 We see here a progression in the absoluteness of the proposition that an award cannot be set aside for error in fact or law. In *John Holland*, it was merely held that “[a] fundamental irregularity in itself cannot render an award bad” but nevertheless suggested that an award could be set aside if “one can see plainly that justice was not done”.⁴⁰ In the *PT Asuransi* cases, while it was made clear that an award would not be set aside for error, this was expressed in mild terms to the effect that there would be “no recourse” “if the tribunal has made a mistake of fact or of law”.⁴¹ In contrast, the court in *VV v VW* put it as “arbitral awards are *inviolable* notwithstanding mistakes of fact or law”⁴² [emphasis added] – an unmovable and rigid statement.

D. Dongwoo Mann+Hummel Co Ltd v Mann v Hummel GmbH

33 *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH*⁴³ (“*Dongwoo*”) involved an application by the claimant (“DW”) to the High Court to set aside an arbitral award under the IAA.

34 In the course of arbitration proceedings, DW had obtained a discovery order against the respondent in the setting aside application (“M+H”). M+H refused to comply with the discovery order and wrote a letter to the tribunal enclosing the confidentiality provisions of a contract with its customer and certain design drawings (which were part of the disclosure order). However, these attachments were not provided to DW. The tribunal then issued a second order of discovery confirming the first, but M+H continued to refuse to disclose the documents. At the conclusion of the arbitration, the tribunal drew no adverse inference against M+H, and an award was issued in favour of M+H.

35 DW applied to the High Court for an order to set aside the arbitration award under the IAA on various grounds, one of which was Article 34(2)(a)(ii) of the Model Law, *viz*, DW had been unable to present its case.

36 Chan Seng Onn J refused the application to set aside the award, holding that if after hearing full arguments from the parties, the tribunal

⁴⁰ *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443 at [25] and [19].

⁴¹ *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] 1 SLR(R) 197 (HC) at [30]; [2007] 1 SLR(R) 597 (CA) at [54] and [55].

⁴² *VV v VW* [2008] 2 SLR(R) 929 at [31].

⁴³ [2008] 3 SLR(R) 871.

refused to draw an adverse inference, it would be a mere error of fact or law, which cannot be a ground for setting aside (and is not a ground for setting aside under Article 34(2)(a)(ii) of the Model Law). In his words:⁴⁴

If after hearing full arguments from both parties, the tribunal decided wrongly that it was not appropriate to draw any adverse inference, *it would then be a mere error of fact finding and/or of law, which cannot be a ground for setting aside the award.* An error of fact or law made by the tribunal does not come within the ground for setting aside under Art 34(2)(a)(ii) of the Model Law. Just because the tribunal had ruled against Dongwoo on that question did not mean that the losing side (*ie*, Dongwoo) was thus unable to present its case on this issue. If losing on an issue would ordinarily mean that the party concerned was not able to present its case on that issue, then it would be a remarkable distortion of logic. It would also follow that in all arbitration cases, where one side must necessarily lose, a situation would be invariably created for setting aside because the losing party must have been unable to present its case and hence, it lost for that reason. That cannot be right.

...

Even if the tribunal made a wrong finding of fact ... then *that bona fide error of determination by the tribunal (whether of fact or law) is insufficient to constitute a valid ground (whether of public policy or otherwise) upon which to set aside the award.*

[emphasis added]

37 While it does not quite reach the high-water mark set down in *VV v VW* as to the absoluteness of the proposition that an award may not be set aside for error by the tribunal, *Dongwoo* nevertheless stands for the proposition that a *bona fide* error of determination by the tribunal (whether of fact or law) is insufficient to constitute a valid ground (whether of public policy or otherwise) upon which to set aside an award. To the extent that *Dongwoo* suggests that an egregious error may not be set aside as long as it was made *bona fide*, the authors must also respectfully disagree.

⁴⁴ *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] 3 SLR(R) 871 at [70] and [77].

E. Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd

38 In *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd*⁴⁵ (“*Sui Southern*”), the applicant sought to set aside an award (governed by the IAA) on the basis that the award was perverse, manifestly unreasonable and irrational. The applicant’s complaint was that the award, by construing the term “pipeline system” as meaning the entirety of the applicant’s network of pipes, rather than restricting it by geographical locality to the applicant’s pipeline network in Quetta (an area in Pakistan), imposed an obligation on Sui Southern Gas Co Ltd to upgrade its pipeline system. Given the scale of the works that would be required, the award imposed “impossible obligations” on the applicant and was consequently perverse, manifestly unreasonable and irrational and *Wednesbury* unreasonable.⁴⁶

39 The secondary line of argument by the applicant was that the award could be set aside for *Wednesbury* unreasonableness, *ie*, the perversion, manifest unreasonableness and irrationality of the arbitral award was *per se* a ground upon which the award could be set aside. Effectively, the court was asked to recognise a ground for setting aside outside of what was provided in the IAA (or at least subsumed under the ground of breach of public policy). This line of argument was quickly dismissed on the basis that review for *Wednesbury* unreasonableness exists because it is presumed that when Parliament gives an administrative decision-maker a discretion, that discretion is to be exercised reasonably. In contrast, that presumption “finds no purchase in the context of private arbitrations, where parties have contractually agreed to abide by the decision of the arbitral tribunal” and, in the absence of any of the specific grounds for challenging an award set out by Parliament in the IAA, that award is not to be set aside.⁴⁷ Since no ground of challenge on the basis of

⁴⁵ [2010] 3 SLR 1.

⁴⁶ “*Wednesbury* unreasonableness” is an administrative law concept which finds its roots in the seminal case, *Associated Provincial Picture Houses v Wednesbury Corp* [1947] 1 KB 223. As Lord Diplock put it in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, a decision will be *Wednesbury* unreasonable if it is “[s]o outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it”.

⁴⁷ *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at [18].

unreasonableness or irrationality existed, the award could not be set aside on such grounds.

40 It was also argued by the applicant that a *Wednesbury* unreasonable, “perverse” or “irrational” award could be set aside under Article 34(2)(b)(ii) of the Model Law, *viz*, the public policy ground and it was held by Judith Prakash J, quoting the Court of Appeal’s statement in *PT Asuransi (CA)*,⁴⁸ that:⁴⁹

... errors of law or fact, *per se*, do not engage the public policy of Singapore under Art 34(2)(b)(ii) of the Model Law when they cannot be set aside under Art 34(2)(a)(iii) of the Model Law.

In order for the applicant to succeed on the public policy argument:⁵⁰

... it had to cross a very high threshold and demonstrate egregious circumstances such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice.

It was also held that:⁵¹

Although the court undoubtedly has, on judicial review, a power to quash an administrative decision when its substantive merits are so absurd that no sensible person could have made that decision, I was of the view that no such power is available where the decision in question is made by an arbitral tribunal. This is because there is no appropriate analogy between administrative and arbitral decisions. Review for *Wednesbury* unreasonableness or irrationality exists because it is presumed that, when Parliament gives an administrative decision-maker a discretion, that discretion is not unfettered; rather, Parliament intends that that discretion be exercised reasonably: see H W R Wade and C F Forsyth, *Administrative Law* (Oxford University Press, 9th Ed, 2004), pp 349–365. *This presumption of rationality, however, finds no purchase in the context of private arbitrations, where parties have contractually agreed to abide by the decision of the arbitral tribunal.* Parties must therefore be held to that agreement, in the absence of any of the specific grounds for

⁴⁸ *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [57] and [59].

⁴⁹ *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at [47]. See also *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [57].

⁵⁰ *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at [48].

⁵¹ *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at [18].

challenging an award set out by Parliament in the Act. *The ability to challenge an award for unreasonableness or irrationality is not a ground set out in the Act.* [emphasis added]

41 With respect, it is hard to see why parties to an arbitration, very much like Parliament granting administrative powers to a decision-maker, should not be presumed to have given the arbitrator the power to decide the issues in dispute, subject to the arbitrator exercising his power (and mind) with a minimal degree of rationality, so that an arbitral award should be set aside if found to be unreasonable in the *Wednesbury* sense.⁵² Similarly, it is not clear why the fact that an award is *Wednesbury* unreasonable is not enough to “violate the most basic notion of ... justice” and “cross a very high threshold and demonstrate egregious circumstances” to engage “public policy”.⁵³ In the authors’ view, there is no serious impediment to a finding by the Singapore courts that an award that is *Wednesbury* unreasonable is in breach of “public policy”, and the issue ultimately turns on the extent that the courts wish to be “pro-arbitration” and protect the finality of the arbitral award (the authors take the position that awards which are *Wednesbury* unreasonable are a subset of egregious errors), or provide a good working test of when an error is so egregious as to require annulment of the award.

42 The main line of argument was that, because the award was perverse, manifestly unreasonable and irrational, the award should be set aside under Article 34(2)(a)(iii) of the Model Law for dealing with issues beyond the scope of submission to arbitration. This argument was dismissed as the High Court found that the applicant had indeed submitted

⁵² Of course, it may be argued that the main difference between arbitral awards and administrative decisions is that parties to an administrative decision have no choice in their decision-maker and arguably should receive a second chance if the decision-maker gets it wrong, while parties to an arbitration are generally the ones who choose their arbitrator and so must take his judgment as they find it (finality of decision being a trade-off for the ability to participate in the choice of tribunal). However, it is submitted that there is no magic in the number of extra chances, and the decision is sometimes arbitrary, albeit based on considerations of practicality. Ultimately, the issue is really the extent to which the courts wish to protect the finality of an administrative or arbitral decision versus the need to ensure that justice is properly dispensed.

⁵³ *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at [48].

the definition of the term “pipeline system”. Prakash J also further commented:⁵⁴

As for [the applicant’s] complaint that the Award was made in manifest disregard of the applicable principles of English law, this too was unsuccessful. *Where an arbitral tribunal correctly states but misapplies the law, this is an error of law (and does not cease to be such even if the error is gross or egregious), in respect of which no challenge lies under the Act. PT Asuransi* at [57]. Insofar as [the applicant’s] alleged that the Tribunal ignored “the matrix of facts”, *this was an allegation that the Tribunal committed an error of fact, in respect of which there is also no remedy under the Act. PT Asuransi* at [57]. Neither contention has any effect on the scope of submission to arbitration. [emphasis added]

43 *Sui Southern* thus confirms that which was set out by the line of cases before it – that no challenge lies against an arbitral award on the basis that it contains an error of law or fact, even if the error were manifest or egregious.

IV. Errors of law and fact in other jurisdictions

44 This section sets out how other jurisdictions have taken the position that it is possible for an arbitral award to be set aside for egregious error.

A. Canada⁵⁵

45 The Canadian courts’ approach suggests that awards that are “patently unreasonable”⁵⁶ or reflect a “manifest error of law” can be set

⁵⁴ *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at [38].

⁵⁵ This portion of the paper was derived from a similar section on Canadian case law in Michael Hwang SC & Amy Lai, “Do Egregious Errors Amount to a Breach of Public Policy?” (2005) 71(1) *Arbitration* 1 (The authors also caution that research on the Canadian position ended upon the publication of that article.)

⁵⁶ In *Dunsmuir v New Brunswick* 2008 SCC 9; [2008] 1 SCR 190 (“*Dunsmuir*”), the Supreme Court of Canada analysed the judicial review of the decisions of administrative tribunals and held that there are only two standards of review: correctness and reasonableness. Accordingly, the “patently unreasonable” test has been removed. However, this does not pave the way for courts to undertake a more intrusive review. The court stated that the test of reasonableness is concerned with “the existence of
(continued on next page)

aside under the public policy ground in Article 34 of the Model Law (Canada being one of the earliest countries to follow the Model Law). The kind of error that is required by the Canadian courts to justify setting aside is the sort that reflects a “kind of insult to the law, a significant error, gross or intolerable in respect of which the judges cannot refrain from exercising their power of review”,⁵⁷ and when an error is so, it constitutes a breach of public policy which allows the award to be set aside. The cases below serve as illustration.

46 In *Navigation Sonamar Inc v Algoma Steamships Ltd*⁵⁸ (“*Navigation Sonamar*”), Charles Gonthier SCJ accepted a line of Canadian authorities holding that awards which are “patently unreasonable”⁵⁹ or “reflect a kind of insult to the law”,⁶⁰ could be set aside under the public policy ground in Article 34(2)(b)(ii) of the Model Law. While reiterating the well-established principle that a court must abstain from setting aside or refusing to enforce arbitral awards simply because it believes it would

justification, transparency and intelligibility within the decision-making process” and also with “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: *Dunsmuir* at [47]. The Ontario Court of Appeal in *United Mexican States v Cargill Inc* 2011 ONCA 622 (“*United Mexican States*”), held that the standard of review on a true question of arbitral jurisdiction under Art 34(2)(a)(iii) of the UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) was one of correctness and not reasonableness. Following *Dunsmuir*, the court clarified that: “true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter”: *United Mexican States* at [40]. The test of correctness meant that the tribunal had to correctly identify the limits of its decision-making authority. In applying the standard of correctness, the court should only intervene in cases of true jurisdictional errors and should not stray into the merits of the question that was decided by the tribunal.

⁵⁷ Gilles Pépin & Yves Ouellette, *Principes de Contentieux Administratif* (Éditions Yvon Blais, 2nd Ed, 1982) at p 233.

⁵⁸ Unreported, 16 April 1987, Quebec.

⁵⁹ *Blanchard v Control Data Canada Ltd* (1984) 14 DLR (4th) 289 following *Canadian Union of Public Employees Local 963 v New Brunswick Liquor Corp* (1979) 97 DLR (3d) 417.

⁶⁰ Gilles Pépin & Yves Ouellette, *Principes de Contentieux Administratif* (Éditions Yvon Blais, 2nd Ed, 1982) at p 233.

have arrived at a different conclusion,⁶¹ the court accepted the applicant's invocation of the concept of "patently unreasonable error" as a basis for challenge under the public policy ground in Article 34. *Navigation Sonamar* involved an application to challenge the arbitral award on the basis that the arbitral award which resulted from the arbitrator's erroneous application and interpretation of the charterparty in dispute was "patently unreasonable" and "makes a mockery of the law".⁶² It was further contended that the arbitrator gave no coherent reasons and the award constituted a breach of public policy. However, the award was not set aside. The court ruled that the errors were not patently unreasonable.

47 In *Blanchard v Control Data Canada Ltd*,⁶³ the arbitrator had to consider the validity of the dismissal of an employee who had accepted a bribe. The arbitrator was protected by a "privative" clause which prohibited judicial review under Article 33 of the Canadian Code of Civil Procedure⁶⁴ by way of extraordinary recourse or by injunction. He had decided that the employee should be reinstated after a four-month suspension. The majority of the Quebec Court of Appeal held that he had exceeded his jurisdiction by making an unreasonable award in substituting a penalty, and that the reasons for the award were not sufficient. However, the Supreme Court of Canada disagreed, holding that the award did not constitute an abuse of authority amounting to:⁶⁵

... fraud and of such a nature as to cause a flagrant injustice [that] would divest him of his jurisdiction and be basis for judicial review by evocation, regardless of any privative clause.

⁶¹ The Canadian courts have cautioned that arbitral awards must be approached with deference: *Quintette Coal Ltd v Nippon Steel Corp* 50 BCLR (2d) 207 at 217: "[A] standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention" should be adopted. *Quintette Coal* went further: that the challenging party must overcome a "power presumption" that the arbitrator acted within his powers.

⁶² *Navigation Sonamar Inc v Algoma Steamships Ltd* (16 April 1987) (Quebec) (Unreported) at 16.

⁶³ [1984] 2 SCR 476.

⁶⁴ RSQ, c C-25.

⁶⁵ *Blanchard v Control Data Canada Ltd* [1984] 2 SCR 476 at 480.

However, the Supreme Court observed that prior decisions of the Canadian courts had established the proposition that “patently unreasonable” errors could deprive arbitrators of their jurisdiction.⁶⁶

48 The concept of the “patently unreasonable” error is derived from the frequently quoted statement of the Supreme Court of Canada in *Canadian Union of Public Employees Local 963 v New Brunswick Liquor Corp.*⁶⁷ an administrative law case:⁶⁸

Put another way, was the Board’s interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the Court upon review?

49 The Canadian courts therefore appear to recognise that blatant or “patently unreasonable” errors by arbitrators can result in them losing their jurisdiction.⁶⁹ This reasoning is sound, given the voluntary nature of arbitration and the presumed intention of the parties that there must be a limit to their tolerance of error.

50 This idea was also developed in *Corp Transnacional De Inversiones v STET International*⁷⁰ (“CTDI”). Lax J said that the concepts of fairness and natural justice enunciated in Article 18⁷¹ of the Model Law significantly overlap with the public policy ground in Article 34, and ruled that awards could only be set aside on the public policy ground if they:⁷²

... fundamentally offend the most basic and explicit principles of justice and fairness in Ontario, or evidence intolerable ignorance or corruption

⁶⁶ In *Université du Québec à Trois-Rivières v Larocque* [1993] 1 SCR 471, the Supreme Court of Canada held that an arbitrator had the jurisdiction to determine the scope of issues submitted to him and only a “patently unreasonable error or breach of natural justice can constitute an excess of jurisdiction and give rise to judicial review”.

⁶⁷ (1979) 97 DLR (3d) 417.

⁶⁸ *Canadian Union of Public Employees Local 963 v New Brunswick Liquor Corp* (1979) 97 DLR (3d) 417 at 425.

⁶⁹ See n 56.

⁷⁰ [1999] 45 OR (3d) 183. Upheld by the Ontario Court of Appeal.

⁷¹ Article 18 of the Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) sets out that “[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case”.

⁷² *Corp Transnacional De Inversiones v STET International* [1999] 45 OR (3d) 183 at 193, para e.

on the part of the Arbitral tribunal. The applicants must establish that the awards are contrary to the essential morality of Ontario.

51 The applications had unsuccessfully attacked the award on the grounds that the tribunal was without jurisdiction in respect of three of the applicants, and that they were denied equality of treatment and the opportunity to present their case contrary to Article 18 of the Model Law. A further argument based on the same grounds was that the award was in conflict with the public policy of the State under Article 34. The court rejected that argument as well.

52 Similarly, the Ontario Court of Justice in *Arcata Graphics Buffalo Ltd v Movie (Magazine) Corp*⁷³ held that the public policy exception under Article 36(1)(b)(ii)⁷⁴ of the Model Law would only apply if the matter complained of was contrary to the essential fundamental morality of Ontario.

53 Whatever the words used, it is clear that the Canadian courts take the view that only extremely serious or egregious errors justify a setting aside of the award under the public policy ground.⁷⁵ This approach is

⁷³ [1993] OJ No 564 (unreported), discussed in H C Alvarez, D W Rivkin & Neil Kaplan, *Model Law Decisions: Cases Applying the UNCITRAL Model Law on International Commercial Arbitration (1985–2001)* (Kluwer Law International, 2003) at p 243. The respondent unsuccessfully resisted the application to enforce the award on the basis that the award contained an award of interest at a rate of 1–1.5% *per* month, which was contrary to the public policy of Ontario under Art 36 of the Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006). The court noted that even if the respondent's argument had merit, it would not have given rise to a refusal to enforce the whole award, but merely the part which awarded interest above the post-judgment interest rate in Ontario.

⁷⁴ Article 36 of the Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) sets out the grounds on which an award may be refused recognition or enforcement. Article 36(1)(b)(ii):

Recognition or enforcement of an arbitral award, irrespective of that country in which it was made, may be refused ... if the court finds that ... the recognition or enforcement of the award would be contrary to the public policy of this State.

⁷⁵ The Supreme Court of Canada in *Desputeaux v Éditions Chouette (1987) Inc* [2003] 1 SCR 178 “held that the court must examine the award as a whole and determine whether the decision itself, in its disposition of the case, violated matters of public policy”: United Nations Commission on
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commendable as it would be contrary to the public policy of any civilised system of justice to allow such errors to stand uncorrected. The absence of judicial intervention would undermine confidence in arbitration as an effective and fair means of dispute resolution. This would be as bad as second guessing the arbitrator's judgment. However, while the Canadian courts have accepted in theory the possibility of challenge in these circumstances, there is no reported Canadian decision that has actually applied Article 34(2)(b)(ii) or Article V(2)(b) to set aside an award or deny enforcement on the basis of egregious error.⁷⁶ (This is in contrast to the position in Zimbabwe, which will be discussed in the paragraphs immediately following.)

B. Zimbabwe⁷⁷

54 The only case which the authors have traced where a Model Law country has set aside an award on the ground that an egregious error violated Article 34 is a Zimbabwean case, *Zimbabwe Electricity Supply Authority v Genius Joel Maposa*⁷⁸ ("Genius"), rendered by the Zimbabwean Supreme Court.

55 In *Genius*, the Zimbabwean Supreme Court set aside an award based on what it viewed as a very serious and fundamental mistake by the tribunal on the application by an employer to set aside an award

International Trade Law, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (2012) at para 141. The court also made it clear that not every violation of a mandatory provision amounts to a violation of public policy.

⁷⁶ Interestingly, the court in *Smart Systems Technologies Inc v Domotique Secant Inc* 2008 QCCA 444 at 464 refused to enforce a foreign award based on public policy grounds under Art V(2)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959) where the arbitrators did not give any reasons for their decision. In this case, it was clear from the face of the award that the arbitrators had acted outside their mandate and the court therefore refused enforcement. This case was discussed in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Herbert Kronke *et al* eds) (Kluwer Law International, 2010) at pp 375–376.

⁷⁷ This portion of the article was also derived from Michael Hwang SC & Amy Lai, "Do Egregious Errors Amount to a Breach of Public Policy?" (2005) 71(1) *Arbitration* 1.

⁷⁸ (2000) XXV YB Comm Arb 546 (HC); 548 (SC).

because the arbitrator had made a reviewable factual error in calculating arrears of salary due to the employee (resulting in an overpayment to the employee). This was on the basis that such an error, under Article 34 of Zimbabwe's Arbitration Act 1996⁷⁹ (*in pari materia* with Article 34 of the Model Law), rendered the award contrary to public policy. The Harare High Court had upheld the award on the basis that awards were contrary to public policy only if they would undermine the integrity of the Model Law system, including cases of fraud, corruption, bribery and serious procedural irregularity. As the arbitrator was guilty of no moral turpitude, the High Court took the view that the award did not conflict with public policy. It further held that as the error related to a mere mistake in computation (for which the Model Law made adequate provision), the employer could simply request the tribunal to correct the error. The Supreme Court disagreed. The International Council for Commercial Arbitration Yearbook Commercial Arbitration ("ICCA Yearbook") account states that the Supreme Court took the view:

[W]here an award was based on so fundamental an error, as in this case, that it constituted a palpable inequity that was so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair-minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it should be contrary to public policy to uphold it. The same consequence applied where the arbitrator has not applied his mind to the question or has totally misunderstood the issue and the resultant injustice reaches the point mentioned above.

56 The Supreme Court further held that, although there was no moral turpitude, the award was contrary to the public policy of Zimbabwe under Article 34(2)(b)(ii) of the Model Law. *Genius* may not have been the kind of case envisaged by the Canadian courts as "an insult to the law" so gross as to be intolerable. Unfortunately, the relatively brief report does not show why the error was so egregious as to take it out of the realm of an error which the court would normally decline to review. Nevertheless, while the reasoning of the Zimbabwean Supreme Court does not give much guidance to other courts, it shows that the principles espoused in the Canadian courts are capable of application in practice and are not mere motherhood statements more honoured in the breach than in the observance.

⁷⁹ Act 6 of 1996.

C. *Hong Kong*⁸⁰

57 Hong Kong has also accepted the idea that arbitral awards can be set aside for errors of law or fact.

58 In *Hebei Import and Export Corp (PR China) v Polytek Engineering Co Ltd (HK)*⁸¹ (“*Hebei*”), the court had to consider an arbitral award made in China, enforcement of which was challenged under the public policy ground in Article V of the New York Convention on the basis that the chief arbitrator had been in contact with the buyer’s employees or agents in the seller’s absence, and was therefore biased. The award was eventually enforced, but the Hong Kong Court of Final Appeal accepted that it was possible that enforcement could be refused or the award set aside for errors committed by the tribunal, although it remarked that the award need not contain errors “so extreme that the award falls to be cursed by bell, book and candle”.⁸² However, it stressed (in the context

⁸⁰ This portion of the paper was also derived from Michael Hwang SC & Amy Lai, “Do Egregious Errors Amount to a Breach of Public Policy?” (2005) 71(1) *Arbitration* 1.

⁸¹ (1999) XXIVa YB Comm Arb 652 at 675; [1999] 2 HKC 205. It appears from the report that actual bias (which was not established in the case) was a minimum requirement before enforcement could be challenged on the public policy ground. Hong Kong incorporated both the Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) (“Model Law”) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959) (“New York Convention”), which respectively form the Third and Fifth Schedules to the Hong Kong Arbitration Ordinance (Cap 609), of which s 44(2) lists the grounds on which enforcement of a New York Convention award may be refused, replicating with minor modifications Art V of the New York Convention and for setting aside those in Art 34 of the Model Law.

⁸² *Hebei Import and Export Corp (PR China) v Polytek Engineering Co Ltd (HK)* [1999] HKCFA 40 at [27]. The Hong Kong Court of Appeal in *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd* [2012] HKCA 200; [2012] 4 HKLRD 1; [2012] 3 HKC 498 refused to set aside an award for it found that there were no breaches of Art 34(2) of the Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) (“Model Law”) that were of a “serious” or even “egregious” nature. The court also accepted *obiter* that it had the discretion not to set aside awards even where a violation of Art 34(2)(a) of the Model Law was established, if it was satisfied that “the arbitral tribunal could not have reached a different conclusion”. On
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of different approaches to be taken as regards domestic and foreign arbitral awards) that the reasons “must go beyond the minimum which would justify setting aside a domestic judgment or award”.⁸³ The judgment makes it clear that a higher threshold has to be crossed before a New York Convention award will be set aside than for a domestic award. Bokhary PJ also commented that the award must be:⁸⁴

... so fundamentally offensive to [the enforcing] jurisdiction’s notions of justice, that, despite its being a party to the New York Convention, it cannot reasonably be expected to overlook the objection.

The court rejected the idea that “international public policy” meant some standard common to all civilised nations but rather:⁸⁵

... those elements of a State’s own public policy which are so fundamental to its notions of justice that its courts feel obliged to apply the same not only to purely internal matters but even to matters with a foreign element by which other States are affected.

59 Twenty years prior to *Hebei*, the Hong Kong Court of Appeal⁸⁶ had taken a narrow view of the public policy ground in section 44(3) of the Hong Kong Arbitration Ordinance⁸⁷ when considering an application to deny enforcement of a German arbitral award under the New York Convention. The arbitration agreement provided for the arbitration to be conducted in accordance with regulations issued by the Hamburg Chamber of Commerce. The public policy defence relied on by the opposing party was premised on the contention that the arbitrators had failed to apply the proper law of the contract. The finding at first instance (accepted by the Court of Appeal) was that the arbitrators could not be

19 February 2013, the Hong Kong Court of Final Appeal refused leave to appeal against the Hong Kong Court of Appeal’s judgment.

⁸³ *Hebei Import and Export Corp (PR China) v Polytek Engineering Co Ltd (HK)* [1999] HKCFA 40 at [27]. Hong Kong domestic awards may be set aside where “the arbitrator has misconducted himself or the proceedings, or where the arbitration or the award, has been improperly procured”: Hong Kong Arbitration Ordinance (Cap 609) s 25(2). This ground is similar to that in s 23 of the English Arbitration Act 1950 (c 27) and s 17 of the repealed Singapore Arbitration Act (Cap 10, 1985 Rev Ed).

⁸⁴ *Hebei Import and Export Corp (PR China) v Polytek Engineering Co Ltd (HK)* [1999] HKCFA 40 at [31].

⁸⁵ *Hebei Import and Export Corp (PR China) v Polytek Engineering Co Ltd (HK)* [1999] HKCFA 40 at [29].

⁸⁶ *Wener A Bock KG v The N’s Co Ltd* [1978] HKCA 222.

⁸⁷ Cap 609.

said to have disregarded the proper law, since there was no evidence of any law alleged to be the proper law. What is pertinent was the court's observation that, even if it could be shown that the tribunal had applied the wrong law, it would not be contrary to public policy: "'Public policy' must not be extended to include every conceivable kind of error."⁸⁸ Nevertheless, even on a narrow view of "public policy", note that the Hong Kong court stopped short of making a blanket statement that "a mere error of fact finding and/or of law ... cannot be a ground for setting aside" (*Dongwoo*)⁸⁹ or "[t]he prevailing public policy being that substantive arbitral awards are inviolable notwithstanding mistakes of fact or law" (*VV v VW*),⁹⁰ leaving room for an award to be set aside in cases of egregious errors, which arguably should "shock the conscience".

D. India

60 The Indian judiciary has similarly made pronouncements to the effect that errors committed by the tribunal can be grounds for setting aside or refusal to enforce an award. However, case law allowing such errors to be grounds for setting aside have been roundly criticised for effectively adding a new ground for setting aside based on error of law (whether or not egregious).

61 In *Oil & Natural Gas Corp Ltd v SAW Pipes Ltd*⁹¹ ("*SAW Pipes*"), the applicant sought to set aside a domestic arbitral award under section 34 of the Indian Arbitration and Conciliation Act 1996⁹² ("Indian Act"), *viz*, the award breached the "public policy of India". The facts of the case were that the contract between the parties provided for liquidated damages to be recovered by the appellant in event of delay in delivery of pipes to the appellant by the respondent and there had indeed been a delay in delivery. However, the arbitral tribunal declined to award liquidated damages on the basis that the appellant had not established that it had suffered loss.

62 It was argued by the appellant that public policy had been breached because the tribunal had failed to decide the dispute in accordance with

⁸⁸ *Wener A Bock KG v The N's Co Ltd* [1978] HKCA 222 at [8].

⁸⁹ *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] 3 SLR(R) 871 at [70].

⁹⁰ *VV v VW* [2008] 2 SLR(R) 929 at [31].

⁹¹ (2003) 5 SCC 705.

⁹² No 26 of 1996.

the terms of the contract, and section 28(3) of the Indian Act provided that the arbitral tribunal shall decide the dispute in accordance with the terms of the contract. Further, it was argued that the award should also be set aside because the proper state of Indian law was that damages need not be proven for the recovery of liquidated damages so in fact there had been a misapplication of the law by the tribunal and this vitiated the award.

63 It was held by the Indian Supreme Court that an award would breach the public policy of India and be liable to being set aside if it were “patently illegal”, and one of the instances in which an award would be patently illegal was if “if the award [were] contrary to the substantive provisions of law or the provisions of the [Indian Act] or against the terms of the contract”.⁹³ The tribunal’s error in applying the law when it required proof of loss despite the liquidated damages clause was against the terms of the contract with the effect that the award was patently illegal and the award was set aside. In the Supreme Court’s words:⁹⁴

... it cannot be disputed that if contractual term ... is to be taken into consideration, the award, is on the face of it, erroneous and in violation of the terms of the contract and thereby it violates Section 28(3) of the [Indian Act] ... Hence, if the award is erroneous on the basis of record with regard to the proposition of law or its application, the court will have jurisdiction to interfere ... [emphasis added]

64 Put another way, an award may be set aside on the basis that it contains an error of law. While the Supreme Court did appear to attempt to qualify the type of patent illegality required for setting aside, it established only a very low threshold: the qualification was that the error “must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy”.⁹⁵ On the facts of *SAW Pipes*, it was enough for the error to go to the root of the matter when the error was that the tribunal had failed to take into account a liquidated damages clause and required proof of loss. The suggestion is that any error of law which makes a difference to the outcome of the case can be grounds for setting aside.⁹⁶

⁹³ *Oil & Natural Gas Corp Ltd v SAW Pipes Ltd* (2003) 5 SCC 705 at [15].

⁹⁴ *Oil & Natural Gas Corp Ltd v SAW Pipes Ltd* (2003) 5 SCC 705 at [55].

⁹⁵ *Oil & Natural Gas Corp Ltd v SAW Pipes Ltd* (2003) 5 SCC 705 at [31].

⁹⁶ Note that the Court of Appeal in Singapore explicitly refused to accept the position in *Oil & Natural Gas Corp Ltd v SAW Pipes Ltd* (2003) 5 SCC 705
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65 This position was carried even further in *Venture Global Engineering v Satyam Computer Services Ltd*,⁹⁷ where the Supreme Court held that an international award (even one issued by a foreign jurisdiction, where the arbitration was not seated in India) could be reviewed and set aside if it violated Indian law and was patently illegal.⁹⁸

66 The problem here is that the Indian courts seem to have adopted (without acknowledgment) a mongrelised version of the *Wednesbury* unreasonableness test, and have so lowered the threshold for the application of that test⁹⁹ as to give it a bad name and have therefore made it difficult for the Canadian test (which on occasion has been expressed by using the same terminology of “patently illegal”) to be

that an error of law *per se* could be grounds for setting aside in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 (on the grounds that the legislative intention under the Indian Arbitration and Conciliation Act 1996 (No 26 of 1996) was different from the legislative intention under the International Arbitration Act (Cap 143A, 2002 Rev Ed). See *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [57].

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(2008) 4 SCC 190.

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This was based on the Supreme Court’s interpretation of the Indian Arbitration and Conciliation Act 1996 (No 26 of 1996) (“Indian Act”) and finding that Pt I of the Indian Act (in which s 34 for setting aside was contained) was applicable not only to domestic arbitrations, but international arbitrations as well. Previously, the position had been that, properly interpreted, Pt I of the Indian Act only applied to domestic arbitrations. But see also *Bhatia International v Bulk Trading SA* (2002) 4 SCC 105. The Indian Supreme Court in *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc* Civil Appeal No 7019 of 2005 (6 September 2012), recognised that it should refrain from interfering with arbitrations seated outside India. The Supreme Court concluded that Pt I of the Indian Arbitration Act only applied to arbitrations seated in India, thereby reversing its earlier decisions in *Bhatia International v Bulk Trading SA* (2002) 4 SCC 105; 2002(2) SCR 411 and *Venture Global Engineering v Satyam Computer Services Ltd* (2008) 4 SCC 190; 2008(1) SCR 501.

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It has been commented that *Oil & Natural Gas Corp Ltd v SAW Pipes Ltd* (2003) 5 SCC 705 opens the door for Indian courts to examine the merits of an award. Simon Greenberg, Christopher Kee & J Romesh Weeramanthy, *International Commercial Arbitration – An Asia-Pacific Perspective* (New York: Cambridge University Press, 2011) at p 423.

applied by other courts without invoking the spectre of the Indian-style application of that test.¹⁰⁰

E. Singapore, England and New Zealand

67 The English, New Zealand and Singapore arbitration statutes explicitly provide for the possibility of setting aside an award on grounds of error of law by the tribunal. The statutes provide as follows.

Singapore AA	English Arbitration Act 1996	New Zealand Arbitration Act 1996¹⁰¹
section 49 provides Appeal against award 49. — (1) A party to arbitration proceedings may ... <i>appeal to the Court on a question of law</i> arising out of an award ...	section 69 provides Appeal on point of law 69(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may ...	Schedule 2 clause 5 Appeals on questions of law 5(1) Notwithstanding anything in <i>articles 5</i> or <i>34</i> of Schedule 1, any party may <i>appeal</i> to the High

¹⁰⁰ While a number of Indian courts have relied heavily on *Oil & Natural Gas Corp Ltd v SAW Pipes Ltd* (2003) 5 SCC 705 (“*SAW Pipes*”), some lower courts have tried to interpret the decision narrowly. The Indian Supreme Court itself in *McDermott International Inc v Burn Standard Co Ltd* (2006) 11 SCC 181, although considering itself bound by *SAW Pipes*, indicated that it was not questioning the correctness of that decision but observed that:

The [Indian Arbitration and Conciliation Act 1996 (“Indian Act”)] makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators ... patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the Arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the [Indian Act].

Simon Greenberg, Christopher Kee & J Romesh Weeramanthy, *International Commercial Arbitration – An Asia-Pacific Perspective* (New York: Cambridge University Press, 2011) at p 423. The Indian Ministry of Law and Justice released a consultation paper on proposed amendments to the Arbitration and Conciliation Act 1996 (No 26 of 1996) in the year 2010 and one of the amendments proposed was to legislatively overrule the extended definition given to “public policy” in *SAW Pipes* by removing the ground of “patent illegality” from the definition of “public policy” but still retaining it as a separate additional ground.

¹⁰¹ 1996 No 99.

<p>(2) Notwithstanding subsection (1), the parties may agree to exclude the jurisdiction of the Court under this section ...</p> <p>(5) Leave to appeal shall be given only if the Court is satisfied that —</p> <p>(a) the determination of the question will substantially affect the rights of one or more of the parties; [and] ...</p> <p>(c) on the basis of the findings of fact in the award —</p> <p>(i) <i>the decision of the arbitral tribunal on the question is obviously wrong, or</i></p> <p>(ii) the question is one of general public importance and the <i>decision of the arbitral tribunal is at least open to serious doubt...</i> [emphasis added]</p>	<p><i>appeal to the court on a question of law</i> arising out of an award ...</p> <p>(3) Leave to appeal shall be given only if the court is satisfied —</p> <p>(a) the determination of the question will substantially affect the rights of one or more of the parties; [and] ...</p> <p>(c) that, on the basis of the findings of fact in the award —</p> <p>(i) <i>the decision of the tribunal on the question is obviously wrong, or ...</i></p> <p>(ii) the question is one of general public importance and the <i>decision of the arbitral tribunal is at least open to serious doubt...</i> [emphasis added]</p>	<p><i>Court on any question of law ...</i></p> <p>(2) The High Court shall not grant leave under subclause (1)(c) unless it considers that, having regard to all the circumstances, the determination of the <i>question of law concerned could substantially affect the rights of 1 or more of the parties.</i> ...</p> <p>(10) For the purposes of this clause, <i>question of law</i> —</p> <p>(a) <i>includes an error of law that involves an incorrect interpretation of the applicable law</i> (whether or not the error appears on the record of the decision); but</p> <p>(b) <i>does not include</i> any question as to whether —</p> <p>(i) the award or any part of the award was <i>supported by any evidence</i> or any sufficient or substantial evidence; and</p> <p>(ii) the arbitral tribunal <i>drew the correct factual inferences</i> from the relevant primary facts. [emphasis added]</p>
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68 As can be seen, the English, Singapore and New Zealand Arbitration Acts specifically allow for appeals on errors by the tribunal, albeit errors of law.¹⁰² Under the English and Singapore Arbitration Acts, errors of

¹⁰² With regard to appeals on errors of law under s 69 of the English Arbitration Act 1996 (c 23), the High Court held in a recent case, *Guangzhou Dockyards Co Ltd v E N E Aegiali* [2010] EWHC 2826 (Comm), that it is doubtful that the English courts have jurisdiction under s 69 to hear appeals on questions of fact, even if the parties had agreed to such an appeal. The basic position is that findings of fact by a tribunal are conclusive, in line with Steyn LJ's holding in *The Baleares* [1993] 1 Lloyd's Rep 215 that:

It ... does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of the fact might be ... the principle of party autonomy decrees that a Court ought never to question the arbitrators' findings of fact.

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law may be attacked if the decision of the tribunal substantially affects the rights of at least one of the parties and was (a) “obviously wrong” or (b) “open to serious doubt” (where the question of law was one of public importance). The New Zealand Arbitration Act appears to apply a lower standard for appeal against a question of law,¹⁰³ requiring, aside from

Section 69 provides a narrow exception to the general rule that courts cannot interfere with a tribunal’s award by permitting appeals on points of law only. The words “unless otherwise agreed by the parties” in s 69 allow the parties to exclude a right of appeal on a point of law, but do not permit the parties to widen the narrow scope of s 69, so as to permit the court to interfere with a tribunal’s findings of fact.

Note also that s 68(1) of the English Arbitration Act 1996 allows awards to be challenged “on the ground of serious irregularity affecting the tribunal, the proceedings or the award”. Section 68(2) then provides that a “[s]erious irregularity means an irregularity of one or more of [a list set out in s 68(2)] which the court considers has caused or will cause substantial injustice to the applicant”. One form of serious irregularity based on which an award could be challenged recognised by the list in s 68(2) is “the tribunal exceeding its powers”. It was held in *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43 (“*Lesotho*”) that an error of law (or fact) would not be caught under s 68(2)(b) and a party seeking to challenge an award on error of law had to do so under s 69, which allows for appeals on questions of law. *Lesotho* is also significant in that it highlights the high threshold that is required for successfully challenging an award under s 68 for serious irregularity: the threshold that must be passed is that “substantial injustice” is caused to the applicant. This echoes one of the requirements under s 69 for leave to appeal a question of law to be granted: “the determination of the question [must] *substantially affect the rights* of one or more of the parties” [emphasis added].

¹⁰³ With regard to errors of fact by the tribunal, the High Court of New Zealand appears to have accepted that it is possible, although difficult, for an award to be set aside for error of fact constituting a breach of public policy. In *Downer-Hill Joint Ventures (New Zealand) v The Government of Fiji* [2005] 1 NZLR 554 (“*Downer*”), Fiji applied to strike out Downer-Hill’s application to set aside an award under Art 34 of the First Schedule to the New Zealand Arbitration Act 1996 (1996 No 99) (which corresponds to Art 34 of the Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006)). Fiji argued that the award was contrary to the public policy of New Zealand on the basis that it contained or was affected by serious and fundamental errors as 11 of the specific findings of the tribunal in its award were not supported by any evidence and/or were unreasonable or against a substantial preponderance of evidence. The High Court noted that a high standard

the requirement that the tribunal's erroneous decision substantially affect the rights of at least one party, only an "incorrect interpretation of the applicable law (whether or not the error appears on the record)".¹⁰⁴

69 It thus can be seen that the major common law jurisdictions¹⁰⁵ across the globe have accepted that, in limited and prescribed

would have to be satisfied before the public policy ground could be used and that it was difficult to attack the factual findings of an arbitrator on the ground of public policy. Article 34(6)(b) of the First Schedule of the New Zealand Arbitration Act explicitly provides that "an award is in conflict with public policy ... if a breach of natural justice occurred during the arbitral proceedings ... or ... in connection with the making of the award". The High Court also pointed out that the only rule of assistance to *Downer-Hill* was the requirement (set out by New Zealand case law) that a factual finding be based on some logically probative evidence and that, even if *Downer-Hill* could establish a breach of natural justice on the ground that an arbitrator's factual finding was unsupported by logically probative evidence, the high threshold that Art 34 of the Model Law imposed upon *Downer-Hill* would require a substantial miscarriage of justice. This meant that the disputed finding must be fundamental to a reasoning or outcome of the award. This was not demonstrated on the facts of *Downer*, so the application to set aside was dismissed.

It is also noteworthy that the High Court in *Downer* declined to adopt the Canadian case of *Navigation Sonamar Inc v Algoma Steamships Ltd* (Unreported, 16 April 1987, Quebec) and the Zimbabwean case *Zimbabwe Electricity Supply Authority v Genius Joel Maposa* (2000) XXV YB Comm Arb 546 (HC); 548 (SC) (discussed earlier in this article) as authority for the proposition that "public policy" can be subject to a wide interpretation. Instead, the High Court preferred the narrow interpretation of public policy set out in the US decision *Parsons and Whittemore Overseas Co v Société Generale de l'Industrie du Papier* 508 F 2d 969 (2nd Cir, 1974), viz:

... the [New York Convention's] public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would *violate the forum State's most basic notions of morality and justice*. [emphasis added]

¹⁰⁴ Note also that cl 5(10)(b) of Sch 2 of the New Zealand Arbitration Act 1996 (1996 No 99) explicitly excludes questions of fact which are sometimes disguised as questions of law from appeal.

¹⁰⁵ The traditional position in the US is that arbitral awards may be set aside (or in their terminology, "vacated") under the Federal Arbitration Act 9 USC (US) ("FAA") if there is a "manifest disregard" of law: *Wilko v Swan* 346 US 427 (1953). However, the US Supreme Court has recently suggested that the FAA's statutory grounds for *vacatur* of an award are exclusive and leave no room for the manifest disregard doctrine (which case
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circumstances,¹⁰⁶ errors of law (and possibly fact) can justify the setting aside or refusal of enforcement of an award.

V. Rehearing on grounds of error in jurisdiction or finding of illegality, fraud or corruption

70 One consideration taken by the Singapore courts against allowing challenges to arbitral awards on the basis of egregious error may be that to do so would be effectively to subject arbitral awards to a rehearing on the merits of the issue on which error was committed. This would violate the principle that arbitral awards should be final. However, rehearing on the merits is already allowed in Singapore, albeit only in two narrow circumstances: (a) where the tribunal commits an error in its decision on jurisdiction; and (b) where the tribunal commits an error in finding that there was no illegality, fraud or corruption.

71 Thus, in *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan*¹⁰⁷ (“*Dallah Estate*”), the English Court of Appeal held that a court could conduct a rehearing (as

law has admitted to be a judge-made ground of *vacatur*): *Hall Street Associates, LLC v Mattel, Inc* 128 S Ct 1396 (US Supreme Court, 2008).

¹⁰⁶ Excepting India, which appears to set the bar for setting aside based on error very low.

¹⁰⁷ In *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755, an arbitral award was rendered in favour of Dallah Real Estate and Tourism Holding Co (“DRETHC”) in Paris. DRETHC proceeded to apply for enforcement of the award in England and this application was challenged by the Government of Pakistan (“GOP”) under the English Arbitration Act 1996 (c 23) equivalent of Art V(1)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959) (or s 31(2)(b) of the International Arbitration Act (Cap 143A, 2002 Rev Ed)). The tribunal had found that it had jurisdiction to hear the arbitration on the basis that, based on French law which the tribunal had found to be applicable to the arbitration agreement, the GOP was “a true party” to an agreement expressed to be made between and signed on behalf of the Dallah and Awami Hjj Trust). It was argued by the GOP that the tribunal had wrongly found that it had jurisdiction to hear the arbitration and that there was no valid arbitration agreement. The Court of Appeal found that it was entitled to rehear the issue of jurisdiction and found that the tribunal did not have jurisdiction under French law. DRETHC’s application for enforcement was thus set aside.

opposed to a review)¹⁰⁸ of the issue as to whether an arbitral tribunal had jurisdiction to hear a dispute. The implication of this decision is that an arbitral award can be reopened on the basis that the tribunal had committed an error in its decision on jurisdiction. On appeal, *Dallah Estate* was upheld by the UK Supreme Court.¹⁰⁹ The *Dallah Estate* approach has also been accepted and applied locally.¹¹⁰

¹⁰⁸ The traditional position with respect to challenges to enforcement based on Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959) (“New York Convention”) grounds is that the court will conduct only a review (*ie*, conduct a limited inquiry) of the issues of fact and law relevant to the ground pleaded for refusal of enforcement. *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755 suggests that a rehearing (*ie*, retrial of issues of fact and law with adduction of evidence) of relevant issues is possible with respect to challenges to enforcement based on New York Convention grounds.

¹⁰⁹ *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46. The arbitral award in *Dallah Estate* was thus refused enforcement. The Government of Pakistan subsequently applied to set aside the arbitral award in Paris. In its judgment delivered on 11 February 2011 (*Gouvernement du Pakistan – Ministère des Affaires Religieuses v Dallah Real Estate and Tourism Holding Co* (Case No 09/28533)), the Paris *Cour d’appel* declined to do so.

¹¹⁰ See *Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd* [2010] 3 SLR 661; *Strandore Invest A/S v Soh Kim Wat* [2010] SGHC 151 which endorsed and/or applied the *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755 approach which allows for the rehearing of issues related to Art V Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959) grounds where there is a challenge on the said grounds. *AJT v AJU* [2010] 4 SLR 649 applied the *Dallah Estate* approach to setting aside applications under the International Arbitration Act (Cap 143A, 2002 Rev Ed) (“IAA”), *viz*, in deciding whether or not to set aside under one of the grounds for setting aside in Art 34 of the Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) (“Model Law”), the court is entitled to conduct a rehearing of the issues relating to the pleaded ground for setting aside. The Singapore Court of Appeal in *AJU v AJT* [2011] 4 SLR 739 held that even if an arbitral tribunal’s findings of law and/or fact were wrong, such errors would not per se engage the public policy of Singapore. The High Court was therefore not entitled to reject the tribunal’s findings based on a very low threshold of error and substitute its own

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72 Case law has long suggested that (and allowed) the rehearing of the tribunal's decision on whether there was illegality whenever *prima facie* evidence that the award was based on an illegal contract had been brought before the court. In *Soleimany v Soleimany*¹¹¹ ("*Soleimany*"), an arbitral tribunal found that a contract for the export of carpets out of Iran was illegal under the laws of Iran (where the contract was performed) but nevertheless went on to issue an award on the basis that the contract was governed by Jewish law. The succeeding party sought to enforce the award in England but failed, as the English Court of Appeal refused to enforce the award on the basis that it would be contrary to public policy, since there had been a finding that the contract was illegal. No rehearing on the issue of illegality was conducted (since there had already been a finding of illegality in the award) but the court observed (by way of *dicta*) that a rehearing on the tribunal's decision on illegality could be conducted if *prima facie* evidence of illegality had been brought before the court. The *dicta* in *Soleimany* that a rehearing of the issue of illegality may be conducted when *prima facie* evidence of illegality has been demonstrated has been accepted in subsequent cases,¹¹² including Singapore case law.¹¹³ Further, section 24(a) of the IAA also provides

findings for theirs. The Court of Appeal held that unless the Tribunal's decision was tainted by fraud, breach of natural justice or any other vitiating factor, any errors made by the tribunal were not *per se* contrary to public policy under Art 34(2)(b)(ii) of the Model Law (read with s 19B(4) of the IAA).

¹¹¹ [1999] QB 785.

¹¹² *Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd* [1999] QB 740; *Corvertina Technology Ltd v Clough Engineering Ltd* 183 FLR 317.

¹¹³ *AJT v AJU* [2010] 4 SLR 649 ("*AJT v AJU*") in which the Singapore High Court set aside a Singapore International Arbitration Centre arbitral award upholding the legality of an agreement to drop criminal proceedings relating to forgery in Thailand on the basis that the enforcement of the award would be in breach of public policy, since the agreement was illegal. In so finding, the High Court conducted a full-scale inquiry of the issue of whether the agreement was illegal. *Soleimany v Soleimany* [1999] QB 785 ("*Soleimany*") essentially suggests a two-stage process before the issue of illegality can be heard:

- (a) the court would have to satisfy itself that there was *prima facie* evidence from one side that the contract was illegal; and
- (b) once there was *prima facie* evidence that the contract was illegal, the court could then embark on a more elaborate inquiry into the issue of illegality as a second stage.

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that an arbitral award may be set aside if “the making of the award was induced or affected by fraud or corruption” and it has also been suggested that a rehearing of the tribunal’s decision on the basis that the award was tainted by fraud is possible.¹¹⁴

73 Thus, it can be seen that there is no absolute principle against allowing issues which have been decided in (egregious) error from

Commentators have questioned whether the High Court in *AJT v AJU* bypassed the first stage inquiry and immediately launched a full scale inquiry by examining the terms of the agreement and the facts surrounding the agreement, including a review of the testimony of the Thai law expert. See Chong Yee Leong, “Commentary on *AJT v AJU*” at <http://www.siac.org.sg/index.php?option=com_content&view=article&id=219:dispute-resolution-in-the-oil-a-gas-sector&catid=56:articles&Itemid=171> (accessed 17 April 2013). It has been suggested that a tribunal itself may revisit its own findings of fact if those findings were procured by fraud, provided the tribunal is not *functus officio*: see *Antoine Biloune v Ghana Inv Centre* [Award on Jurisdiction and Liability] (27 October 1989), (1994) XIX YB Comm Arb 11 at 21. Regarding the divergent approaches *vis-à-vis* the circumstances in which the court may reopen an arbitral tribunal’s decision that an underlying contract is legal, the Court of Appeal in *AJU v AJT* [2011] 4 SLR 739 (“*AJU v AJT*”) rejected the approach taken in *Soleimany* and by Waller LJ in *Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd* [1999] QB 740 (“*Westacre*”) but agreed with the majority’s approach in *Westacre* as it found that it was “consonant with the legislative policy of the IAA of giving primacy to the autonomy of arbitral proceedings and upholding the finality of arbitral awards (whether foreign arbitral awards or IAA awards)”: *AJU v AJT* at [60]. On the facts, the Court of Appeal found that it was not appropriate for the High Court to reopen the tribunal’s finding that the contract was legal. As s 19B(1) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) called for the court to give deference to the factual findings of the tribunal, “findings of fact made in an IAA award are binding on the parties and cannot be reopened except where there is fraud, breach of natural justice or some other recognised vitiating factor”: *AJU v AJT* at [65].

¹¹⁴ For instance, see *Westacre v Jugoimport* [2000] QB 288; *DDT Trucks of North America Ltd v DDT Holdings Ltd* [2007] 2 Lloyd’s Rep 213; *Profilati Italia Srl v PaineWebber Inc* [2001] 1 Lloyd’s Rep 715. See also *Swiss Singapore Overseas Enterprises Pte Ltd v Exim Rajathi India Pvt Ltd* [2010] 1 SLR 573. See discussion on the Court of Appeal’s decision in *AJU v AJT* [2011] 4 SLR 739 in nn 110 and 113. See also Michael Hwang SC & Kevin Lim, “Corruption in Arbitration – Law and Reality” (2012) 8(1) AIAJ 1 at 105–115 for a discussion on the appropriate standard of review courts should apply when reviewing an award.

being revisited. In fact, the setting aside and challenge to enforcement provisions in the Model Law and New York Convention provide grounds¹¹⁵ upon which a revisiting of issues decided in arbitration may be called for and these grounds provided are open to interpretation. For instance, under the IAA, an award may be set aside or refused enforcement for being “contrary to the public policy of [Singapore]”¹¹⁶ – “public policy of [Singapore]” being a phrase open to the court’s interpretation. The only issue is whether the Singapore courts wish or think it justified to interpret “public policy of [Singapore]” to include egregious error balancing the need to provide the sanctity of the arbitral award with the need to do justice. For reasons discussed, the authors submit that egregious errors cry out for relief and that our courts must have the discretion to set aside or refuse enforcement based on egregious error.

VI. Proposed solution

74 In *Hutchinson v Shepperton*¹¹⁷ (“*Hutchinson*”), an arbitral award was set aside. The facts of the case were that the parties had told the arbitrator that part of the plaintiff’s claim was not disputed but the arbitrator misunderstood them to mean that the agreed sum was to be excluded from the award and excluded the said sum accordingly. The arbitrator later told the plaintiff’s lawyer that he had intentionally omitted the sum, because his minutes showed that he was asked to do so. The plaintiff applied to set aside the award and the application was granted. In Lord Denman CJ’s words, “[i]f awards were allowed to be questioned under any circumstances, it may be difficult to draw a line; but a line must be drawn somewhere”.¹¹⁸ Indeed, so egregious and fundamental was the error in *Hutchinson* that confidence in the justice system would have been undermined if the award had been allowed to stand. However, based on the bright-line approach adopted by the Singapore courts, under which “arbitral awards are inviolable notwithstanding

¹¹⁵ Although note that these are *exhaustive* grounds.

¹¹⁶ See s 31(4)(b) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) and Art 34(2)(b) of the Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006).

¹¹⁷ (1849) 13 QB 1528.

¹¹⁸ *Hutchinson v Shepperton* (1849) 13 QB 1528 at 1529. Lord Denman CJ was also critical of the defendant’s conduct in taking advantage of the tribunal’s error and agreeing to pay only the sum awarded.

mistakes of fact or law” and a “*bona fide* error of determination by the tribunal (whether of fact or law) is insufficient to constitute a valid ground (whether of public policy or otherwise) upon which to set aside the award”, there would arguably be no recourse against a *Hutchinson*-type error.¹¹⁹ It is respectfully argued that this cannot be right.

75 The survey of the positions taken by various jurisdictions above demonstrates that major common law jurisdictions have accepted that, in limited and prescribed circumstances,¹²⁰ errors of law (and possibly fact) can justify the setting aside or refusal of enforcement of an award. While it may be argued that the different jurisdictions all have different legislative contexts and public policies from Singapore, and so the final position taken by them is of limited assistance, the fact is that notions of justice are universal. The fact that the various jurisdictions discussed above (including the Singapore domestic arbitration regime) all allow for some degree of challenging an arbitral award on the basis of error suggests that basic notions of justice require that parties to an arbitration must be afforded some form of recourse against errors (especially egregious errors) committed by the tribunal. The Singapore position¹²¹ that “no challenge lies” against an “error of law (and does not cease to be such even if the error is gross or egregious)” and that there is “no remedy” against “an error of fact”, is arguably too extreme and absolute a position to take even if we may be a pro-arbitration regime. (In fact, no other common law country has taken so absolute a stand and stated in express terms that an arbitral award can never be set aside for error by the tribunal.)

76 The authors would also argue that, at the very least, some form of relief should be allowed against egregious errors (*ie*, *Hutchinson*-type

¹¹⁹ Although note that Art 33 of the Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) allows for correction by the tribunal of “any errors in computation, any clerical or typographical errors or any errors of a similar nature” in the award rendered upon request by one party (with notice to the other) within 30 days of receipt of the award. The error in *Hutchinson v Shepperton* (1849) 13 QB 1528 appears to have been an error of gross carelessness or absent-mindedness and it is not clear that it can be characterised as a computation, clerical or typographical error.

¹²⁰ Excepting India, which appears to set the bar for setting aside based on error very low.

¹²¹ *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at [38].

errors of fact or errors of law which are easily demonstrable).¹²² Otherwise, we would be promoting arbitration at the expense of justice and thereby get our priorities wrong since arbitration must be a means of achieving justice, and not a substitute for justice. It must therefore be possible for the courts to consider setting aside or refusing to enforce an award tainted by egregious errors.

77 While it may be feared that a policy of allowing arbitral awards to be challenged on grounds of egregious error may (in those eternal words used to justify resistance to change) “open the floodgates”, it is suggested that this fear is unfounded and may be checked simply by the court enforcing a strict policy of allowing challenges for error only in cases of egregious error, and nothing less.¹²³

78 Bearing in mind that a Model Law and New York Convention country should only allow challenges to an arbitral award on the limited

¹²² See the test of annulment of International Centre for Settlement of Investment Disputes (“ICSID”) awards on the grounds of “manifest excess of powers” in *Duke Energy International Peru Investments No 1 Ltd v Republic of Peru* [Decision of the *ad hoc* Committee] ICSID Case No ARB/03/28 (1 March 2011) discussed later.

¹²³ Indeed, it would be a rare case that an award can be successfully challenged for an egregious error of fact. Article 33 of the Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) (“Model Law”) allows a tribunal to “correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature” if so requested by a party to the arbitration within 30 days of receipt of the award by the parties. A rule similar to Art 33 of the Model Law which allows for rectification can also be found in the rules of most arbitral institutions as well as in the UNCITRAL Arbitration Rules GA Res 65/22, UN GAOR 65th Sess (2010). It is submitted that a good proportion of the instances of errors of fact that can be classified as egregious will be caught and can be rectified under Art 33 of the Model Law or institutional/UNCITRAL rectification clauses. While it may be argued that the presence of Art 33 and similar institutional/UNCITRAL rules for rectification negates the need for courts to allow challenges on the basis of egregious errors, since provisions already exist to protect the parties from errors of fact, note that Art 33 and institutional/UNCITRAL rectification clauses are limited in scope and cover only computational, clerical and typographical errors. Errors of reasoning and *Hutchinson*-type errors are not covered by Art 33 and institutional and UNCITRAL rectification clauses. There thus remains a need for parties to be protected against such errors where they are egregious and the Singapore courts should retain jurisdiction to permit challenges of egregious errors.

grounds provided in the said Model Law and Convention, in the authors' view, the most sensible way to allow parties to an arbitration to be protected against the harmful effects of errors by the tribunal would be to interpret "public policy of [Singapore]" so as to hold that it is contrary to public policy for an award to be recognised, enforced or upheld if it contains serious and egregious errors. Such an interpretation would not be inconsistent with UNCITRAL's interpretation of Article 34's concept of "public policy", which did not preclude errors of law or fact from being reasons for setting aside (provided the case was serious enough). It was stated by the Commission in its report¹²⁴ that:

It was understood that the term 'public policy' which was used in the 1958 New York Convention and many other treaties, covered *fundamental principles of law and justice in substantive as well as procedural aspects*. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside. It was noted in that connection that the words 'the award is in conflict with the public policy of this State' *was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at*. [emphasis added]

79 The point is not simply that an award may contain errors; that fact alone would not justify action by the curial court. However, where such errors are egregious and materially affect the outcome of the decision then the curial court is invited (and required) to intervene to make the curial court worthy of its name and to justify its very existence.

80 The issue which follows is when an error can be considered egregious enough to be in breach of public policy to be set aside. Case law provides a few tests: *Navigation Sonamar* suggests that an error can be set aside if it "reflects a kind of insult to the law"; while *CTDI* suggests that an error will be egregious enough to be set aside if they "fundamentally offend the most basic and explicit principles of justice and fairness [in the place the award is challenged] ... or evidence intolerable ignorance on the part of the [tribunal]". The *Genius* case's formulation (as expressed by the ICCA Yearbook) was that an error could justify a setting aside if "it constituted a palpable inequity that was so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair-minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award" while *Hebei*

¹²⁴ UNCITRAL, *Report of the United Nations Commission on International Trade Law on the Work of Its Eighteenth Session* (UN Doc A/40/17) (Vienna, 3–31 June 1985).

suggested that an award would be set aside if “so fundamentally offensive to [the enforcing] jurisdiction’s notions of justice, that, despite its being a party to the New York Convention, it cannot reasonably be expected to overlook the objection” although the error need not be an error “so extreme that the award falls to be cursed by bell, book and candle”. While it may be argued that these tests are not particularly helpful, being based on very abstract concepts (such as “palpable inequity”, and “offensive to notions of justice”), it is suggested that there should not be undue worry about when an error will be egregious enough to be in breach of public policy to be set aside. In the authors’ view, an “egregious error” is one of those familiar concepts which elude precise definition but can immediately be identified once placed before the viewer. To paraphrase the picturesque words of the Supreme Court of Victoria in *Stannard v Sperway Construction Pty Ltd*¹²⁵ (with regard to a similarly elusive concept): egregious errors are like “the elephant – we know it when we see it”.¹²⁶

81 Some assistance may perhaps also be found in International Centre for Settlement of Investment Disputes (“ICSID”) jurisprudence on annulment of arbitral awards on the ground that “the [t]ribunal has manifestly exceeded its powers”.¹²⁷ In *Duke Energy International Peru*

¹²⁵ [1990] VR 673 at 678.

¹²⁶ Note that the Supreme Court of Victoria had used the comparison to an elephant to describe what constituted “misconduct” to justify the removal of an arbitrator under s 44 of the Australian Commercial Arbitration Act 1984 (No 10167 of 1984), “misconduct” being a concept as difficult to define as “egregious error”, but as capable of instant recognition when placed before the viewer. The “elephant approach”, or the “you will know when an error needs to be set aside when you see it” approach, appears to have been implicitly accepted in *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443 (“*John Holland*”) by Choo Han Teck JC (as he then was), when he opined that the “elephant approach” would only be useful in cases “in the penumbra” and would not be useful in cases “clearly in the definable [*ie*, permitted] limits”. For instance, “[a] mistaken view of the application of *Hadley v Baxendale*, for example, is an error of law that cannot be challenged. A mistaken calculation of the number of days of delay is a mistake of fact which cannot be challenged”. Choo JC found that the errors in *John Holland* were errors of law or mixed fact and law (*ie*, were cases clearly in the definable limits) and could not be challenged: see *John Holland* at [20].

¹²⁷ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into
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*Investments No 1 Ltd v Republic of Peru*¹²⁸ (“*Duke Energy*”), the ICSID annulment committee held that an award would not be annulled “if the tribunal’s disposition on a question of law is tenable, even if the committee considers that it is incorrect as a matter of law”.¹²⁹ A decision by the tribunal would be “untenable” if it was not supported by “reasonable arguments”.¹³⁰ The authors would suggest that a similar test could be adopted in determining what constitutes an egregious error with

force 14 October 1966) (“ICSID Convention”) Art 52(1)(b). Article 52 of the ICSID Convention prescribes five exhaustive grounds for the annulment of International Centre for Settlement of Investment Disputes (“ICSID”) arbitral awards. It is submitted that the ground that “the [t]ribunal has manifestly exceeded its powers”, *ie*, Art 52(1)(b), is the most appropriate (and only ground) upon which an ICSID award may be set aside for reason of error on merits or for deficiencies in reasoning.

¹²⁸ [Decision of the *ad hoc* Committee] ICSID Case No ARB/03/28 (1 March 2011).

¹²⁹ *Duke Energy International Peru Investments No 1 Ltd v Republic of Peru* [Decision of the *ad hoc* Committee] ICSID Case No ARB/03/28 (1 March 2011) at [99].

¹³⁰ In the annulment committee’s words, the question to ask was, “Is the opinion of the tribunal so untenable that it cannot be supported by reasonable arguments?”: *Duke Energy International Peru Investments No 1 Ltd v Republic of Peru* [Decision of the *ad hoc* Committee] ICSID Case No ARB/03/28 (1 March 2011) at [99]. See also *Helnan International Hotels A/S v Arab Republic of Egypt* [Decision of the *ad hoc* Committee] ICSID Case No ARB/05/19 (14 June 2010), where the committee stated that it “will not annul an award if the [t]ribunal’s disposition is tenable, even if the committee considers that it is incorrect as a matter of law”. In *MCI Power Group LC and New Turbine Inc v Republic of Ecuador* [Decision on Annulment] ICSID Case No ARB/03/6 (19 October 2009), the committee found that the tribunal had manifestly exceeded its powers and annulled the award under Art 52(1)(b) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into force 14 October 1966). The committee explained that “[m]isinterpretation or misapplication of the proper law may, in particular cases, be so gross or egregious as substantially to amount to failure to apply the proper law”. Other decisions such as *Republic of Kazakhstan v Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS* [Decision of the *ad hoc* Committee] ICSID Case No ARB/05/16 (25 March 2010) and *Azurix Corp v the Argentine Republic* [Decision on the Application for Annulment] ICSID Case No ARB/01/12 (1 September 2009) noted that the tribunals’ errors must be evident or apparent on the face of the award.

the effect that a decision by the tribunal would be egregiously wrong if it could not be supported by reasonable arguments.

82 While the ground of annulment based on the fact that “the [t]ribunal has manifestly exceeded its powers” appears to bear no relation to setting aside or refusal of enforcement based on “public policy”, it is suggested that the rationale for allowing annulment on grounds of manifest excess of power should be subsumed within the public policy of Singapore. ICSID case law has set out that Article 52(1)(b)¹³¹ of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”) plays an important role in the control of ICSID awards under the annulment process, since it is directly related to the principle of mutual consent which, as is expressly recognised in the Preamble to the ICSID Convention, is fundamental to the operation of the obligations assumed under the Convention and to the jurisdiction of ICSID.¹³² Put another way, the ICSID Convention ground of annulment based on the fact that “the [t]ribunal has manifestly exceeded its powers” exists essentially to protect the parties’ bargain as to the extent of power they wished to grant to the tribunal. It is submitted that the “public policy” of a pro-arbitration jurisdiction should, like the ICSID regime, provide an equal amount of protection to the parties’ agreement as to the tribunal’s jurisdiction.¹³³ After all, arbitration as a means of

¹³¹ Article 52(1)(b) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into force 14 October 1966) allows for an International Centre for Settlement of Investment Disputes award to be challenged on the ground that “the [t]ribunal has manifestly exceeded its powers”.

¹³² See *Duke Energy International Peru Investments No 1 Ltd v Republic of Peru* [Decision of the *ad hoc* Committee] ICSID Case No ARB/03/28 (1 March 2011) at [94].

¹³³ Article 34(2)(a)(iii) of the Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) (“Model Law”) and s 31(2)(d) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) provide that arbitral awards may be set aside or refused enforcement if they deal with a dispute “not falling within ... the terms of ... submission to arbitration”. It was argued in *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 that the conclusions on interpretation of the agreement between the parties that the tribunal had come to were so egregious and erroneous that they went beyond any possible and rational interpretation of the agreement in dispute. Consequently, the arbitral award perversely went beyond the agreement, and dealt with “a dispute not contemplated by or not
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dispute resolution is founded on the consent and agreement of the parties to arbitrate, and true respect of arbitration as a process must involve giving effect to the parties' intentions as to the scope and limits of the appointed arbitral tribunal's jurisdiction. It cannot plausibly be argued that parties who agree to have their dispute settled by an arbitrator agree also to egregious errors on the arbitrator's part. Consequently, where an arbitrator commits an egregious error, respect for arbitration as a credible dispute resolution process requires that the public policy of a pro-arbitration jurisdiction step in to allow the award to be set aside or refused enforcement.

VII. Conclusion

83 A curial court's policy on reviewing or enforcing awards must be based on a balance of protecting the sanctity of an arbitral award with the need to ensure that there are no miscarriages of justice. It is suggested that the Singapore position may tilt the balance too much in favour of protecting the arbitral award. After all, a pro-arbitration policy should not involve giving the tribunal licence to commit error.

84 The correct balance to be struck may be expressed in the following extract from Gilbert & Sullivan's *HMS Pinafore*. Imagine the Chief Justice being asked whether the Singapore courts would ever set aside or refuse enforcement of an award on the grounds of error of fact or law. The authors would like him to repeat the words of Captain Corcoran in that opera:

falling within the terms of the submission to arbitration", or contained "decisions on matters beyond the scope of the submission to arbitration" and it was argued that the award should be set aside under Art 34(2)(a)(iii) of the Model Law. This application was dismissed on the basis that Art 34(2)(a)(iii) merely reflects the basic principle that an arbitral tribunal has no jurisdiction to decide any issue not referred to it for determination by the parties. On the facts, the agreement had been submitted for interpretation and it could not be said that the tribunal's erroneous decision on the issue of interpretation took the issue out of the submission. It is submitted that Judith Prakash J's decision is correct. An issue submitted for arbitration that has been wrongly decided is not outside the terms of the submission to arbitration. It is simply wrongly decided and it would be artificial to say that the issue was decided so wrongly that it would bring the issue out of the scope of submission.

“No, never!”

“What, never?”

“Well, hardly ever!”

VIII. Postscript

85 It may be of comfort to the arbitration bar to know that a senior and esteemed member of the Bench¹³⁴ has remarked extra-judicially that excessive reliance should not be placed on the literal words in various judgments. In his words, “a pro-arbitration approach does not mean a blind approach” and, while “[c]ourts will be slow to upset arbitration awards, ... it would be wrong to say that courts will never or are reluctant [to do so]”. The learned judge went on to say that, if the courts really felt that their intervention was necessary in the interests of justice, they would find a way of ensuring that justice would be done.

¹³⁴ V K Rajah JA, during the Singapore Academy of Law Conference 2011, Singapore (24–25 February 2011).

Background to Essay 3

This is one of the papers which has given me the greatest satisfaction. I was first honoured to be invited to deliver the Second Annual Hong Kong International Arbitration Centre Kaplan Lecture in Hong Kong in 2008 (Neil Kaplan himself having delivered the first). Confidentiality was very much on my mind at that time because of a case in which I was involved as counsel and confidentiality of the arbitral process was at the forefront of the issues in this case. I therefore worked with Katie Chung to undertake a global survey of the different confidentiality regimes in various countries and to suggest some thoughts for the future direction of this area of the law. Katie's contribution to the research was magnificent and gave me the base for my conclusions and recommendations. Indeed, there was so much material assembled that I knew that I had to write a further paper in due course on the solution to what seemed to me to be intractable problems. In fact, Katie and I subsequently cannibalised part of this paper for an article for a special International Chamber of Commerce Supplement on the problems of Confidentiality in Arbitration (see Michael Hwang SC & Katie Chung, "Protecting Confidentiality and its Exceptions – The Way Forward?" (2009) 54 ICC ICArb Bull, Special Supplement, *Confidentiality in Arbitration*).

I wish to extend my thanks to the *Journal of International Arbitration* for kindly granting me permission to republish this paper in this book.

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DEFINING THE INDEFINABLE: PRACTICAL PROBLEMS OF CONFIDENTIALITY IN ARBITRATION

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This article seeks to provide a comprehensive review of the international law on confidentiality in arbitration both in terms of theory and in practice (by examining national legislation and the rules of the various institutions). The essential point is that the problem is not in defining confidentiality but in defining the exceptions to the duty of confidentiality where such a duty is recognised. The argument is made that, in practice, it is difficult to come up with a comprehensive formula for, or list of, all the exceptions to the obligation of confidentiality. However, there is an examination of the most comprehensive and recent attempt to codify the exceptions to the duty of confidentiality in the New Zealand Arbitration Act 1996 (2007 Amendment)¹. Nonetheless, even as the New Zealand Arbitration Act 1996 recognises, no code can be fully comprehensive, and there must be room for an independent third party (either the tribunal or the curial court) to rule on permitted exceptions to the obligation of confidentiality.

Contents

I.	Introduction	93
II.	The problems of defining the duty	93
III.	To whom does the duty extend?.....	94
IV.	To what information and documents does the duty extend?.....	94
V.	What is the juridical basis of the duty?	97
VI.	Difficulties in the absolute nature of confidentiality.....	98

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¹ 1996 No 99.

A.	Enforcement actions	98
B.	Parallel actions	99
VII.	How have the courts dealt with exceptions?.....	105
A.	Public Interest	105
B.	Where the matter has come to court	108
C.	Consent of the parties (pre/post dispute: Implied?)	112
D.	By compulsion of law	113
E.	With leave of court	114
F.	Disclosure for protecting legitimate interests of an arbitrating party.....	116
G.	Where the interests of justice/the public interest require it.....	120
H.	Where there is an obligation of disclosure	121
I.	Everyday situations.....	122
J.	Where disclosure is made to professional or other advisers and persons assisting in the conduct of the arbitration	122
VIII.	The problems of drafting	123
IX.	How has national legislation dealt with the obligation of confidentiality?	125
A.	UNCITRAL Model Law and rules	125
B.	Hong Kong	127
C.	New Zealand	133
D.	Singapore	138
E.	Australia	140
F.	Sweden.....	140
G.	United States.....	141
H.	Dubai International Financial Centre.....	141
X.	How have institutional rules dealt with the obligation of confidentiality?	142
A.	International Chamber of Commerce	144
B.	International Centre for Settlement of Investment Disputes	145
C.	World Intellectual Property Organization.....	146
D.	Singapore International Arbitration Centre	147
E.	Hong Kong International Arbitration Centre.....	148
XI.	What are the possible sanctions or consequences of breach of confidentiality?	151
XII.	A model confidentiality clause?	152
XIII.	Conclusion	153
A.	How then should the problem be approached for the future?	155
(1)	Legislation	155
(2)	Contractual solutions	155
(3)	Institutional rules	155
(4)	Model clauses.....	156
B.	What should parties do in the meantime?.....	156

I. Introduction

1 It is a particular pleasure to deliver the second Kaplan lecture in Hong Kong in honor of Neil Kaplan, whom I have known for some 15 years. No one needs reminding that Neil is internationally recognised as one of the super-arbitrators of the world. We also know that, quite apart from his personal career, he has also devoted much of his time over the years to building up the cause of international arbitration, both in Hong Kong and the world, by his judgments in the Hong Kong High Court, his chairmanship of the Hong Kong International Arbitration Centre (“HKIAC”), and then later on the world stage as chair of the Chartered Institute of Arbitrators. More than any other person, he put Hong Kong on the world map of arbitration and led the way for Hong Kong to be recognised, not only for having a fine arbitration institution, but also for having many fine practitioners in international arbitration. This perception has established Hong Kong as Asia’s leading center for international arbitration (although Singapore may have something to say about that in the near future). But Neil has also unselfishly nurtured neophytes into the world of international arbitration, and I am one of those neophytes whom he mentored and assisted over the years. He opened many doors for me and helped me with advice and encouragement to enable me to mutate from a litigator to an arbitrator, and his example is one that I intend to follow in terms of putting back what I have got out of this world of international arbitration.

II. The problems of defining the duty

2 It is not always realised that the definition of the scope of the duty of confidentiality is a major problem. This is why so few definitions at the legislative and institutional levels have been attempted, and why the existing definitions are not completely successful. But practitioners who do attempt to find a contractual definition quickly find out how difficult a mutually acceptable solution is to achieve, which is why, in practice, there are few model clauses available.

3 In common law countries, attempts have been made to define the duty through the courts, mainly through the device of the implied term,

but these attempts have run into conceptual difficulties, although they have provided valuable insights into the nature and scope of the problem.

III. To whom does the duty extend?

4 The first question is: Who should know about the arbitration? Once this is ascertained, then the duty can be imposed on such persons. It should be uncontroversial that the persons who are entitled to know about the arbitration (and all its aspects) are the parties, their counsel, the tribunal and the administering institution (if any).

5 But problems start immediately when we go beyond this inner circle, starting with the position of witnesses, actual and potential. Are they entitled to be fully briefed on the facts and documents relating to the arbitration or only to the extent necessary for them to assist in their function as witnesses? If the latter, who decides on the boundaries of the permitted disclosures? And what about persons who are being considered as witnesses but have not yet agreed to do so? How far is it permissible to show them confidential documents after the commencement of the arbitration? These are not questions to which case law, legislation or institutional rules have given any answer.

IV. To what information and documents does the duty extend?

6 We start with the issues of:

- (a) the existence of the arbitration; and
- (b) the decision of the tribunal.

7 Should either of these facts be confidential? In the latter case, should the contents of the award (as opposed to its outcome) be confidential as well? Again, existing law and rules do not give a clear or uniform solution.²

² See figure following para 75, where the first author's scorecard on the protection of confidentiality by 12 arbitral institutions clearly shows that, while not all institutional rules treat the existence of an arbitration as
(continued on next page)

8 We then move on to the more difficult question of the documents which will be used or referred to in the course of the arbitration. And here we begin to receive some assistance from the courts. Case law has given some protection for the confidentiality of documents generated in the course of the arbitration (*eg*, pleadings, witness statements, submissions, transcripts and documents disclosed by the other party) not otherwise in the public domain.³ The starting point for an examination of the Commonwealth position on confidentiality is the recent decision of the English Court of Appeal in *John Forster Emmott v Michael Wilson & Partners Ltd* (“*Emmott*”),⁴ where the court made the following pronouncements on the obligations of the parties.

9 Lawrence Collins LJ stipulated:⁵

An implied obligation (arising out of the nature of arbitration itself) on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and not to disclose in any other way what evidence has been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court.

confidential, most institutional rules treat the contents of an arbitral award as confidential.

³ See, *eg*, *Dolling-Baker v Merrett* [1990] 1 WLR 1205; *Hassneh Insurance Co of Israel v Stuart J Mew* [1993] 2 Lloyd’s Rep 243; *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314; *Associated Electric and Gas Insurance Services Ltd (AEGIS) v European Reinsurance Co of Zurich* [2003] 1 WLR 1041; *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184; [2008] Bus LR 1361.

⁴ [2008] EWCA Civ 184; [2008] Bus LR 1361.

⁵ *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184 at [81].

Likewise, Thomas LJ:⁶

A specific obligation of confidentiality in relation to documents produced by each party to the arbitration under the process of disclosure applicable by the procedural law of arbitrations conducted in England and Wales. This is analogous to that imposed by the courts of England and Wales in proceedings before them. As between the parties, all such documents are covered by the obligation of confidentiality.

10 It is important to note that there are at least three classes of documents:

- (a) documents which are inherently confidential;
- (b) documents which are disclosed by parties for purposes of the arbitration, whether voluntarily or pursuant to tribunal orders for production; and
- (c) the award.

Different considerations apply to each of these classes.

11 In the case of inherently confidential documents (*eg*, those containing proprietary commercial information), they will attract the same protection within the arbitration as they do outside it, that is, they will not depend on any doctrine of arbitral confidentiality for that protection.⁷

12 In the case of documents disclosed by the parties, they will have the protection afforded to similar documents in litigation (sometimes known as “the *Riddick* principle”),⁸ which means that they may not be disclosed without the permission of the other party or the tribunal.

13 The confidentiality of awards depends on what the applicable institutional rules provide. *Ad hoc* arbitrations will depend on the applicable *ad hoc* rules (usually the United Nations Commission on International Trade Law (“UNCITRAL”) Arbitration Rules in the case of

⁶ *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184 at [129].

⁷ *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184 at [79] and [81].

⁸ Derived from *Riddick v Thames Board Mills Ltd* [1977] QB 881.

international arbitrations),⁹ and the applicable arbitral law, but this is rarely likely to have any express provision governing confidentiality.¹⁰

V. What is the juridical basis of the duty?

14 After some differences of judicial opinion in the English courts,¹¹ a definitive statement has now emerged from the English Court of Appeal in *Emmott*,¹² which seems to have settled the juridical basis for the duty. Judicial opinion in other parts of the world remains divided. *Emmott* has laid down the following principles.

- (a) The obligation of confidentiality in arbitration is implied by law and arises out of the nature of arbitration.
- (b) This obligation is a substantive rule of law masquerading as an implied term.
- (c) It imposes an obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and not to disclose in any other way what evidence has been given by any witness in the arbitration.
- (d) The content of the obligation may depend on the context in which it arises and on the nature of the information or documents in

⁹ The United Nations Commission on International Trade Law Arbitration Rules GA Res 65/22, UN GAOR 65th Sess (2010) do not provide for confidentiality except for hearings to be held in camera unless the parties agree otherwise (see Art 25(4)) and the publication of the award (see Art 32(5)).

¹⁰ See, *eg*, ss 22–23 of the Singapore International Arbitration Act (Cap 143A, 2002 Rev Ed) and ss 2D–2E of the Hong Kong Arbitration Ordinance (Cap 341). Sections 2D–2E have been repealed by the Hong Kong Arbitration Ordinance (Cap 609) (Repealed 17 of 2010 s 109).

¹¹ *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184; [2008] Bus LR 1361.

¹² *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184; [2008] Bus LR 1361.

question; the limits of the obligation are still in the process of development on a case-by-case basis.

(e) The principal cases in which disclosure will be permissible are where:

- (i) there is consent (express or implied) of the parties;
- (ii) there is an order or leave of the court;
- (iii) it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; and
- (iv) the public interest or the interests of justice require disclosure.

VI. Difficulties in the absolute nature of confidentiality

15 Whatever may be the juridical basis of the duty, it is clear that the duty cannot be an absolute one. Several practical situations immediately come to mind which call for exceptions to the duty.

A. Enforcement actions

16 Clearly, the winning party in an arbitration must be allowed to disclose the contents of the award if it has to proceed with enforcement action to obtain its rights under the award.

17 In *Hassneh Insurance Co of Israel v Stuart J Mew* (“*Hassneh Insurance*”),¹³ Colman J considered that the award was subject to a duty of confidentiality, even though the award identified the parties’ respective rights and obligations, and was at least potentially a public document for the purposes of supervision by the courts or enforcement in them.¹⁴ However, Colman J held that the implied duty of confidentiality is subject to the following exceptions.¹⁵

¹³ [1993] 2 Lloyd’s Rep 243.

¹⁴ *Hassneh Insurance Co of Israel v Stuart J Mew* [1993] 2 Lloyd’s Rep 243 at 248.

¹⁵ *Hassneh Insurance Co of Israel v Stuart J Mew* [1993] 2 Lloyd’s Rep 243 at 249.

- (a) Disclosure of the award (including its reasons) is permitted where it is reasonably necessary for the protection of an arbitrating party's rights *vis-à-vis* a third party.
- (b) An arbitrating party may bring the award and reasons into court for the purpose of invoking the supervisory jurisdiction of the court over arbitration awards and for the purpose of enforcement of the award itself.

This holding is still valid as it is not inconsistent with the pronouncements of the Court of Appeal in *Emmott*.

B. Parallel actions

18 The problem here is where there are different arbitrations between the same (or different) parties arising from the same or related disputes. Where the tribunal is the same in different arbitrations between the same parties, there should be no practical difficulty in migrating information about the first arbitration into the second arbitration. Where the tribunal is different, some theoretical and practical difficulties can be encountered. Although the parties may be the same, the choice of a different tribunal may be due to the wish to keep the two arbitrations separate and discrete from each other, precisely to prevent the migration of information which may be relevant in one arbitration but would be viewed as irrelevant or prejudicial to the outcome of the second arbitration. And where the parties are different in two arbitrations, the difficulties could become even greater.

19 These difficulties typically arise in construction cases, where there are likely to be separate arbitrations between employer and main contractor on the one hand, and between main contractor and subcontractor on the other. They also frequently arise in reinsurance cases where there is one arbitration between the primary insurer and the insured, and another arbitration between the primary insurer and the reinsurers.

20 The source of the problem is the general lack of power to consolidate two arbitrations,¹⁶ which is generally viewed as a deficiency in the arbitral process that is an inevitable consequence of the principle of the consensual basis of arbitral jurisdiction.

21 All these difficulties were canvassed in a quartet of English cases.

22 In *Dolling-Baker v Merrett* (“*Dolling-Baker*”),¹⁷ the plaintiff representative underwriter claimed against the first defendant (a representative underwriter for two Lloyd’s syndicates) for sums of money allegedly due under an aggregate excess of loss reinsurance

¹⁶ One exception is s 2 of Sch 2 of the Hong Kong Arbitration Ordinance (Cap 609), which allows the court to consolidate two or more arbitration proceedings in certain circumstances, *eg*, a common question of law or fact arises in both or all of the arbitrations (s 2(1)(a)). There are other institutional rules that provide for the consolidation of arbitrations. Article 17(1) of the 2012 China International Economic and Trade Arbitration Commission (“CIETAC”) Rules allows CIETAC to consolidate two or more pending arbitrations into a single arbitration, where (a) it is requested by a party and all the parties agree; or (b) CIETAC believes it is necessary and all the parties agree. Article 22 of the China Maritime Arbitration Commission Arbitration Rules also provides that the arbitral tribunal may, upon the agreement made in writing by both parties, consolidate two or more than two cases of which the subject matters are the same or related to each other. Under Art 10 of the International Chamber of Commerce (“ICC”) Rules of Arbitration (entry into force 1 January 2012), the ICC Court may consolidate two or more arbitration proceedings in circumstances including where (a) the parties have agreed; or (b) all of the claims in the arbitration are made under the same arbitration agreement.

Other exceptions include Art 22.1(h) of the London Court of International Arbitration Arbitration Rules (effective 1 January 1998), Art 24(b) of the Singapore International Arbitration Centre Arbitration Rules (5th Ed, 1 April 2013) and Art 14.6 of the Hong Kong International Arbitration Centre Administered Arbitration Rules (effective 1 September 2008), all of which allow joinder of third parties with their consent but not necessarily the consent of all the existing parties.

¹⁷ [1990] 1 WLR 1205.

effected through the second defendants, the placing brokers for that reinsurance. The first defendant sought to avoid the reinsurance policy on grounds of non-disclosure. The plaintiff claimed, in the alternative, against the second defendant for negligence. There had been an earlier arbitration involving a similar type of reinsurance in which the first defendant was representative underwriter and the second defendants were placing brokers, and where the first defendant also sought to avoid the reinsurance policies on grounds of non-disclosure (“the Turner arbitration”). In that arbitration, the arbitrator had declared that the reinsurance was invalid, and so the first defendant had succeeded in avoiding liability in the Turner arbitration. In *Dolling-Baker*, the plaintiff wanted disclosure of documents in the Turner arbitration, which included, amongst other things, transcript evidence and the award itself (“the Turner documents”). The Turner documents were in the possession, custody and control of both the first and second defendants. The plaintiff failed to obtain discovery on the ground that they were not relevant to the issues in the current action and that even if they were, the production of the Turner documents for inspection was not necessary for disposing fairly of the issues. The first defendant also succeeded in obtaining an injunction against the second defendant from disclosing those documents used in the Turner arbitration. Parker LJ, in the English Court of Appeal, held that there was an implied obligation of confidentiality arising out of the nature of arbitration itself. He considered that:¹⁸

As between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must, in my judgment, be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and indeed not to disclose in any other way what evidence had been given by witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court. That qualification is

¹⁸ *Dolling-Baker v Merrett* [1990] 1 WLR 1205 at 1213.

necessary, just as it is in the case of the implied obligation of secrecy between banker and customer.

23 In *Hassneh Insurance*, the plaintiff reinsurers sought an injunction to restrain disclosures by the defendant reassured of certain documents engendered in the course of an arbitration between the plaintiffs and the defendant. The defendant was reinsured by the plaintiffs under various reinsurance contracts, and the placing brokers were CE Heath & Co. The defendant had commenced the arbitration against the plaintiffs claiming to recover under those reinsurance contracts. The plaintiffs raised various defenses, which included non-disclosure and misrepresentation. The defendant also sought to make a claim against their placing brokers in court (because there was no arbitration agreement between them), in case the defendant failed against the reinsurers. The defendant, however, lost its arbitration against the plaintiffs in an interim arbitral award issued by the tribunal. Hence, the defendant sought to proceed against the placing brokers, claiming on the basis of negligence and breach of duty as placing brokers. The defendant therefore wanted to disclose to the placing brokers the interim award and the reasons for that award. The plaintiffs were content that the defendant should disclose the interim award to the placing brokers and the reasons as referred to in the interim award. However, the plaintiffs objected to the disclosure of the reasons or the disclosure of any other documents (such as pleadings, witness statements or transcripts), and sought an injunction to restrain such disclosure on the basis that the disclosure would be a breach of confidence by the defendant. Colman J held that the implied duty of confidentiality in arbitration applied to documents generated in the course of the arbitration (*eg*, pleadings, witness statements, transcripts, submissions) and documents disclosed during the arbitral process. However, as discussed above, the implied duty of confidentiality was subject to the exception that the disclosure of the reasoned award was reasonably necessary for the protection of the arbitrating party's rights *vis-à-vis* a third party, so that to disclose it would not be a breach of the duty of confidence. Colman J cited the English Court of Appeal case of

*Tournier v National Provincial and Union Bank of England*¹⁹ (“*Tournier*”) as the basis for this qualification to the implied duty of confidentiality. In *Tournier*, Bankes LJ set out the following four qualifications to a bank’s duty of confidentiality:

- (a) where disclosure is under compulsion of law;
- (b) where there is a duty to the public to disclose;
- (c) where the interests of the bank require disclosure; and
- (d) where the disclosure is made by the express or implied consent of the customer.

24 In *Hassneh*, Colman J found that the disclosure of the reasoned award was reasonably necessary for the defendant to establish his causes of action against the placing brokers. However, Colman J did not extend the exception to the other documents generated or disclosed in the course of the arbitration, as they were merely the materials which were used to give rise to the award which defined the rights and obligations of the parties to the arbitration. Accordingly, Colman J held that the qualification to the duty of confidentiality based on the reasonable necessity for the protection of an arbitrating party’s rights against a third party could not be expected to apply to such documents.

25 In *Insurance Co v Lloyd’s Syndicate*,²⁰ the defendant reassured commenced arbitration against the plaintiffs as lead underwriters under a contract of reinsurance. The plaintiffs had contended that they were entitled to avoid the contract of reinsurance on the grounds of non-disclosure, or alternatively that the plaintiffs were not liable under the policy wording to indemnify the defendant against a particular class of risks. Subsequently, the syndicate of five other reinsurers all asserted that they were not bound to indemnify the reassured against such risks. The arbitral tribunal later issued an interim award in favour of the defendant reassured, which then sought to disclose the award to the five other reinsurers in order to persuade them to accept liability. The plaintiffs applied for an injunction to restrain the defendant reassured

¹⁹ [1924] 1 KB 461.

²⁰ [1995] 1 Lloyd’s Rep 272.

from disclosing the interim award. In granting the injunction Colman J applied the reasonable necessity test which he had laid out in *Hassneh*²¹ and found that, although the disclosure of the award and reasons might have a persuasive effect on the syndicate of the five other reinsurers, their disclosure would be irrelevant to founding the basis of any cause of action by the defendant reassured against the reinsurers, as they were not bound by the arbitration agreement between the plaintiffs and defendant. Accordingly, Colman J held that the interim award was not a necessary element to the establishment of the defendant's legal rights against the five following reinsurers, and the defendant reassured would be in breach of an implied duty of confidentiality if it were to disclose the interim award to those five reinsurers.

26 In contrast to the reinsurance cases discussed above, *London & Leeds Estates Ltd v Paribas Ltd (No 2)*²² ("*London & Leeds*") raises the question of whether the parties in an arbitration owe any duty of confidentiality to an expert witness in an arbitration where the witness was found to have given evidence that was inconsistent with the evidence that he had given in previous arbitrations. *London & Leeds* arose out of a rent review arbitration between the plaintiff landlord and the defendant tenant. The landlord retained an expert valuer ("the Expert") who gave evidence on the office rental market in London's West End relevant to the review date of April 1991. The Expert was also involved in two previous arbitrations (the "Euston Tower arbitration" and "Delta Point arbitration") in which the Expert had given contrary expert evidence on behalf of the tenants. Counsel for the defendant tenant in this arbitration had also been counsel for the tenant in the Euston Tower arbitration, and had cross-examined the Expert on the evidence he had given in the Euston Tower arbitration. The defendant's expert in this arbitration was the arbitrator in the Delta Point arbitration, but he had completed and published his award, and the only ancillary matters left outstanding were costs and interest. Subsequently, the defendant tenant issued subpoenas

²¹ *Hassneh Insurance Co of Israel v Stuart J Mew* [1993] 2 Lloyd's Rep 243 at 275.

²² [1995] 1 EGLR 102.

addressed to the Expert relating to his Euston Tower and Delta Point proofs (witness statements), and to the defendant's expert relating to the Expert's Delta Point proof. The plaintiff landlord and Expert applied by separate summons to set aside the subpoenas addressed to the Expert and the defendant's expert. By the hearing of the present case, the defendant's expert had complied with the subpoena addressed to him. It was not disputed that the parties to the Euston Tower and Delta Point arbitrations owed each other a duty of confidence and privacy in respect of the arbitration and the evidence given during the arbitration. Mance J held that the plaintiff landlord had no *locus standi* in the matter as it was not a party to any confidential relationship involving the information sought by the subpoenas. However, Mance J held that the Expert had *locus standi* to object to the subpoenas as he was owed a duty of confidentiality by the parties to the Euston Tower and Delta Point arbitrations in respect of his evidence. The issue before Mance J was whether it was necessary for the fair disposal of the action or for the saving of costs for the duty of confidentiality to be overridden. Mance J held that where a witness was proved to have expressed himself in a materially different sense when acting for different sides, that would be a factor which should be brought out in the interests of individual litigants involved and in the public interest. Mance J therefore concluded that the duty of confidentiality which attaches to the proof in the Euston Tower arbitration was overridden in the interest of the fair disposal of the proceedings.

VII. How have the courts dealt with exceptions?

27 Legislatures and arbitral institutions have generally recognised the difficulty of enacting a comprehensive code of exceptions or a formula for creating exceptions. Hence, exceptions have been introduced into the common law by incremental additions.

A. Public interest

28 The nature of the arbitration may give the public a legitimate interest in certain aspects of the arbitration. In *Esso Australia Resources*

Ltd v Plowman (Minister for Energy and Minerals) ("Esso Australia"),²³ the arbitration concerned a dispute over a proposed increase in the price of natural gas supplied by the appellant vendors to two public utilities, the Gas and Fuel Corporation of Victoria ("GFC") and the State Electricity Commission of Victoria ("SEC"), allegedly due to the imposition of a new tax on gas. GFC and SEC had entered into separate sales agreements with the appellants. Both the GFC sales agreement and SEC sales agreement contained a provision which required the appellants to provide GFC and SEC as buyers of the gas with details of the calculations on the basis of which an increase or decrease in the price of gas was derived. The appellants did not provide the details of the calculations to GFC and SEC. The appellants later commenced arbitrations pursuant to the arbitration clauses in the GFC and SEC sales agreements respectively. Subsequently, the Minister for Energy and Minerals brought an action against the appellants, as well as GFC and SEC, seeking a declaration that any information disclosed in the arbitration was not subject to any duty of confidentiality. By way of counterclaim, the appellants sought declarations, based on implied terms, that each arbitration was to be conducted in private and the documents or information supplied in the arbitration were subject to a duty of confidentiality. Both GFC and SEC brought a cross-claim against the appellants seeking declarations in the same terms as the declarations sought by the minister. The claims for confidentiality arose from the appellants' response to requests by the minister, GFC and SEC for details of the calculations on which the appellants' claims for price increases were based. The appellants had declined to give details unless GFC and SEC entered into agreements that they would not disclose the information to anyone else, including the minister, the Executive Government and the people of Victoria. Mason CJ, delivering the judgment of the majority in the High Court of Australia, considered that there was a distinction between privacy and the duty of confidentiality, and that it was clear that complete confidentiality of the proceedings in an arbitration

²³ [1995] 128 ALR 391; *Esso Australia* was followed by the Supreme Court of New South Wales in *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662.

could not be achieved.²⁴ Mason CJ held that while an arbitration proceeding is private, confidentiality is not an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration. To that extent, Mason CJ therefore rejected the English approach to the obligation of confidentiality as an implied term. Nonetheless, Mason CJ was prepared to accept that there is, similar to the obligation of confidentiality which attaches to documents obtained on disclosure in judicial proceedings, an obligation of confidentiality that attaches to documents which a party is compelled to produce pursuant to a direction by the arbitrator.²⁵ That obligation is, however, necessarily subject to the public's legitimate interest in obtaining information about the affairs of public authorities. The subject matter of the arbitration also affected the public's interest in knowing how the cost of their utilities bills was derived, and this might well have been a factor influencing the decision of the High Court of Australia. Likewise, Robertson J in the New Zealand case of *Television New Zealand Ltd v Langley Productions Ltd*²⁶ ("*Television New Zealand*") found that the public interest in knowing how much a well-known TV personality was paid was additional justification for not suppressing reporting of the court hearing of the appeal from the arbitration hearing.

29 This feature is particularly prevalent in International Centre for Settlement of Investment Disputes ("ICSID") arbitrations, where there is clearly a public interest in any arbitration by an investor against a government, especially if the claim is for a large sum of damages. This explains why it is commonplace for investment arbitrations to be

²⁴ *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* [1995] 128 ALR 391 at 400 and 401.

²⁵ *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* [1995] 128 ALR 391 at 404.

²⁶ [2000] NZLR 250.

relatively freely reported; awards are rarely secret, and inevitably find their way into the public domain.²⁷

B. Where the matter has come to court

30 An arbitration claim often comes to court for, among other things, the enforcement or setting aside of the arbitral award, and the issue is whether the implied obligation of confidentiality in the arbitration proceeding extends to the court proceedings. While parties may have agreed to arbitrate confidentially and privately, this cannot dictate the position in respect of arbitration claims that are brought before the courts. One countervailing factor that militates against the extension of the implied obligation of confidentiality to court proceedings is the principle of open justice.

31 For instance, under rule 62.10 of the English Civil Procedure Rules²⁸ (“CPR”), the English courts have the discretion to order an arbitration claim to be heard in public or in private. Further, CPR rule 62.10²⁹ excludes the application of the ordinary rule under CPR

²⁷ The International Centre for Settlement of Investment Disputes (“ICSID”) must promptly publish the legal reasoning of ICSID awards regardless of the publication of the award as a whole. See r 48(4) of the ICSID Rules of Procedure for Arbitration Proceedings (amended 10 April 2006) (“ICSID Arbitration Rules”); Art 48(5) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into force 14 October 1966) requires consent of the parties for the publication of the award in its entirety. The Secretary-General of the ICSID arranges for publication of an award in an appropriate form with a view to furthering the development of international law in relation to investments. See reg 22 of the ICSID Administrative and Financial Regulations (amended 10 April 2006). Rule 37(2) of the ICSID Arbitration Rules allows the submission of *amicus* briefs by third parties. ICSID awards, <www.investmentclaims.com> (accessed 10 May 2013).

²⁸ 1998 No 3132 (UK) with amendments up to 31 June 2013.

²⁹ Rule 62.10 of the English Civil Procedure Rules (1998 No 3132) reads as follows:

(continued on next page)

rule 39.2, under which hearings are to be held in public unless the court decides that there is a special reason based on confidentiality to hold the hearing in private. Under CPR rule 62.10(3), apart from applications for the determination of a preliminary point of law under section 45 of the English Arbitration Act 1996,³⁰ or an appeal under section 69 of the English Arbitration Act 1996 on a question of law arising out of an award, all other arbitration claims are heard in private.

32 In *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co*,³¹ the English Court of Appeal considered the effect of CPR rule 62.10, as well as its implications on the publication

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- (1) The court may order that an arbitration claim be heard either in public or in private.
 - (2) Rule 39.2 does not apply.
 - (3) Subject to any order made under paragraph (1):
 - (a) the determination of:
 - (i) a preliminary point of law under section 45 of the 1996 Act; or
 - (ii) an appeal under section 69 of the 1996 Act on a question of law arising out of an award, will be heard in public; and
 - (b) all other arbitration claims will be heard in private.
 - (4) Paragraph (3)(a) does not apply to:
 - (a) the preliminary question of whether the court is satisfied of the matters set out in section 45(2)(b); or
 - (b) an application for permission to appeal under section 69(2)(b).

³⁰ Arbitration Act 1996 (c 23) (UK).

³¹ [2004] 3 WLR 533. See also *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] EWHC 532, a case concerning an application to set aside a freezing order that had been granted pursuant to s 44 of the English Arbitration Act 1996 (c 23) in support of an intended International Chamber of Commerce arbitration. The application for setting aside fell under r 62.10 of the Civil Procedure Rules (“CPR”), which provided that such an application should be heard in private unless the court ordered that the hearing be in public. As the freezing order had received considerable publicity, Walker J decided pursuant to r 62.10 of the CPR that the hearing on the application for setting aside should be in public save for those aspects of the matter which were confidential.

of court judgments on arbitration claims. In an arbitration in London, Bankers Trust Co (“BTC”) was successful against one party but not against two other parties, one of which was the government and the other a department of the city of Moscow (“Moscow”). BTC proceeded to challenge the arbitral award under section 68 of the English Arbitration Act 1996 on the ground of serious irregularity, which was eventually dismissed. The arbitration took place in private and the arbitral award was published only to the parties. While BTC’s application was also heard in private as it fell within CPR rule 62.10(3)(b), the judge omitted to mark the judgment as “private” when it was handed down. Lawtel, an online law reporting service, obtained a copy of the judgment in good faith and summarised it. The summary was later sent to Lawtel’s (approximately 15,000) e-mail subscribers with a link to the full judgment. After the mistake was discovered, the full judgment was deleted, but the e-mail summaries remained on the computers of Lawtel’s e-mail subscribers. Prior to this, however, the existence of a dispute between the parties (not the subject matter), the identities of the parties and the existence of BTC’s application in court had already been freely mentioned to the press by the parties. As the respondent wanted the general investment community to know that the allegations of financial default against them had been the subject of detailed consideration in arbitration, the respondent applied to the court for an order for general publication of the full judgment or alternatively, a summary of the judgment. The lower court held that the judgment on the section 68 application should remain private and that neither it nor Lawtel’s summary should be available for publication. Moscow appealed to the Court of Appeal on the basis that either the full judgment should be made available, or the Lawtel summary should be available either for general publication or limited publication to specified financial institutions.

33 In dismissing the appeal against the order refusing publication of the judgment, the English Court of Appeal held that the parties’ wish for confidentiality and privacy should outweigh the public interest in public hearings. However, the Court of Appeal added that the court retained a supervisory role under the English Arbitration Act 1996, and the court had to be ready to hear representations from either party for the hearing to continue in public or, where appropriate, to raise that possibility itself.

34 The Court of Appeal, however, allowed the appeal in respect of the Lawtel summary, and held that Moscow could publish the Lawtel summary for general circulation since it did not disclose any sensitive or confidential information, and there were no other grounds to preclude its publication.

35 Significantly, the Court of Appeal held that rule 62.10(3)(b) of the CPR, in providing for arbitration claims to be heard in private, represented only the starting point of the analysis, and could easily give way to a public hearing. The court further held that even though a hearing might have been in private, the court should, when preparing and giving judgment, bear in mind that any judgment should be given in public, where this could be done without disclosing significant confidential information. Mance LJ considered various factors which were relevant to whether a judgment should be given in public:³²

The public interest in ensuring appropriate standards of fairness in the conduct of arbitrations militates in favour of a public judgment in respect of judgments given on applications under section 68. The desirability of public scrutiny as a means by which confidence in the courts can be maintained and the administration of justice made transparent applies here as in other areas of court activity ... Arbitration is an important feature of international, commercial and financial life, and there is legitimate interest in its operation and practice. The desirability of a public judgment is particularly present in any case where a judgment involves points of law or practice which may offer future guidance to lawyers or practitioners.

36 A similar position has been taken in New Zealand concerning the treatment of arbitral awards in enforcement or challenge proceedings in the courts. In *Television New Zealand v Langley Productions*,³³ disputes arose out of interrelated contracts between Television New Zealand Ltd (“TVNZ”), a state-owned enterprise; Langley Productions; and one of its newsreaders, H, and litigation ensued. TVNZ sought to keep the court file confidential, but Langley Productions and H sought the opposite. There

³² *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co* [2004] 3 WLR 533 at 555.

³³ [2000] NZLR 250.

was an arbitration clause in the contract between TVNZ and Langley Productions but not in the contract between TVNZ and H. The parties eventually agreed to submit their disputes to arbitration. The arbitration agreement contained a specific confidentiality clause expressing itself subject to section 14(2) of the New Zealand Arbitration Act 1996. After the award was rendered, TVNZ applied to the High Court to appeal against the decision of the arbitrator and Langley Productions applied to enforce the award. TVNZ then applied for an order that the confidentiality provisions no longer applied, and Langley Productions and H opposed the application. Robertson J held that the confidentiality provisions in the arbitration no longer applied, as:³⁴

... the confidentiality which the parties have adopted and embraced with regard to their dispute resolution in arbitration cannot automatically extend to processes for enforcement or challenge in the High Court.

He also noted that the parties specifically chose to allow for the right of appeal, and that one party had sought to register the award and enforce it in the High Court. Robertson J concluded that once either of those steps occurred, the principles applicable to the High Court hearings would determine the question of access and public knowledge. If the cloak of confidentiality in private dispute resolution necessarily applied to subsequent proceedings in the High Court, then this would require a clear and unambiguous determination of Parliament. Accordingly, Robertson J held that the arbitral award should be available for public scrutiny and without any impediment being created by the confidentiality clause in the TVNZ-Langley Productions contract, and that the proceedings to dispose of certain matters would also take place in public.

C. Consent of the parties (pre/post dispute: Implied?)

37 The consent of the parties to public disclosure of the existence of the arbitration (as well as arbitration-related information) is another exception to the implied obligation of confidentiality. For instance, the

³⁴ *Television New Zealand v Langley Productions* [2000] NZLR 250 at [38].

consent of the parties can be written into the substantive agreement between the parties, or given after a dispute has arisen in a post-dispute arbitration agreement. The implied consent of the parties can arise from the parties' conduct after a dispute has arisen. One example of this is where an arbitrating party applies to the court for the removal of an arbitrator, in which case that arbitrating party implicitly gives consent to the challenged arbitrator to disclose matters concerning the arbitration to the court. A further question that arises in this context is whether an application to the court arising out of an arbitration without an arbitrating party asking for those proceedings to be held in camera (assuming such provisions exist in the relevant national court), amounts to a consent to public disclosure of all facts and documents put before the court.

D. By compulsion of law

38 Statutory provisions may override any obligation of confidentiality that parties may have provided for in an arbitration agreement and compel disclosure of arbitration-related documents. Anti-money laundering legislation, for instance, imposes a duty of disclosure on a person who suspects that a transaction may involve property that, directly or indirectly, represents the proceeds of crime. In Singapore, the relevant anti-money laundering legislation is the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act³⁵ ("SCA"). Section 39(1) of the SCA³⁶ imposes a duty of disclosure on a person who knows or has

³⁵ Cap 65A, 2000 Rev Ed.

³⁶ Section 39(1) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) reads as follows:

39. Duty to disclose knowledge or suspicion

(1) Where a person knows or has reasonable grounds to suspect that any property:

- (a) in whole or in part, directly or indirectly, represents the proceeds of;
- (b) was used in connection with; or
- (c) is intended to be used in connection with,

any act which may constitute drug trafficking or criminal conduct, as the case may be, and the information or matter on which the

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reasonable grounds to suspect that certain property may represent the proceeds of, or is used in connection with, drug trafficking or other criminal conduct. However, section 39(6) of the SCA³⁷ excuses an arbitrating party from any breach of the obligation of confidentiality and bars any claim against the arbitrating party as a result of a disclosure pursuant to section 39(1) of the same Act.³⁸ Likewise, any police or public authority may have statutory power to demand production of documents and there is no privilege attached to documents submitted in arbitration.

E. With leave of court

39 Although various cases have recognised the disclosure of arbitration-related documents with leave of court as an exception to the obligation of confidentiality,³⁹ the question remains as to whether or not

knowledge or suspicion is based came to his attention in the course of his trade, profession, business or employment, he shall disclose the knowledge or suspicion or the information or other matter on which that knowledge or suspicion is based to a Suspicious Transaction Reporting Officer as soon as is reasonably practicable after it comes to his attention.

³⁷ Section 39(6) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) reads as follows:

(6) Where a person discloses in good faith to a Suspicious Transaction Reporting Officer

(a) his knowledge or suspicion of the matters referred to in subsection (1)(a), (b) or (c); or

(b) any information or other matter on which that knowledge or suspicion is based,

the disclosure shall not be treated as a breach of any restriction upon the disclosure imposed by law, contract or rules of professional conduct and he shall not be liable for any loss arising out of the disclosure or any act or omission in consequence of the disclosure.

³⁸ Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) s 39(1).

³⁹ *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 at 327; *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184 at [107].

a court or tribunal order for disclosure overrides the obligation of confidentiality.⁴⁰

40 In *Hassneh Insurance*, Colman J advised on the disclosure of arbitration documents subject to an obligation of confidentiality as follows:

If a party is put in a 'potentially extremely hazardous' position and cannot decide whether to disclose documents as in doing so he may therefore be in breach of his duty of confidentiality to the opposite party to the arbitration or be accused of failing to disclose a relevant document in his possession which would be necessary for fairly disposing of the litigation, he should first write to his opposite party in the arbitration inviting consent to disclose; if this is not forthcoming, he should decline to let the third party inspect the same without first obtaining an order of court under O 24 r 11 of the Rules of Court.

41 However, the English Court of Appeal in *Emmott* expressed the view that the court does not have a general power to order or give permission for disclosure of arbitration-related documents when an arbitration is underway. Thomas LJ considered that leave of the court is a matter which arises in circumstances where the court is deciding the issue as between a party to the arbitration and a stranger (as where the court is ordering disclosure in litigation of arbitration documents in the possession of one party) or in circumstances where the arbitration has come to an end. Thomas LJ further considered that:

[i]t is difficult to see readily how it is consistent with the principles in the 1996 Act that there is to be an implied term which requires resort to the court during the currency of the arbitration for the court to determine these issues as between the parties to the arbitration ... I cannot accept that the implied term of confidentiality

⁴⁰ See, eg, Robert Merkin, *Arbitration Law* (Informa, Looseleaf, 1991, April 2013 – 1st Ed – Service Issue 64) at para 17.32, where Merkin expresses the view that:

[i]t has nevertheless been doubted whether these exceptions actually exist, in that the cases in which disclosure has been permitted following an order or permission of the court rest upon either the need to protect a party's legitimate interest or the interests of justice.

should be formulated to confer by this means jurisdiction on the court; it would be contrary to the ethos and policy of the Act.⁴¹

Collins LJ in *Emmott* expressed similar sentiments:⁴²

[i]t does not follow from the fact that a court refers to the possibility of an exception for the order or leave of the court in a case where it has the power to make the order or give leave ... the court has a general and unlimited jurisdiction to consider whether an exception to confidentiality exists and applies.

42 These remarks are problematical because they seem to preclude the intervention of an independent third party to resolve difficulties in defining the scope and extent of exceptions to confidentiality. However, this problem will be addressed in the conclusion below.

F. Disclosure for protecting legitimate interests of an arbitrating party

43 The disclosure of arbitration documents for the protection of the legitimate interests of an arbitrating party is clearly a potentially very wide exception. The enforcement of an arbitrating party's rights under an earlier arbitration award would certainly be a disclosure for protecting the legitimate interests of the winning party. Alternatively, a party may wish to disclose an arbitration award to adduce evidence of a position that was taken by an arbitrating party in an earlier arbitration so as to raise issue estoppel. In *Associated Electric and Gas Insurance Services Ltd (AEGIS) v European Reinsurance Co of Zurich ("AEGIS")*,⁴³ a case arising out of two separate arbitrations concerning European Reinsurance's ("European Re") obligation to indemnify AEGIS under a reinsurance agreement, European Re sought to refer to the arbitration award

⁴¹ *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184 at [124].

⁴² *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184 at [87].

⁴³ *Associated Electric and Gas Insurance Services Ltd (AEGIS) v European Reinsurance Co of Zurich* [2003] 1 WLR 1041.

obtained from the first arbitration in the second arbitration on the basis that the same dispute had been raised on the pleadings in the second arbitration between the same parties. The tribunals for both the first and second arbitrations were different. As there was an express confidentiality agreement between the parties that had been entered into in the course of the first arbitration, AEGIS contended that the award in the first arbitration should not be disclosed to the tribunal in the second arbitration because it would breach the confidentiality of the first arbitration. Subsequently, AEGIS obtained an *ex parte* injunction against European Re in order to stop European Re from referring to the award from the first arbitration, thereby precluding European Re from raising a plea of issue estoppel in the second arbitration. European Re applied unsuccessfully to discharge the injunction. European Re then appealed successfully to the Court of Appeal of Bermuda and discharged the injunction. AEGIS appealed to the Privy Council and sought to reinstate the injunction to restrain European Re from disclosing the arbitral award in the first arbitration to any third party, including the tribunal in the second arbitration. The issue before the Privy Council was whether, on its proper construction, a confidentiality agreement that the parties had entered into in the first arbitration precluded reliance on the arbitral award in the second arbitration.

44 In dismissing AEGIS's appeal, the Privy Council held that the confidentiality agreement between the parties did not preclude reliance on the arbitral award in the first arbitration. The Privy Council was of the view that the principle of issue estoppel meant that the parties to proceedings were bound by an earlier arbitral award on the same issue and that confidentiality was immaterial. In that context, the Privy Council considered that issue estoppel was "a species of the enforcement of the rights given by the award just as much as it would be a cause of action estoppel" even though it was a rule of evidence rather than a mechanism for enforcement as such.⁴⁴

⁴⁴ *Associated Electric and Gas Insurance Services Ltd (AEGIS) v European Reinsurance Co of Zurich* [2003] 1 WLR 1041 at 1048.

45 There is a requirement of reasonable necessity in the application of this exception for disclosure in the protection of the legitimate interests of an arbitrating party. In *Ali Shipping Corp v Shipyard Trogir* (“*Ali Shipping*”),⁴⁵ Potter LJ framed this requirement as follows: “disclosure when, and to the extent to which, it is reasonably necessary for the protection of the legitimate interests of an arbitrating party”.

46 However, Potter LJ also added that:⁴⁶

In this context, that means reasonably necessary for the establishment of an arbitrating party’s legal rights *vis-à-vis* a third party in order to found a cause of action against that third party or to defend a claim, or counterclaim, brought by the third party.

47 In *Ali Shipping*, Potter LJ noted the comments of Colman J in *Hassneh Insurance* that it was not enough that an award or reasons might have a commercially persuasive impact on the third party to whom they are disclosed, nor that their disclosure would be “merely helpful, as distinct from necessary, for the protection of such rights”, but went on to qualify the concept of reasonable necessity as he considered that the court should take a rounded view.⁴⁷ Potter LJ stated that:⁴⁸

When the concept of reasonable ‘necessity’ comes into play in relation to the enforcement or protection of a party’s legal rights, it seems to me to require a degree of flexibility in the court’s approach. For instance, in reaching its decision, the court should not require the parties seeking disclosure to prove necessity regardless of difficulty or expense. It should approach the matter in the round, taking account of the nature and purpose of the proceedings for

⁴⁵ *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 at 327.

⁴⁶ *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 at 327. See also *Glidepath BV v Thompson (No 2)* [2005] 2 Lloyd’s Rep 549, in which the court held that a non-party to an arbitration agreement who applies for access to arbitration-related documents on a court file must show that access to the arbitration-related documents is (a) reasonably necessary to protect or establish the legal rights of the third party; or (b) in the interests of justice.

⁴⁷ *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 at 327.

⁴⁸ *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 at 327.

which the material is required, the powers and procedures of the tribunal in which the proceedings are being conducted, the issues to which the evidence or information sought is directed and the practicality and expense of obtaining such evidence or information elsewhere.

48 One question that arises from Potter LJ's observations above is whether the protection of the legitimate interests of an arbitrating party is only confined to the protection of that arbitrating party's legitimate interests *vis-à-vis* a third party. Notably, in *Emmott*, the Court of Appeal did not appear to confine the protection of the legitimate interests of an arbitrating party *vis-à-vis* a third party only.

49 Thomas LJ did not state that a third party was necessary to establish this exception: "Use can, however, be made [of arbitration documents] if it is reasonably necessary to protect the legitimate private interests of a party."⁴⁹

⁴⁹ *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184 at [132(iii)] ("*Emmott*"). Collins LJ expressed the same view at [107]: "... where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party". *Emmott* was applied in *Westwood Shipping Lines Inc v Universal Schiffahrtsgesellschaft mbH* [2012] EWHC 3837. In this case, the claimant applied for permission to rely on documents used in arbitration proceedings for the purposes of an unlawful means conspiracy claim. The High Court held that this was a case which fell within the third and fourth recognised situations set out in *Emmott* where disclosure of arbitration documents would be permissible. The High Court held that the claimant had a legitimate interest in pursuing the claim in unlawful means conspiracy, which on the face of the pleading, was an arguable claim. It was a claim which they could not pursue properly, possibly not at all, unless they had access to the materials from the arbitration. This was because it relied to a considerable extent on the detail of the arbitration and this in itself justified an order for the claimants to obtain the arbitration material for the purpose of pursuing that claim. In any event, the High Court found (at [14]) that this was a case in which the interests of justice clearly required disclosure:

... not just because otherwise the claimants would be precluded from making what is otherwise an arguable claim, but also because whilst the court is not currently concerned with the detail of those claims and

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G. Where the interests of justice/the public interest require it

50 If a party has given inconsistent evidence in two separate arbitrations, it is clear that the interests of justice (sometimes called public interest) would require disclosure of arbitration documents in spite of any obligation of confidentiality. In *London & Leeds*,⁵⁰ it was found that an expert valuer in an arbitration had given contrary expert evidence in two previous arbitrations. As discussed above,⁵¹ Mance LJ held that where a witness was proved to have expressed himself in a materially different sense when acting for different sides, that would be a factor which should be brought out in the interests of individual litigants involved and in the public interest. Mance LJ therefore held that the duty of confidentiality that the parties in the two previous arbitrations owed to the expert valuer in respect of his evidence in those arbitrations was overridden in the interests of the fair disposal of the proceedings.

51 It is useful to note that there is an issue of whether the interests of justice is an exception in itself, or whether it is part of a wider public interest. The English courts appear to be divided in their opinion on this. The public interest exception was expressly recognised by Mance LJ in

their merits, in circumstances where there is, at least on the face of the material before the court, an arguable case of unlawful actions, unlawful conduct, having taken place, that the court should not allow confidentiality of arbitration materials in any sense to stifle the ability to bring to light wrongdoing of one kind or another.

The High Court therefore ordered the disclosure of the written pleadings and submissions in the arbitration, all the disclosure in the arbitration, the witness statements, the experts' reports, the inter-solicitor correspondence, the correspondence with the tribunal, transcripts of the hearings, written opening and closing submissions, the award and the reasons. The High Court also referred to *Department of Economic Policy and Development of the City of Moscow v Bankers Trust Co* [2005] QB 207 and held that the court judgment itself should be public because there was no confidential information that was going to be disclosed.

⁵⁰ *London & Leeds Estates Ltd v Paribas Ltd (No 2)* [1995] 1 EGLR 102.

⁵¹ *London & Leeds Estates Ltd v Paribas Ltd (No 2)* [1995] 1 EGLR 102.

London & Leeds,⁵² and also by Thomas LJ in *Emmott*.⁵³ However, Potter LJ in *Ali Shipping* preferred the “interests of justice” which he considered to be narrower than the “public interest” exception.⁵⁴ Likewise, Collins LJ in *Emmott* expressly recognised the interests of justice exception, but only tentatively recognised the public interest exception.⁵⁵

52 Like the legitimate interests exception, there also seems to be a reasonable necessity requirement for the public interest exception, in that disclosure of arbitration documents subject to an obligation of confidentiality should go no further than is reasonably necessary to achieve the purpose of that public interest in disclosure.⁵⁶

H. Where there is an obligation of disclosure

53 Corporations owe an obligation of disclosure to various stakeholders who would, according to conventional theory, be strangers to the arbitration, but who certainly have a legitimate interest in the progress and outcome of the arbitration. Such stakeholders include:

- (a) shareholders;
- (b) bondholders;
- (c) beneficiaries of trust corporations;
- (d) any stock exchange or professional body to which an arbitrating party belongs;

⁵² *London & Leeds Estates Ltd v Paribas Ltd (No 2)* [1995] 1 EGLR 102 at 109.

⁵³ *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184 at [130].

⁵⁴ *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 at 327 and 328. See n 49 where the High Court in *Westwood Shipping Lines Inc v Universal Schiffahrtsgesellschaft mbH* [2012] EWHC 3837 found it was in the “interest of justice” to require disclosure to bring to light “wrongdoing of one kind or another”.

⁵⁵ *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184 at [107].

⁵⁶ *Pharaon v Bank of Credit and Commerce International SA* [1998] 4 All ER 455, *per* Rattee J.

- (e) joint venture partners or anyone covered by the *uberrimae fidei* principle;
- (f) a potential new shareholder acquirer conducting due diligence; and
- (g) insurers under an indemnity policy covering the subject matter of the arbitration.

54 Likewise, insurance and reinsurance companies may owe obligations of disclosure to each other. Parties who are in contracts with back to back obligations may also be subject to an obligation of disclosure.

I. Everyday situations

55 The authorities do not discuss everyday situations which would most certainly be exceptions to the obligation of confidentiality, but one can conceive of a myriad of such everyday situations. Some examples of these situations include:

- (a) discussing an arbitration with members of the family (after swearing them to secrecy);
- (b) discussing an arbitration with lawyers in the same firm to check for conflicts;
- (c) discussing an arbitration with potential arbitrators; and
- (d) disclosing details of an arbitration to an immigration office in a visa application.

J. Where disclosure is made to professional or other advisers and persons assisting in the conduct of the arbitration

56 Where the disclosure of arbitration documents is made to professional or other advisers and persons assisting in the conduct of the arbitration, this should be treated as a legitimate exception to the obligation of confidentiality. Any disclosure to lawyers who are not involved in the arbitration should not be a problem because lawyers are subject to legal professional privilege in any case. Any disclosure made to persons assisting in the conduct of the arbitration should also be an exception to the obligation of confidentiality. Such persons include:

- (a) potential witnesses, both factual and expert;
- (b) private investigators;
- (c) executives or in-house counsel of affiliate companies;
- (d) secretaries and personal assistants to persons working on the arbitration even if not employees of the arbitrating party (*eg*, from related or affiliated companies); and
- (e) independent providers of business services (transcribers, interpreters, photocopiers, hotel business centers, couriers).

VIII. The problems of drafting

57 It is clear that there are a myriad number of exceptions to the obligation of confidentiality, some of which have been expressly recognised by the courts. The reservations of the Privy Council in *AEGIS* to adopting Potter LJ's approach in *Ali Shipping* of characterising a duty of confidentiality as an implied term, and then to formulate exceptions to which it would be subject,⁵⁷ clearly highlight the problems of drafting appropriate national legislation or arbitral rules to provide for some form of confidentiality in arbitration. In delivering the advice of the Privy Council in *AEGIS*, Lord Hobhouse aptly pointed out that formulating exceptions to the obligation of confidentiality runs the risk of failing to distinguish between different types of confidentiality which attach to different types of document or to documents which have been obtained in different ways, and elides privacy and confidentiality.⁵⁸

58 The drafters of the English Arbitration Act 1996 were fully aware of the numerous exceptions and qualifications to the obligation of confidentiality and the consequent difficulty of drafting provisions to govern confidentiality in arbitration. In the English Departmental Advisory Committee Report of February 1996 on the draft Arbitration Bill ("DAC Report"), it was considered that the privacy and confidentiality in

⁵⁷ *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 at 326 and 327.

⁵⁸ *Associated Electric and Gas Insurance Services Ltd (AEGIS) v European Reinsurance Co of Zurich* [2003] 1 WLR 1041 at 1050.

arbitrations was one area of law which was better left to the common law to evolve. The DAC Report noted that:⁵⁹

Given these exceptions and qualifications, the formulation of any statutory principles would be likely to create new impediments to the practice of English arbitration and, in particular, to add to English litigation on the issue. Far from solving a difficulty, the DAC was firmly of the view that it would create new ones. Indeed, even if acceptable statutory guidelines could be formulated, there would remain the difficulty of fixing and enforcing sanctions for non-compliance.

59 The New Zealand Law Commission expressed similar views regarding the inadequacy of the previous section 14 of the New Zealand Arbitration Act 1996⁶⁰ and its failure to deal with the many exceptions to the obligation of confidentiality.⁶¹ J Bruce Robertson J led the New Zealand Law Commission in drafting its report on the amendments to the New Zealand Arbitration Act (“the Robertson Report”) and the Robertson

⁵⁹ Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* (February 1996) at para 17.

⁶⁰ The previous s 14 of the New Zealand Arbitration Act 1996 (1996 No 99) read as follows:

14. Disclosure of information relating to arbitral proceedings and awards prohibited

(1) Subject to subsection (2), an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that the parties shall not publish, disclose or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings.

(2) Nothing in subsection (1) prevents the publication, disclosure, or communication of information referred to in that subsection

(a) If the publication, disclosure, or communication is contemplated by this Act; or

(b) To a professional or other adviser of any of the parties.

⁶¹ New Zealand Law Commission, *Improving the Arbitration Act 1996* (Report 83, February 2003).

Report made the following observations on the previous section 14 of the New Zealand Arbitration Act 1996:⁶²

Section 14, however, arguably contains flaws: First, the exceptions to the implied term seem insufficiently wide to deal with many everyday situations where disclosure may be necessary. In England, for example, cases have recognized exceptions to their common law rule, which may not be contemplated under section 14. Second, it is arguable that no statutory implied term can ever set out exhaustively all of the exceptions that may arise; these need to be determined on a case-by-case basis.

IX. How has national legislation dealt with the obligation of confidentiality?

A. UNCITRAL Model Law and rules

60 The UNCITRAL Model Law on International Commercial Arbitration⁶³ does not say anything about confidentiality.⁶⁴ Likewise, the

⁶² New Zealand Law Commission, *Improving the Arbitration Act 1996* (Report 83, February 2003) at para 5.

⁶³ UN Doc A/40/17; UN Doc A/61/17, Annex I (21 June 1985; amended 7 July 2006).

⁶⁴ See Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 2nd Ed, 2005) at para 11-005:

The case, decided by the High Court of Australia, of *Esso v Plowman* sparked the international discussion on whether the requirement of confidentiality of the arbitral proceedings was adequately protected. The only international text to refer to the issue are the UNCITRAL Arbitration Rules; the Model Law does not deal with the issue and only few national laws make provision for protecting confidentiality of the proceedings. Parties to international commercial arbitration were becoming 'increasingly concerned over the absence of any rules in respect of confidentiality', and further study of the issues was thought to be a good idea. However, despite the Secretariat suggesting a solution in the form of a model legislative provision, the delegates, although holding UNCITRAL to be the right body for attending to this

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UNCITRAL Arbitration Rules do not provide for confidentiality, apart from the award, which may be made public only with the consent of both parties.⁶⁵

61 The UNCITRAL Notes for Organizing Arbitral Proceedings make the following points:⁶⁶

- (a) There is no uniform answer in national laws as to the extent to which the participants in an arbitration are under a duty to observe the confidentiality of information relating to the case.

issue, saw only a small likelihood of ‘achieving anything more than a rule to the effect that “arbitration is confidential except where disclosure is required by law”’. Accordingly, the topic was at first accorded low priority by the commission, the Working Group however later expressed more interest here.

See also UNCITRAL, *Report of the United Nations Commission on International Trade Law on the Work of Its Thirty-second Session* (UN Doc A/54/17) (Vienna, 17 May–4 June 1999) at para 359:

Some support was given to the topic [of confidentiality] as one of priority. In support of that view, it was explained that parties involved in arbitral proceedings were becoming increasingly concerned over the absence of any rules in respect of confidentiality. It was felt that it would be useful to study the issues, which were becoming increasingly difficult and thorny. Another view was that, although the topic would merit study, it was not one that should be given high priority by the Commission, because of the absence of any viable solutions. It seemed to some that there was little likelihood of achieving anything more than a rule to the effect that ‘arbitration is confidential except where disclosure is required by law’. The prevailing view was that, albeit interesting, the topic was not of high priority.

See also *Report of the Working Group on Arbitration on the Work of Its Thirty-second Session* (UN Doc A/CN.9/468) (Vienna, 20–31 March 2000) at para 112, in which interest in “the duty of confidentiality, with regard to both arbitration and conciliation” was expressed by the Working Group.

⁶⁵ United Nations Commission on International Trade Law Arbitration Rules, GA Res 65/22, UN GAOR 65th Sess (2010) Art 32(5).

⁶⁶ United Nations Commission on International Trade Law Notes for Organizing Arbitral Proceedings at para 31.

- (b) Parties that have agreed on arbitration rules or other provisions that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognise an implied commitment to confidentiality.
- (c) Participants in an arbitration might not have the same understanding as regards to the extent of confidentiality that is expected.

B. Hong Kong

62 Currently, section 2D of the Hong Kong Arbitration Ordinance allows a party to apply for court proceedings concerning arbitration to be heard otherwise than in open court.⁶⁷ Section 2E of the Arbitration Ordinance restricts the reporting of proceedings otherwise than in open court.⁶⁸

⁶⁷ Section 2D of the Hong Kong Arbitration Ordinance (Cap 341) read as follows: "Proceedings under this Ordinance in the Court or Court of Appeal shall on the application of any party to the proceedings be heard otherwise than in open court." The Hong Kong Arbitration Ordinance (Cap 609) came into force on 1 June 2011, replacing the old Arbitration Ordinance (Cap 341). Section 2D has been repealed by s 16 of the Hong Kong Arbitration Ordinance (Cap 609). Section 16 reads as follows:

- (1) Subject to subsection (2), proceedings under this Ordinance in the court are to be heard otherwise than in open court.
- (2) The court may order those proceedings to be heard in open court—
 - (a) on the application of any party; or
 - (b) if, in any particular case, the court is satisfied that those proceedings ought to be heard in open court.
- (3) An order of the court under subsection (2) is not subject to appeal.

⁶⁸ Section 2E of the Hong Kong Arbitration Ordinance (Cap 341) reads as follows:

2E. Restrictions on reporting of proceedings heard otherwise than in open court

- (1) This section applies to proceedings under this Ordinance in the Court or Court of Appeal heard otherwise than in open court.

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- (2) A court in which proceedings to which this section applies are being heard shall, on the application of any party to the proceedings, give directions as to what information, if any, relating to the proceedings may be published.
- (3) A court shall not give a direction under subsection (2) permitting information to be published unless:
 - (a) all parties to the proceedings agree that such information may be published; or
 - (b) the court is satisfied that the information, if published in accordance with such directions as it may give, would not reveal any matter, including the identity of any party to the proceedings, that any party to the proceedings reasonably wishes to remain confidential.
- (4) Notwithstanding subsection (3), where a court gives a judgment in respect of proceedings to which this section applies and considers that judgment to be of major legal interest, it shall direct that reports of the judgment may be published in law reports and professional publications but, if any party to the proceedings reasonably wishes to conceal any matter, including the fact that he was such a party, the court shall:
 - (a) give directions as to the action that shall be taken to conceal that matter in those reports; and
 - (b) if it considers that a report published in accordance with directions given under paragraph (a) would be likely to reveal that matter, direct that no report shall be published until after the end of such period, not exceeding 10 years, as it considers appropriate.

Section 2E has been repealed by s 17 of the Hong Kong Arbitration Ordinance (Cap 609). Section 17 of the Hong Kong Arbitration Ordinance (Cap 609) now reads as follows:

- (1) This section applies to proceedings under this Ordinance in the court heard otherwise than in open court (“closed court proceedings”).
- (2) A court in which closed court proceedings are being heard must, on the application of any party, make a direction as to what information, if any, relating to the proceedings may be published.
- (3) A court must not make a direction permitting information to be published unless—
 - (a) all parties agree that the information may be published; or

(continued on next page)

63 The Hong Kong draft Arbitration Bill 2007 departs from the existing sections 2D and 2E because the presumption now is that arbitration court proceedings will be heard in open court.⁶⁹ Apart from this significant amendment, the draft Arbitration Bill retains the wording of sections 2D and 2E in clauses 16(2) and 17(1) to 17(4) respectively. Clauses 17(5) and 17(6) add a provision allowing judgments to be published with sanitisation if the court thinks fit, as well as a blanket prohibition of reporting on proceedings heard otherwise than in open

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- (b) the court is satisfied that the information, if published, would not reveal any matter (including the identity of any party) that any party reasonably wishes to remain confidential.
 - (4) Despite subsection (3), if—
 - (a) a court gives a judgment in respect of closed court proceedings; and
 - (b) the court considers that judgment to be of major legal interest, the court must direct that reports of the judgment may be published in law reports and professional publications.
 - (5) If a court directs under subsection (4) that reports of a judgment may be published, but any party reasonably wishes to conceal any matter in those reports (including the fact that the party was such a party), the court must, on the application of the party—
 - (a) make a direction as to the action to be taken to conceal that matter in those reports; and
 - (b) if the court considers that a report published in accordance with the direction made under paragraph (a) would still be likely to reveal that matter, direct that the report may not be published until after the end of a period, not exceeding 10 years, that the court may direct.

(6) A direction of the court under this section is not subject to appeal.

⁶⁹ Department of Justice, *Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill* (December 2007) cl 16(1) reads as follows: "Proceedings under this Ordinance in the court shall, subject to subsection (2), be heard in open court." See n 67; pursuant to section 16(1) of the Hong Kong Arbitration Ordinance (Cap 609), the presumption that proceedings will be heard in closed court was retained.

court for a period of up to ten years.⁷⁰ Clause 18 of the draft Arbitration Bill⁷¹ adopts the previous section 14 of the New Zealand Arbitration Act

⁷⁰ Clauses 17(5) and 17(6) of the Department of Justice, *Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill* (December 2007) are not in the current s 2E of the Hong Kong Arbitration Ordinance (Cap 609), and read as follows:

- (5) Where a court directs under subsection (4) that reports of a judgment may be published, but any party reasonably wishes to conceal any matter in those reports (including the fact that he was such a party), the court shall:
 - (a) make a direction as to the action to be taken to conceal that matter in those reports; and
 - (b) if it considers that a report published in accordance with the direction made under paragraph (a) would still be likely to reveal that matter, direct that no report is to be published until after the end of such period as it may direct, not exceeding 10 years.
- (6) A direction of the court under this section shall be subject to no appeal.

Section 17 of the Hong Kong Arbitration Ordinance (Cap 609) restricts the reporting of proceedings heard otherwise than in open court (“closed court proceedings”). Sections 17(5) and 17(6) read as follows:

- (5) If a court directs under subsection (4) that reports of a judgment may be published, but any party reasonably wishes to conceal any matter in those reports (including the fact that the party was such a party), the court must, on the application of the party –
 - (a) make a direction as to the action to be taken to conceal that matter in those reports; and
 - (b) if the court considers that a report published in accordance with the direction made under paragraph (a) of a period, not exceeding 10 years, that the court may direct.
- (6) A direction of the court under this section is not subject to appeal.

⁷¹ Department of Justice, *Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill* (December 2007) (“draft Arbitration Bill”) at cl 18 reads as follows:

- 18. Disclosure of information relating to arbitral proceedings and awards prohibited:

(continued on next page)

1996 (despite criticisms made of it in the Robertson Report) but adds clause 18(2)(b) to cover the publication, disclosure or communication that a party is obliged to make by virtue of other provisions of the law. Clause 18(2)(a) permits the disclosure of information relating to arbitral proceedings and awards made in those proceedings in certain situations “as contemplated by this Ordinance”, which include:

- (a) an application by a party for proceedings to be heard otherwise than in open court (clause 16);

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- (1) Unless otherwise agreed by the parties, a party shall not publish, disclose or communicate any information relating to:
 - (a) the arbitral proceedings under the arbitration agreement; or
 - (b) an award made in those proceedings.
 - (2) Nothing in subsection (1) prevents the publication, disclosure or communication of information referred to in that subsection by a party:
 - (a) if the publication, disclosure or communication is contemplated by this Ordinance;
 - (b) if the publication, disclosure or communication is made to any government body, regulatory body, court or tribunal and the party is obliged by law to make such publication, disclosure or communication; or
 - (c) if the publication, disclosure or communication is made to a professional or any other adviser of any of the parties.

The proposed cl 18(2)(a) in the draft Arbitration Bill was not adopted. Instead, s 18(2)(a) of the Hong Kong Arbitration Ordinance (Cap 609) states as follows:

Nothing in subsection (1) prevents the publication, disclosure or communication of information referred to in that subsection by a party—

- (a) if the publication, disclosure or communication is made—
 - (i) to protect or pursue a legal right or interest of the party; or
 - (ii) to enforce or challenge the award referred to in that subsection, in legal proceedings before a court or other judicial authority in or outside Hong Kong.

Section 18(2)(b) was also added to cover the publication, disclosure or communication that a party is obliged to make by virtue of other provisions of the law to any government body, regulatory body, court or tribunal.

- (b) restrictions on reporting of proceedings heard otherwise than in open court (clause 17);
- (c) a challenge of arbitrators (clause 26);
- (d) court-ordered interim measures (clause 46);
- (e) special powers of the court in relation to arbitral proceedings (clause 61);
- (f) enforcement of orders and directions of arbitral tribunal (clause 62);
- (g) taxation of costs of arbitral proceedings (other than fees and expenses of arbitral tribunal) (clause 76);
- (h) applications for setting aside of arbitral award (clause 82);
- (i) enforcement of arbitral awards (clauses 85 and 86);
- (j) enforcement of convention awards (clauses 88 and 89); refusal of enforcement of convention awards (clause 90);
- (k) consolidation of arbitrations (Schedule 3, clause 2);
- (l) determination of preliminary question of law by court (Schedule 3, clause 3);
- (m) challenging arbitral award on ground of serious irregularity (Schedule 3, clause 4);
- (n) appeal against arbitral award on question of law (Schedule 3, clause 5); and
- (o) application for leave to appeal against arbitral award on question of law (Schedule 3, clause 6).

64 There is no guidance given to the court in the current Arbitration Ordinance and the draft Arbitration Bill as to what criteria to apply when ordering a closed door hearing.⁷²

⁷² *Cf* s 14F(2) of the New Zealand Arbitration Act 1996 (1996 No 99) (with effect from 18 October 2007), which provides that the court may order a hearing to be heard in camera:

... only if the court is satisfied that the public interest in having the proceedings conducted in public is outweighed by the interests of any party to the proceedings in having the whole or any part of the proceedings conducted in private.

C. New Zealand

65 As discussed above, the previous section 14 of the New Zealand Arbitration Act 1996 was criticised in the February 2003 Robertson Report and the main criticisms were as follows:

- (a) Exceptions to the implied term seem insufficiently wide to deal with many everyday situations where disclosure may be necessary.
- (b) No statutory implied term can ever set out exhaustively all of the exceptions that may arise; these need to be determined on a case-by-case basis.
- (c) The previous section 14 did not address the concept of open justice in the context of arbitrations that result in subsequent proceedings for challenge or enforcement in the courts.⁷³

66 In response to the criticisms of the previous section 14 of the Arbitration Act 1996, the New Zealand Law Commission's recommendations were as follows:

- (a) The hearing should take place in private.
- (b) Subject to (c) to (d) below, the arbitral tribunal and the parties to the arbitration agreement should not disclose pleadings, evidence, discovered documents or the award arising from the arbitration.
- (c) The requirement is subject to disclosure when compelled by court order or subpoena, or to a professional or other adviser of any of the parties.
- (d) The arbitrating parties may apply to the arbitral tribunal for an order that they be permitted to disclose information otherwise protected by the implied term. Such an order should only be made:
 - (i) after the arbitral tribunal has heard from the arbitrating parties; and
 - (ii) if the arbitral tribunal is satisfied that:
 - (A) such an order is necessary to enable the party applying for disclosure to comply with any statutory, contractual or regulatory requirement; and

⁷³ See, eg, *Television New Zealand v Langley Productions* [2000] NZLR 250.

- (B) disclosure of the information would have been required if no dispute had arisen or the dispute had been resolved by private means (*eg*, negotiation or mediation) other than arbitration.
- (e) If the mandate of the arbitral tribunal has expired, the application referred to in paragraph (d) would be made to the High Court (which would apply the same criteria as the arbitral tribunal).
- (f) If the application is declined by an arbitral tribunal, then there would be an automatic right of appeal to the High Court. There is no appeal where the application is made at first instance to the High Court.

67 Sections 14A to 14I of the Arbitration Act 1996 (introduced with effect from 18 October 2007) therefore address the above recommendations by the New Zealand Law Commission in the Robertson Report. These provisions read as follows:

14A Arbitral proceedings must be private

An arbitral tribunal must conduct the arbitral proceedings in private.

14B Arbitration agreements deemed to prohibit disclosure of confidential information

- (1) Every arbitration agreement to which this section applies is deemed to provide that the parties and the arbitral tribunal must not disclose confidential information.
- (2) Subsection (1) is subject to section 14C.

14C Limits on prohibition on disclosure of confidential information in section 14B

A party or an arbitral tribunal may disclose confidential information—

- (a) to a professional or other adviser of any of the parties; or
- (b) if both of the following matters apply:
 - (i) the disclosure is necessary—
 - (A) to ensure that a party has a full opportunity to present the party's case, as required under Article 18 of Schedule 1 [Model Law];⁷⁴ or

⁷⁴ Article 18 of Sch 1 to the New Zealand Arbitration Act 1996 (1996 No 99) on the equal treatment of parties is the same as Art 18 of the UNCITRAL

- (B) for the establishment or protection of a party's legal rights in relation to a third party; or
- (C) for the making and prosecution of an application to a court under this Act; and
- (ii) the disclosure is no more than what is reasonably required to serve any of the purposes referred to in subparagraph (i)(A) to (C); or
- (c) if the disclosure is in accordance with an order made, or a subpoena issued, by a court; or
- (d) if both of the following matters apply:
 - (i) the disclosure is authorised or required by law (except this Act) or required by a competent regulatory body (including New Zealand Exchange Limited); and
 - (ii) the party who, or the arbitral tribunal that, makes the disclosure provides to the other party and the arbitral tribunal or, as the case may be, the parties, written details of the disclosure (including an explanation of the reasons for the disclosure); or
- (e) if the disclosure is in accordance with an order made by—
 - (i) an arbitral tribunal under section 14D; or
 - (ii) the High Court under section 14E.

14D Arbitral tribunal may allow disclosure of confidential information in certain circumstances

- (1) This section applies if—
 - (a) a question arises in any arbitral proceedings as to whether confidential information should be disclosed other than as authorised under section 14C(a) to (d)); and
 - (b) at least one of the parties agrees to refer that question to the arbitral tribunal concerned.

Model Law on International Commercial Arbitration 2006 (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) and reads: “The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.”

- (2) The arbitral tribunal, after giving each of the parties an opportunity to be heard, may make or refuse to make an order allowing all or any of the parties to disclose confidential information.

14E High Court may allow or prohibit disclosure of confidential information if arbitral proceedings have been terminated or party lodges appeal concerning confidentiality

- (1) The High Court may make an order allowing a party to disclose only confidential information—
 - (a) on the application of that party, which application may be made only if the mandate of the arbitral tribunal has been terminated in accordance with Article 32 of Schedule 1 [*ie*, termination of proceedings]; or
 - (b) on an appeal by that party, after an order under section 14D(2) allowing that party to disclose the confidential information has been refused by an arbitral tribunal.
- (2) The High Court may make an order under subsection (1) only if—
 - (a) it is satisfied, in the circumstances of the particular case, that the public interest in preserving the confidentiality of arbitral proceedings is outweighed by other considerations that render it desirable in the public interest for the confidential information to be disclosed; and
 - (b) the disclosure is no more than what is reasonably required to serve the other considerations referred to in paragraph (a).
- (3) The High Court may make an order prohibiting a party (party A) from disclosing confidential information on an appeal by another party (party B) who unsuccessfully opposed an application by party A for an order under section 14D(2) allowing party A to disclose confidential information.
- (4) The High Court may make an order under this section only if it has given each of the parties an opportunity to be heard.
- (5) The High Court may make an order under this section—
 - (a) unconditionally; or
 - (b) subject to any conditions it thinks fit.
- (6) To avoid doubt, the High Court may, in imposing any conditions under subsection (5)(b), include a condition that the

order ceases to have effect at a specified stage of the appeal proceedings.

(7) The decision of the High Court under this section is final.

14F Court proceedings under Act must be conducted in public except in certain circumstances

(1) A court must conduct proceedings under this Act in public unless the Court makes an order that the whole or any part of the proceedings must be conducted in private.

(2) A court may make an order under subsection (1)—

(a) on the application of any party to the proceedings; and

(b) only if the Court is satisfied that the public interest in having the proceedings conducted in public is outweighed by the interests of any party to the proceedings in having the whole or any part of the proceedings conducted in private.

(3) If an application is made for an order under subsection (1), the fact that the application had been made, and the contents of the application, must not be made public until the application is determined.

(4) In this section and sections 14G to 14I,—

Court—

(a) means any court that has jurisdiction in regard to the matter in question; and

(b) includes the High Court and the Court of Appeal; but

(c) does not include an arbitral tribunal proceedings includes all matters brought before the Court under this Act (for example, an application to enforce an arbitral award).

proceedings includes all matters brought before the Court under this Act (for example, and application to enforce an arbitral award).

14G Applicant must state nature of, and reasons for seeking, order to conduct Court proceedings in private

An applicant for an order under section 14F must state in the application—

(a) whether the applicant is seeking an order for the whole or part of the proceedings to be conducted in private; and

(b) the applicant's reasons for seeking the order.

14H Matters that Court must consider in determining application for order to conduct Court proceedings in private

In determining an application for an order under section 14F, the Court must consider all of the following matters:

- (a) the open justice principle; and
- (b) the privacy and confidentiality of arbitral proceedings; and
- (c) any other public interest considerations; and
- (d) the terms of any arbitration agreement between the parties to the proceedings; and
- (e) the reasons stated by the applicant under section 14G(b).

14I Effect of order to conduct Court proceedings in private

- (1) If an order is made under section 14F,—
 - (a) no person may search, inspect, or copy any file or any documents on a file in any office of the Court relating to the proceedings for which the order was made; and
 - (b) the Court must not include in the Court's decision on the proceedings any particulars that could identify the parties to those proceedings.
- (2) An order remains in force for the period specified in the order or until it is sooner revoked by the Court on the further application of any party to the proceedings.

D. Singapore

68 Section 22 of the Singapore International Arbitration Act (“IAA”)⁷⁵ allows a party to apply for court proceedings concerning arbitration to be heard otherwise than in open court. Section 23 of the IAA⁷⁶ restricts

⁷⁵ Section 22 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) reads as follows: “Proceedings under this Act in any court shall, on the application of any party to the proceedings, be heard otherwise than in open court.”

⁷⁶ Section 23 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) reads as follows:

- (1) This section shall apply to proceedings under this Act in any court heard otherwise than in open court.
- (2) A court hearing any proceedings to which this section applies shall, on the application of any party to the proceedings, give directions

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reporting of proceedings heard otherwise than in open court. The Singapore position set out in sections 22 and 23 of the IAA is more or less similar to the current sections 16 and 17 of the Hong Kong Arbitration Ordinance.⁷⁷

69 One unresolved question in Singapore is whether, if no application is made for a gag order, that amounts to a waiver of confidentiality so that all court proceedings can be reported and the party is then released from all obligations of confidentiality. Some arbitration cases heard in the courts are reported without disclosure of parties' names,⁷⁸ while other case

as to whether any and, if so, what information relating to the proceedings may be published.

- (3) A court shall not give a direction under subsection (2) permitting information to be published unless:
- (a) all parties to the proceedings agree that such information may be published; or
 - (b) the court is satisfied that the information, if published in accordance with such directions as it may give, would not reveal any matter, including the identity of any party to the proceedings, that any party to the proceedings reasonably wishes to remain confidential.
- (4) Notwithstanding subsection (3), where a court gives grounds of decision for a judgment in respect of proceedings to which this section applies and considers that judgment to be of major legal interest, the court shall direct that reports of the judgment may be published in law reports and professional publications but, if any party to the proceedings reasonably wishes to conceal any matter, including the fact that he was such a party, the court shall:
- (a) give directions as to the action that shall be taken to conceal that matter in those reports; and
 - (b) if it considers that a report published in accordance with directions given under paragraph (a) would be likely to reveal that matter, direct that no report shall be published until after the end of such period, not exceeding 10 years, as it considers appropriate.

⁷⁷ Cap 609.

⁷⁸ See, *eg*, *VV v VW* [2008] 2 SLR(R) 929.

reports identify the parties' names.⁷⁹ Should the rules of confidentiality be different for these two kinds of cases?

70 Australia, Sweden and the US are three important countries where confidentiality is not recognised as a legal incident of arbitration unless parties expressly provide for it.

E. Australia

71 There is no national legislation on confidentiality in Australia and the High Court of Australia in *Esso Australia*⁸⁰ has declared that there is no general rule of confidentiality except that there is a rule of privacy in arbitration hearings.⁸¹ However, it also held that the privacy attaching to an arbitration was just an incident of the subject matter of the agreement to arbitrate rather than a term to be implied into the arbitration agreement.⁸²

F. Sweden

72 In *Bulgarian Foreign Trade Bank Ltd v AI Trade Finance Inc*⁸³ (better known as the "*Bulbank*" case), the Swedish Supreme Court held that there is no implied duty of confidentiality in private arbitrations. Accordingly, there are only two ways to safeguard confidentiality of arbitration proceedings under Swedish law:

⁷⁹ See, eg, *International Coal Pte Ltd v Kristle Trading Ltd* [2009] 1 SLR(R) 945.

⁸⁰ *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* [1995] 128 ALR 391.

⁸¹ The Australian International Arbitration Act 1974 (Cth) (Act 136 of 1974) was reformed and parties to an arbitral proceedings may now agree to adopt the confidentiality regime provided by the Act in ss 23C–23G.

⁸² *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* [1995] 128 ALR 391 at 401.

⁸³ Case T-1881-99. The Swedish Arbitration Act (SFS 1999:116) entered into force in 1999, replacing the 1929 arbitration act which does not contain any provisions regarding *confidentiality*.

(a) expressly contract for confidentiality; or (b) adopt arbitration rules that expressly provide for confidentiality.

G. United States

73 Likewise, the US does not recognise confidentiality as a general rule.⁸⁴

H. Dubai International Financial Centre

74 Section 14 of the Dubai International Financial Centre (“DIFC”) Arbitration Law⁸⁵ does not provide for any release from the obligation of confidentiality in arbitration, and does not envisage any further exceptions other than by an order of the DIFC Court. It is therefore open to the DIFC Court to interpret the general exception of the order of court

⁸⁴ *United States v Panhandle Eastern Corp* 118 FRD 346 (D Del, 1988). See also *Contship Container-lines, Ltd v PPG Industries, Inc* 2003 US Dist LEXIS 6857. *Cf Derrick Walker v Craig Kirin Gore* 2008 US Dist LEXIS 84297, in which the court held that the court file relating to the action between the parties for breach of contract and tort was to remain under seal pending the decision of the court on whether or not to compel arbitration, as the parties had agreed to arbitration on the basis that the terms of their agreements (which contained provisions imposing confidentiality) remained confidential. The Federal Arbitration Act (9 USC §§1–16) does not provide for the confidentiality of arbitration proceedings or the documents and information exchanged by parties in them. In *Trustmark Insurance Co v John Hancock Life Insurance Co* No 09 C 3959, 2010 US Dist LEXIS 4698 (ND Ill, 21 Jan 2010), the court upheld an agreement that required all “Arbitration Information” such as correspondence, oral discussions, and other information exchanged in the proceedings, to be kept confidential even after the proceedings end. However, absent such an agreement, parties cannot expect that documents exchanged during the arbitration proceedings will be protected.

⁸⁵ Section 14 of the Dubai International Financial Centre (“DIFC”) Arbitration Law (DIFC Law No 1 of 2008) reads as follows:

Unless otherwise agreed by the parties, all information relating to the arbitral proceedings shall be kept confidential, except where disclosure is required by an order of the DIFC Court.

as allowing the DIFC Court to determine each application for leave under section 14 according to the circumstances and merits of each case, enabling the jurisprudence of exceptions to confidentiality to be incrementally developed by case law, rather than relying only on the established precedents.

X. How have institutional rules dealt with the obligation of confidentiality?

75 In a paper published in 2005,⁸⁶ the first author advanced the argument that the common law debate about confidentiality was less important than it seemed because in practice, most arbitrations were institutional and most institutions gave some kind of protection of confidentiality. The first author made an analysis of 12 institutions as to the extent to which they protected confidentiality, and highlighted six aspects of confidentiality:

- (a) whether the rules provided for general confidentiality;
- (b) whether the rules provided for non-disclosure of existence of arbitration;
- (c) whether the rules provided for confidentiality to extend to documents used or generated in the arbitration;
- (d) whether the tribunal was bound by confidentiality;
- (e) whether witnesses were bound by confidentiality; and
- (f) whether confidentiality extended to the award.

Institution	General confidentiality	Existence of arbitration	Documents used or generated	Arbitrator	Witnesses	Award
LCIA (1998)	✓		✓	✓		✓
ICC (2012)	? (upon request of any party)					

⁸⁶ Michael Hwang SC & Lee May Ling, “Confidentiality in Arbitration: The Criteria Adopted by Institutions” (2005) 2 *Singapore Institute of Arbitrators Newsletter* 3–7.

UNCITRAL (as revised in 2010)						✓
ICSID (2006)				✓		✓
SWISS (2012)	✓		✓	✓		✓
AAA (2009)	✓	? ("all matters relating to the arbitration or the award")	? ("all matters relating to the arbitration or the award")	✓		✓
SIAC (2013)	✓	✓	✓	✓		✓
KLRC (2012)	✓	? ("all matters relating to the arbitral proceedings")	? ("all matters relating to the arbitral proceedings")	✓		✓
BANI	✓		✓	✓		✓
CIETAC (2012)	✓	? ("any substantive or procedural matters relating to the case")	? ("any substantive or procedural matters relating to the case")	✓	✓	
JCAA (2008)	✓		? (" facts related to arbitration cases or facts learned through arbitration cases")	✓		
WIPO (2009)		✓	✓	✓	✓	✓
HKIAC (2013)	✓	? (any information relating to the arbitration or an award made in the arbitration)	? (any information relating to the arbitration or an award made in the arbitration)	✓		✓
ACICA (2011)	✓	✓	✓	✓	✓	✓

76 The figure above shows the first author’s scorecard on the protection of confidentiality of the fourteen institutions as of April 2013.

77 Based on the scorecard in the figure above, most institutions had rules to cover three or four of the first author’s designated aspects of confidentiality and virtually all institutions recognised confidentiality in

some way. Unsurprisingly, in the author's first analysis in 2005, the champion was the World Intellectual Property Organization ("WIPO"), with rules⁸⁷ covering five out of six aspects, because it handles mainly intellectual property disputes and disputants in such cases value confidentiality. With the addition of the Australian Centre for International Commercial Arbitration to the author's scorecard as of April 2013, it is the only institution that covers all six aspects of confidentiality.

A. *International Chamber of Commerce*

78 Surprisingly, the International Chamber of Commerce ("ICC") Rules of Arbitration ("ICC Rules") say nothing about confidentiality. The reason is that drafters found it too difficult when they drafted the 1988 rules and the position remained the same when the 1998 rules were drafted.⁸⁸

⁸⁷ World Intellectual Property Organization Arbitration Rules (effective 1 October 2002).

⁸⁸ The Arbitration Commission decided against amending the International Chamber of Commerce ("ICC") Rules of Arbitration 1998 (entry into force 1 January 1998) ("1998 ICC Rules") to impose a duty of confidentiality in relation to ICC arbitrations because it considered that confidentiality was a matter for the parties to agree upon. See Jacob Grierson & Annet van Hooff, *Arbitrating under the 2012 ICC Rules* (Kluwer Law International, 2012) at pp 14–15. This is in line with the amendments to Art 22(3) of the ICC Rules of Arbitration 2012 (entry into force 1 January 2012) which provided that:

... upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.

According to the Secretariat of the ICC International Court of Arbitration, "the Rules take a more flexible and tailored approach, leaving the matter for the parties or the arbitral tribunal to address in light of the specific circumstances of the case": Jason Fry, Simon Greenberg & Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* (ICC, 2012) at para 3-807. This is more extensive than Art 20(7) of the 1998 ICC Rules which only provided that the arbitral tribunal "may take measures for protecting trade secrets and confidential information". Article 22(3) does not apply to the

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This was partly due to the problem of agreeing on exceptions and partly because the ICC Rules are meant for use in many countries, so it was difficult to devise a rule which would not conflict with national arbitration laws. Another problem was the lack of sanctions available.

79 However, there are some provisions in the ICC Rules that address privacy and confidentiality (to a very limited extent). Article 21(3) of the ICC Rules provides that arbitration hearings shall be held in private. The tribunal may also take measures to protect trade secrets and confidential information.⁸⁹ Further, the internal rules of the International Court of Arbitration of the ICC prevent disclosure of its proceedings. However, *United States v Panhandle Eastern Corp*⁹⁰ (“*Panhandle*”) held that these rules were neither binding on the parties nor the tribunal. Hence, the court in *Panhandle* refused to deny discovery of documents which had been filed in an ICC arbitration in a separate court action.

Although the ICC does not have express rules about confidentiality, in practice, the ICC pays great attention to confidentiality and warns its arbitrators to observe confidentiality when they are appointed. In addition, the ICC publishes sanitised accounts of their awards but will not do so if the parties object.⁹¹

B. International Centre for Settlement of Investment Disputes

80 There is no express recognition of confidentiality in the Convention on the Settlement of Investment Disputes between States and Nationals

confidentiality obligations of the court and its Secretariat. However, Art 1 of Appendix II provides that the court and its Secretariat will keep confidential all information and documents received in relation to an arbitration.

⁸⁹ International Chamber of Commerce Rules of Arbitration (entry into force 1 January 2012) Art 20(7).

⁹⁰ *United States v Panhandle Eastern Corp* 118 FRD 346 (1988).

⁹¹ It is the Secretariat's usual practice not to release a sanitised award for publication less than three years after the case in which it was rendered was closed: Jason Fry, Simon Greenberg & Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* (ICC, 2012) at para 3-1236.

of Other States,⁹² but the ICSID Rules of Procedure for Arbitration Proceedings (“ICSID Rules”) require the tribunal to respect confidentiality.⁹³ While the publication of the award as a whole remains subject to the consent of the parties,⁹⁴ the ICSID must promptly publish excerpts of the legal reasoning of an ICSID award regardless of whether the award is published as a whole.⁹⁵ The Secretary-General arranges for the publication of the award in an appropriate form with a view to furthering the development of international law in relation to investments.⁹⁶ In practice, ICSID arbitrations are widely publicised because of a great public interest in arbitrations against governments.⁹⁷

C. World Intellectual Property Organization

81 As mentioned above, the WIPO Arbitration Rules expressly provide for five out of six aspects of the first author’s scorecard on confidentiality.⁹⁸ Although there is no rule expressing the principle of confidentiality, given the five aspects of confidentiality that the WIPO Arbitration Rules already cover,⁹⁹ it could be argued that the general principle of confidentiality underpins all the Rules.

⁹² 575 UNTS 159 (18 March 1965; entry into force 14 October 1966).

⁹³ International Centre for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings (amended 10 April 2006) r 6.

⁹⁴ See also Art 48(5) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into force 14 October 1966), which requires consent of parties for publication of the award.

⁹⁵ International Centre for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings (amended 10 April 2006) r 48(4).

⁹⁶ International Centre for Settlement of Investment Disputes Administrative and Financial Regulations (amended 10 April 2006) reg 22.

⁹⁷ See, *eg*, <www.investmentclaims.com> (accessed 10 May 2013) for awards.

⁹⁸ See figure following para 75.

⁹⁹ See, *eg*, Arts 73–76 of the World Intellectual Property Organization Arbitration Rules (effective 1 October 2002).

D. Singapore International Arbitration Centre

82 In Singapore, the Singapore International Arbitration Centre (“SIAC”) Rules 2007 have the most detailed institutional rule on confidentiality in Article 34,¹⁰⁰ but this is far from perfect. Article 34 is

¹⁰⁰ Article 34 of the Singapore International Arbitration Centre (“SIAC”) Arbitration Rules (3rd Ed, 1 July 2007) reads as follows:

34. Confidentiality

34.1 The parties and the Tribunal shall at all times treat all matters relating to the proceedings, and the award as confidential.

34.2 A party or any arbitrator shall not, without the prior written consent of all the parties, disclose to a third party any such matter except:

- a. for the purpose of making an application to any competent court of any State under the applicable law governing the arbitration;
- b. for the purpose of making an application to the courts of any State to enforce or challenge the award;
- c. pursuant to the order or a subpoena issued by a court of competent jurisdiction;
- d. to a party’s legal or other professional advisor for the purpose of pursuing or enforcing a legal right or claim;
- e. in compliance with the provisions of the laws of any State which is binding on the party making the disclosure; or
- f. in compliance with the request or requirement of any regulatory body or other authority.

34.3 In this Rule, ‘matters relating to the proceedings’ means the existence of the proceedings, and the pleadings, evidence and other materials in the arbitration proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings or the award arising from the proceedings but excludes any matter that is otherwise in the public domain.

In the SIAC Rules (5th Ed, 1 April 2013), Art 35 sets out the confidentiality rules. The list of exhaustive exceptions has been amended in Art 35.2. Article 35.2 reads as follows:

35.2 A party or any arbitrator shall not, without the prior written consent of all the parties, disclose to a third party any such matter except:

- a. for the purpose of making an application to any competent court of any State to enforce or challenge the award;

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still open to criticism by providing (in effect) that the listed exceptions in Article 34.2 are exhaustive with no allowance for release from confidentiality by the tribunal or the court.

E. Hong Kong International Arbitration Centre

83 The new HKIAC Administered Arbitration Rules are applicable to international arbitrations with effect from 1 September 2008.¹⁰¹ Article 39 of the Administered Arbitration Rules¹⁰² expressly provides for

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- b. pursuant to the order of or a subpoena issued by a court of competent jurisdiction;
 - c. for the purpose of pursuing or enforcing a legal right or claim;
 - d. in compliance with the provisions of the laws of any State which are binding on the party making the disclosure;
 - e. in compliance with the request or requirement of any regulatory body or other authority; or
 - f. pursuant to an order by the Tribunal on application by a party with proper notice to the other parties.

35.3 In this Rule, 'matters relating to the proceedings' means the existence of the proceedings, and the pleadings, evidence and other materials in the arbitration proceedings and all other documents produced by another party in the proceedings or the award arising from the proceedings, but excludes any matter that is otherwise in the public domain.

¹⁰¹ The revised Hong Kong International Arbitration Centre Administered Arbitration Rules (expected to come into force 1 November 2013) will apply to arbitrations following agreements concluded after the effective date (see Art 1).

¹⁰² Article 39 of the Hong Kong International Arbitration Centre ("HKIAC") Administered Arbitration Rules (effective 1 September 2008) reads as follows:

39.1 Unless the parties expressly agree in writing to the contrary, the parties undertake to keep confidential all matters and documents relating to the arbitral proceedings, including the existence of the proceedings as well as all correspondence, written statements, evidence, awards and orders not otherwise in the public domain, save and to the extent that a disclosure may be required of a party by a legal or regulatory duty, to protect or pursue a legal right or

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to enforce or challenge an award in legal proceedings before a judicial authority. This undertaking also applies to the arbitrators, the tribunal-appointed experts, the secretary of the arbitral tribunal and the HKIAC Secretariat and Council.

39.2 The deliberations of the arbitral tribunal are confidential.

39.3 An award may be published, whether in its entirety or in the form of excerpts or a summary, only under the following conditions:

- (a) a request for publication is addressed to the HKIAC Secretariat;
- (b) all references to the parties' names are deleted; and
- (c) no party objects to such publication within the time limit fixed for that purpose by the HKIAC Secretariat. In the case of an objection, the award shall not be published.

Article 40 on confidentiality of the revised version of the HKIAC Administered Arbitration Rules (expected to come into force on 1 November 2013) reads as follows:

40.1 Unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to:

- (a) the arbitration under the arbitration agreement; or
- (b) an award made in the arbitration.

40.2 The provisions in Article 40.1 also apply to the arbitrators (including any Emergency Arbitrator appointed in accordance with 4), any tribunal-appointed expert, any secretary of the arbitral tribunal and the HKIAC.

40.3 The provisions in Article 40.1 do not prevent the publication, disclosure or communication of information referred to in Article 40.1 by a party:

- (a) (i) to protect or pursue a legal right or interest of the party; or
(ii) to enforce or challenge the award referred to in Article 40.1, in legal proceedings before a court or other judicial authority;
- (b) to any government body, regulatory body, court or tribunal where the party is obliged by law to make the publication, disclosure or communication; or
- (c) to a professional or any other adviser of any of the parties, including any actual or potential witness or expert.

40.4 The deliberations of the arbitral tribunal are confidential.

40.5 An award may be published, whether in its entirety or in the form of excerpts or a summary, only under the following conditions:

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five out of six aspects of the first author's scorecard on confidentiality and also provides that deliberations of the tribunal are confidential.¹⁰³ The obligation of confidentiality under Article 39 also applies to tribunal-appointed experts, the secretary to the tribunal, the HKIAC Secretariat and Council of the HKIAC. The UNCITRAL Arbitration Rules continue to govern unadministered international arbitrations.

84 Article 26 of the HKIAC Domestic Arbitration Rules 1993 also provides for confidentiality,¹⁰⁴ but the commentary on this provision in

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- (a) a request for publication is addressed to the HKIAC;
 - (b) all references to the parties' names are deleted; and
 - (c) no party objects to such publication within the time limit fixed for that purpose by the HKIAC. In the case of an objection, the award shall not be published.

¹⁰³ Article 40 of the revised version of the Hong Kong International Arbitration Centre Administered Arbitration Rules (expected to come into force 1 November 2013) on confidentiality no longer specifies that the existence of the arbitral proceedings is to be kept confidential. In addition, the reference to "documents relating to the arbitral proceedings" which expressly covers documents used or generated in the arbitral proceedings has been removed. Instead, the revised rules only refer to "any information" relating to the arbitration. This broader reference to "any information" arguably includes all documents relating to the arbitration including the existence of the proceedings, as well as correspondence, written statements and evidence.

¹⁰⁴ Article 26 of the Hong Kong International Arbitration Centre ("HKIAC") Domestic Arbitration Rules (1 April 1993) reads as follows: "No information relating to the arbitration shall be disclosed by any person without the written consent of each and every party to the arbitration." Article 26 of the 2012 HKIAC Domestic Arbitration Rules, which came into effect on 2 April 2012, reads as follows: "Subject to the provisions of Section 18 of the Ordinance and these Rules, no information relating to the arbitration shall be disclosed by any person without the written consent of each and every party to the arbitration." Section 18 of the Hong Kong Arbitration Ordinance (Cap 609) reads as follows:

- (1) Unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to—

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the HKIAC Revised Guide to Arbitration under the Domestic Arbitration Rules 1993 suggests that Article 26 follows the position in *Esso Australia*.¹⁰⁵ In other words, apart from the confidentiality which attaches to particular documents or classes of documents, there is no implied obligation of confidentiality.¹⁰⁶

XI. What are the possible sanctions or consequences of breach of confidentiality?

85 If there is an established rule of confidentiality applicable to an arbitration and there is a breach of that rule, what are the possible sanctions and consequences that may arise? Sanctions against breach of confidentiality are not easy to devise. A tribunal can issue an injunction against future breaches of confidentiality, but if the horse has bolted

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- (a) the arbitral proceedings under the arbitration agreement; or
 - (b) an award made in those arbitral proceedings.
- (2) Nothing in subsection (1) prevents the publication, disclosure or communication of information referred to in that subsection by a party—
- (a) if the publication, disclosure or communication is made—
 - (i) to protect or pursue a legal right or interest of the party; or
 - (ii) to enforce or challenge the award referred to in that subsection, in legal proceedings before a court or other judicial authority in or outside Hong Kong;
 - (b) if the publication, disclosure or communication is made to any government body, regulatory body, court or tribunal and the party is obliged by law to make the publication, disclosure or communication; or
 - (c) if the publication, disclosure or communication is made to a professional or any other adviser of any of the parties.

¹⁰⁵ *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* [1995] 128 ALR 391.

¹⁰⁶ With the incorporation of s 18 of the Hong Kong Arbitration Ordinance (Cap 609) into Art 26 of the Hong Kong International Arbitration Centre Domestic Arbitration Rules (2012), there is now an implied obligation of confidentiality unless the parties agree otherwise.

from the stable, such an injunction appears to be of limited value if arbitration information has been disclosed.

86 What about the consequences of past breaches? If confidentiality is considered a contractual right, then there can be a suit for damages for breach, but damages for breach of confidentiality (whether nominal or substantial) are difficult to establish (unless a liquidated damages clause is used, but the difficulties of drafting such a clause would require a separate article to explain). In Singapore, an application can be made to court for an injunction to prevent future breaches and the court can impose sanctions for such breaches (at least if the party is within the jurisdiction of the court). A further question is whether an injured party can claim repudiatory breach of contract and terminate the arbitration proceedings. However, this is rare in practice because the consequence would be that a case would have to be tried in court with no confidentiality at all.

XII. A model confidentiality clause?

87 One example of what may be a model confidentiality clause is set out in Robert Merkin & Julian Critchlow, *Arbitration Forms and Precedents*,¹⁰⁷ paragraph 1G.1.1 of which reads:

1G.1.1. Arbitration Clause providing for confidentiality
Neither party shall disclose to any third party the existence, nature, content or outcome of any arbitration, or purported arbitration, brought in respect of this Agreement. Neither shall any party disclose to any third party:

- (i) Any document prepared or procured in the course of or otherwise for the purpose of the arbitration.
- (ii) Any document prepared or procured by the other party and received in the course of or otherwise for the purpose of the arbitration.

¹⁰⁷ Robert Merkin & Julian Critchlow, *Arbitration Forms and Precedents* (Informa, Looseleaf, 2000, updated to August 2002).

- (iii) Any document received directly or indirectly from the Tribunal or any court of competent jurisdiction including, but not limited to, any direction, order or award.

Save insofar as may be necessary for the purpose of conducting the Arbitration itself, or making any application to a court of competent jurisdiction in respect of the arbitration, or for the enforcement of any order or award of the Tribunal, or of any order or judgment of the Court, or as may be required to comply with any lawful authority.

88 If this model confidentiality clause is compared to some of the provisions on confidentiality in sections 14A to 14I of the New Zealand Arbitration Act 1996, it is clear that there can be no universal confidentiality clause that can comprehensively cover the exceptions to confidentiality. For example, the criteria for the disclosure of confidential information where it is necessary for the purpose of conducting the arbitration are not set out in this confidentiality clause, but section 14C(b) of the New Zealand Arbitration Act 1996 describes circumstances where disclosure of confidential information is necessary and adds that the disclosure must at the same time be “what is reasonably required” to serve those circumstances. The model confidentiality clause also fails to provide the arbitral tribunal with the discretion to allow disclosure of confidential information in certain circumstances similar to that in section 14D of the New Zealand Arbitration Act 1996, so that the tribunal may deal with the questions concerning the disclosure of confidential information before a party applies to court for an order. In short, it is virtually impossible for a contractual confidentiality clause to be drafted so as to encompass all of the possible exceptions (including those mentioned earlier as everyday situations) and not take into account unforeseen situations where justice or expediency would require an exception to be allowed. This makes the intervention of a third party arbiter essential.

XIII. Conclusion

89 The authors’ conclusions are therefore as follows:

- (a) We need to clear our minds when addressing the question of confidentiality in arbitration to understand the different facets of

- that concept in order to understand the difficulty in defining the rules and the exceptions to those rules.
- (b) The most promising attempt to establish a complete code of confidentiality is the current New Zealand model, but it is still an imperfect code.
 - (c) The Robertson Report itself acknowledged that it was not able to provide for all the exceptions to confidentiality in section 14C, and the committee did not think it desirable or practical to set out a detailed code. In short, the most recent authoritative investigation into the problem of confidentiality has conceded that it is not possible to provide a comprehensive list of all the exceptions to confidentiality. It follows from this that the categories of exceptions are never closed.
 - (d) It also follows that all the existing statutory provisions and institutional rules providing for confidentiality are imperfect.
 - (e) Nevertheless, the New Zealand approach has introduced a practical solution to the problem of the constant discovery of new classes (as well as the modification of accepted exceptions) to suit the circumstances of the particular case. This solution is to allow the tribunal to determine on an *ad hoc* basis whether or not there should be an exception to the principle of confidentiality and the exact scope of that exception tailored to the case in question. The guidelines developed in the New Zealand legislation for the exercise of the tribunal's decision are useful in identifying the common situations where exceptions will be recognised. However, there should be residual discretion reserved to the tribunal to permit exceptions to confidentiality where the justice of the case requires or where it is otherwise appropriate to do so. This will allow the statutory exceptions to be extended or restricted or otherwise modified by individual tribunals. In short, there cannot be a "one-size-fits-all" definition of the rule or its exceptions.
 - (f) Where the tribunal cannot perform this function (*eg*, after it has become *functus officio*) then that function should be performed by the appropriate curial court.
 - (g) It may be thought that the remarks of Thomas and Collins LJJ, quoted earlier, about the lack of jurisdiction of a court to determine

whether an exception to confidentiality exists and applies could be an impediment to developing the proposed solutions. However, these remarks (i) only apply to the English Arbitration Act 1996; (ii) only apply to preclude such jurisdiction as an implied term; and (iii) do not therefore preclude an express adoption of an independent third party to resolve difficulties in identifying and defining the exceptions to confidentiality.

A. *How then should the problem be approached for the future?*

(1) Legislation

90 The New Zealand legislation is a promising start, but it needs to be modified as suggested above. While it is certainly desirable to have a clear definition of the general rule and a list of the more commonly accepted exceptions to that rule, legislators should not make the mistake of locking in the concept of confidentiality by a fixed list of exceptions.

(2) Contractual solutions

91 As a general rule, it would be too much to expect the contractual parties to draft an arbitration clause that can address all the concerns outlined in this article. The difficulties of defining the rule and its exceptions are by now well known and, given that the arbitration clause is often a “midnight clause” (*ie*, added in at the end of the contractual negotiations when neither party would like to spend much time on it), it would be more likely than not that a confidentiality clause would create more problems than it solved because of insufficient definition of the exceptions (or worse still, not providing for any exceptions) so that legitimate breaches of confidentiality would apparently be prohibited by the arbitration clause.

(3) Institutional rules

92 In general, arbitrating parties have solved the problem of confidentiality (at least in part) by adopting institutional rules and most institutional rules provide for confidentiality to a greater or lesser extent.

But we have demonstrated above that none of the institutional rules are perfect and indeed can create problems where the exceptions are insufficiently or imperfectly defined, leading to difficulties for one or both parties in protecting their legitimate interests because of the apparent inflexibility of those institutional rules.

(4) *Model clauses*

93 The only medium term solution which might address the problems set out in (2) and (3) above would be for a major arbitration research institution (such as UNCITRAL, the ICC Commission or the Chartered Institute or the International Council for Commercial Arbitration) to develop a model law or a model clause for adoption by arbitration institutions or contracting parties. This could be based on the New Zealand model, adapted in the way suggested in conclusions (1) and (6) above.

B. What should parties do in the meantime?

94 Until there is a change in the applicable laws, contractual provisions or institutional rules governing confidentiality, we suggest that the way forward for tribunals and parties to minimise the problems of confidentiality could be as follows:

- (a) The specific needs of confidentiality should be addressed at an early directions meeting by parties and/or the tribunal of its own motion and an order (ideally a consent order) be issued laying out the parameters of confidentiality applicable to the particular arbitration.
- (b) The order should provide for a blanket rule of confidentiality but allow parties to apply to the tribunal for an exception to or modification of that rule depending on the circumstances of the case, with a fallback to the court should the tribunal be unable to act (*ie*, adapting sections 14A to 14I of the New Zealand Act as appropriate).
- (c) This would in effect allow the tribunal to work as a common law court to develop sensible and fair exceptions to the blanket rule.
- (d) If institutional rules are already applicable to that tribunal, those rules should be modified by a consent order (which is the only way

that those rules could be so modified) so that the tribunal will have the residual power set out in (2) above.

- (e) Ultimately, the solution would be truly *ad hoc*, but the strength of the solution is that it will allow the parties and tribunals to cope appropriately with the myriad situations (many of which are unforeseeable) which will inevitably arise and which will need to be accommodated so as to override confidentiality to a greater or lesser extent.
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Background to Essay 4

This paper arose out of my Kaplan Lecture on Confidentiality where I foreshadowed the ultimate solution (apart from comprehensive legislation, which was unlikely and possibly not comprehensive enough) as being self-help by the parties with the assistance of the tribunal in the shape of a Model Procedural Order (“MPO”) establishing a Confidentiality Regime for each case on an *ad hoc* basis. This became the subject of my Goff Lecture (an annual Lecture series named after Lord Goff and sponsored by City University) in Hong Kong in 2010. My MPO has gained some acceptance in the arbitration universe, and Nathan D O'Malley in his book *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa, 2012) has kindly included my MPO as an appendix under the title “Hwang Model Procedural Order on Confidentiality”. My co-author was Nicholas Thio, who took over Katie Chung’s mantle as my resident consultant on confidentiality in arbitration.

I wish to extend my thanks to the *Journal of International Arbitration* for kindly granting me permission to republish this paper in this book.

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**A PROPOSED MODEL PROCEDURAL ORDER ON
CONFIDENTIALITY IN INTERNATIONAL ARBITRATION:
A COMPREHENSIVE AND SELF-GOVERNING CODE***

Michael HWANG SC[†] and Nicholas THIO[‡]

Contents

I.	Introduction	160
II.	Model Procedural Order on Confidentiality	166
III.	Legal status of a procedural order on confidentiality	169
IV.	The Model Procedural Order on Confidentiality in greater detail	179
A.	Model clauses (1) and (2)	179
B.	Model clause (3): The exceptions to confidentiality	181
	(1) Model clause (3)(a)	181
	(2) Model clause (3)(b)	183
	(3) Model clause (3)(c)	183
	(4) Model clause (3)(d)	184
	(5) Model clause (3)(e)	185
	(6) Model clause (3)(f)	186
	(7) Model clause (3)(g)	189
	(8) Model clause (3)(h)	189
	(9) Model clause (3)(i)	190
C.	Model clauses (4) and (5)	192
D.	Model clause (6)	194
E.	Model clause (7)	198
F.	Model clause (8)	204
G.	Model clause (9)	205
V.	Conclusion	208

* This article is based on the Goff Lecture delivered by the principal author on 7 December 2010 at the City University of Hong Kong. For the presentation slides, see Michael Hwang SC, “Model Procedural Order on Confidentiality (Goff Lecture 2010)” (2011) 8(2) TDM.

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The obligation of confidentiality and the scope of its exceptions is one of the intractable problems in international arbitration because there is no uniformity of practice among national laws and also the rules of arbitral institutions. The problem with the latter is also that although many institutional rules provide for the confidentiality of the proceedings, virtually all have framed the exceptions to confidentiality in absolute terms, with no referee to decide when a particular exception applies or when a new exception ought to be created. The centrepiece of this article is a Model Procedural Order on confidentiality which is designed as a framework to address, among other things, that defect. Based on a survey of the rules of the various arbitral institutions, it also sets out in a practical manner the various situations in which an exception to confidentiality may need to be invoked, thus making it suitable for implementation as a customisable solution to confidentiality (since the Model Procedural Order is in the form of a template which may be tailored to meet the particular requirements of the case) in either *ad hoc* arbitrations or where the provisions on confidentiality contained within the rules of the arbitral institution are replaced wholesale. The Model Procedural Order raises important legal issues associated with its implementation for consideration – these include questions going to the jurisdiction of the arbitral tribunal to make procedural directions directing the preservation of confidentiality upon terms, whether parties continue to be bound by the arbitral tribunal’s directions on confidentiality even after the termination of the arbitration and the limit of the powers of the arbitral tribunal to sanction breaches of confidentiality. These and other concerns are addressed below.

I. Introduction

1 In an article previously written by the principal author and Katie Chung, “Defining the Indefinable: Practical Problems of Confidentiality in Arbitration” (*Defining the Indefinable*),¹ it was explained, after a review of the law of confidentiality in arbitration in various jurisdictions around the world, that the scope of the duty of confidentiality in arbitration is

¹ Michael Hwang SC & Katie Chung, “Defining the Indefinable: Practical Problems of Confidentiality in Arbitration” (2009) 26(5) *J Int Arb* 609.

problematic in the sense that there are very few definitions of the duty at the legislative and institutional levels (*ie*, in the rules of the various arbitral institutions worldwide). For this reason, the International Law Association, in its report on this topic, made (among other things) the following finding:²

Many users of international commercial arbitration assume when choosing arbitration that arbitration is inherently confidential. This assumption is not warranted because many national laws and arbitral rules do not currently provide for confidentiality and those that do vary in their approach and scope (including the persons affected, the duration and the remedies).

2 It is hoped that the reader would have taken away the following key points or themes from *Defining the Indefinable* (which form the basis and provide the *raison d'être* of the present article).

(a) It is well-established that at common law (at least in England and Singapore),³ there is an implied duty of confidentiality. The problem is not so much in defining the obligation of confidentiality in arbitration itself, but rather in defining the exceptions to that duty of confidentiality where such a duty is recognised by the law of the seat of arbitration.⁴

² International Law Association, “Confidentiality in International Commercial Arbitration” The Hague Conference (2010) at p 19.

³ See *AAZ v AAZ* [2011] 1 SLR 1093, a landmark decision of the High Court of Singapore in which the court conducted a comprehensive review of the common law jurisprudence on the duty of confidentiality in arbitration and the scope of its exceptions. It was held there that the implied duty of confidentiality in arbitration applies (as a default rule) at common law to all arbitrations seated in Singapore, unless the parties have expressly provided for the confidential nature of their arbitration in the arbitration agreement or through the applicable arbitration rules, in which case those provisions would govern.

⁴ See International Law Association, “Confidentiality in International Commercial Arbitration” The Hague Conference (2010) at p 16:

Even where an obligation of confidence does exist, it will normally be subject to exceptions. All rules on confidentiality, whether contained in

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- (b) The main reasons for this are that: (i) it is difficult in practice to find a universally acceptable solution (indeed, there is no general consensus); and (ii) it is (by definition) impossible to define, in a comprehensive or exhaustive manner, all the potential exceptions to confidentiality that may arise in situations in the future.⁵
- (c) It follows from this that the categories of exceptions to confidentiality are never closed. This means that a court or arbitral tribunal determining the issue of potential disclosure ought to consider the particular circumstances of the case to determine whether an exception to the principle of confidentiality should apply, or if disclosure should nevertheless be permitted on an *ad hoc* basis.
- (d) Where the arbitral tribunal cannot perform this function (*eg*, after it has become *functus officio*), that function should be performed by the appropriate court at the seat of the arbitration.
- (e) Following from (b) and (c) above (and in the absence of any comprehensive clause on confidentiality embedded in the applicable arbitration rules addressing these issues), it is proposed that the only sensible solution for now would be for the specific needs of confidentiality in each case to be addressed at an early stage by means of a meeting between the parties and the arbitral tribunal,

statutes, arbitral rules or in the pronouncements of courts, contemplate exceptions to the duty, although there is less agreement as to what the exceptions are and as to their scope. Actually, the difficulty in defining the exceptions is one of the reasons given to explain why certain legislators and arbitral institutions have so far abstained from adopting rules on the subject.

⁵ See Michael Hwang SC & Katie Chung, "Defining the Indefinable: Practical Problems of Confidentiality in Arbitration" (2009) 26(5) *J Int Arb* 609 at 612. It was held by the English Court of Appeal in *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] Bus LR 1361; [2008] EWCA Civ 184 that although there are established exceptions to the duty of confidentiality in arbitration where disclosure would be permissible, the content of the obligation of confidentiality in arbitration may depend on the context in which it arises and on the nature of the information or documents in question; accordingly, the limits of the obligation are still in the process of development on a case-by-case basis.

and for a custom-made solution to be implemented by means of a procedural order on confidentiality handed down by the arbitral tribunal.⁶

- (f) The order should provide for a blanket rule of confidentiality, while at the same time allowing the parties to apply to the arbitral tribunal for an exception to or modification of that rule depending on the circumstances of the case, with a fallback to the court should

⁶ The International Law Association makes the same recommendation – see “Confidentiality in International Commercial Arbitration” The Hague Conference (2010) at p 20:

In the absence of contractual provisions on confidentiality, arbitrators should consider drawing the attention of the parties to confidentiality and, if appropriate, addressing the issue in terms of reference or a procedural order at the outset of the proceedings.

See also United Nations Commission of International Trade Law, *Notes on Organizing Arbitral Proceedings* <<http://www.cnudmi.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf>> (accessed 8 March 2013):

... there is no uniform answer in national laws as to the extent to which the participants in an arbitration are under the duty to observe the confidentiality of information relating to the case. Moreover, parties that have agreed on arbitration rules or other provisions that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognize an implied commitment to confidentiality. Furthermore, the participants in an arbitration might not have the same understanding as regards the extent of confidentiality that is expected. Therefore, the arbitral tribunal might wish to discuss that with the parties and, if considered appropriate, record any agreed principles on the duty of confidentiality.

Article 22(3) of the new International Chamber of Commerce Arbitration Rules (entry into force 1 January 2012) also contemplates this possibility, although it does not appear to clothe the tribunal with any additional powers or authority which would not otherwise exist in the absence of this provision. It states as follows:

Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.

the arbitral tribunal be unable to act. This would, in effect, allow the arbitral tribunal to operate as a common law court to develop sensible and fair exceptions to the blanket rule.

- (g) If institutional rules containing provisions on confidentiality are already applicable, those rules would have to be modified by a consent order (which is the only way that those rules may be so modified) so that the arbitral tribunal would have the residual or inherent power to conduct the proceedings as described in (e) above. In this regard, it is noted that although arbitral institutes, in their arbitration rules, generally provide to some extent for confidentiality, the exact provisions vary significantly.⁷ Consequently, there is no uniformity of practice⁸ and they all suffer from one defect, which is that the exceptions are framed in absolute terms with no arbiter to decide when the exception does or does not apply.⁹
- (h) In sum, the only way to create a comprehensive and self-governing confidentiality regime is to design one. What is needed is a form of code on confidentiality by which the parties to the arbitration will be bound. The points in (e) and (f) above are most easily and best

⁷ See Michael Hwang SC & Katie Chung, "Defining the Indefinable: Practical Problems of Confidentiality in Arbitration" (2009) 26(5) *J Int Arb* 609 at 637–641.

⁸ See International Law Association, "Confidentiality in International Commercial Arbitration" *The Hague Conference* (2010) at p 3:

The solutions adopted by national legislators and courts and by arbitral institutions vary substantially and today there is no uniform approach regarding confidentiality in commercial arbitration. Often the issue is addressed directly by the parties in their agreements. Consequently, whether some or all aspects of any given arbitration engage confidentiality obligations varies considerably depending on the arbitration agreement, the substantive contract in dispute, the applicable rules of arbitration and the applicable laws.

⁹ The only exception is Art 35.2(f) of the Arbitration Rules of the Singapore International Arbitration Centre (4th Ed, 1 July 2010), which allows an arbitrating party to disclose matters relating to the arbitration if authorised to do so by an order of the tribunal made on application by a party with proper notice to the other parties.

addressed by crafting a procedural order on confidentiality binding on the parties by their mutual consent (for the reason given in (g) above).¹⁰ This would be a truly bespoke or custom-made solution, tailored to the individual circumstances of the dispute in question. The strength of this solution is that it would allow the parties and arbitral tribunals to deal appropriately with the myriad situations (many of which are unforeseeable) which will inevitably arise and which will need to be accommodated so as to override the default confidentiality regime, to a greater or lesser extent.

3 The subject of this article, and what follows immediately below, is therefore a proposed Model Procedural Order on Confidentiality (“MPO”),¹¹

¹⁰ A contractual solution to confidentiality in arbitration was considered in Michael Hwang SC & Katie Chung, “Defining the Indefinable: Practical Problems of Confidentiality in Arbitration” (2009) 26(5) J Int Arb 609 at 644, but it was said there (and also maintained here) that it would be highly unrealistic to expect contractual parties to draft an arbitration clause that would address all the concerns raised above. Indeed, if arbitration clauses are “midnight clauses” then any clause on confidentiality would have to be relegated to become the “dawn clause”. In short, it would not be practical to expect transactional lawyers to be able to draft a satisfactory clause on confidentiality when they are unlikely to understand the law sufficiently to be able to foresee all the scenarios which might present themselves during the life of an arbitration.

¹¹ Two Commonwealth countries, *viz*, Australia and New Zealand, have introduced statutory codes on confidentiality in arbitration which are intended to be comprehensive in nature, but only apply locally (*ie*, where Australia or New Zealand is designated as the seat of the arbitration). In New Zealand, see ss 14A to 14I of the Arbitration Act 1996 (1996 No 99) (introduced with effect from October 2007); in Australia, see ss 23C to 23G of the International Arbitration Act 1974 (Act No 136 of 1974) (introduced with effect from July 2010). In New Zealand, the provisions on confidentiality apply to every arbitration seated there unless the parties agree otherwise (*ie*, on an opt-out basis), whereas for an arbitration seated in Australia, the position is the reverse and the relevant provisions apply only if the parties so agree (*ie*, on an opt-in basis). In Hong Kong, similar (but
(continued on next page)

intended as a starting point as described in (e) above, which may then be modified on a case-by-case basis, depending on the degree or extent of confidentiality required and the other requirements of the case.

4 It is suggested that the best time for setting a customised confidentiality regime is usually after the close of pleadings when the issues are known, and the parties have had the chance to consider which aspects of the arbitration need to remain confidential (and how such confidentiality ought to be protected). Indeed, this might well be the only practical time when the parties can properly address the requirements of a confidentiality regime that would be binding on both sides.

5 There is no reason in theory why parties should not, as between themselves, agree on a form of confidentiality agreement or consent order; but in practice, this is much more easily done with the guidance of an experienced arbitrator who starts with a template, and who then discusses with the parties how much of it is appropriate for the case at hand. The arbitral tribunal can then proceed to issue a procedural order to establish the applicable confidentiality regime using the template with such modifications as the particular case might require.

II. Model Procedural Order on Confidentiality

6 Set out below is the MPO in its entirety, followed by a brief explanation of its legal context and a commentary on its individual provisions.

- (1) Except as the parties expressly agree in writing (whether in the arbitration agreement or otherwise) or leave is given by the Arbitral Tribunal, the parties undertake to keep confidential all Confidential Information. [Additionally, the provisions of this Procedural Order shall continue in force notwithstanding the termination of the arbitration.]

less detailed) provisions are to be found in s 18 of the Arbitration Ordinance (Cap 609).

- (2) In this Procedural Order, “Confidential Information” is defined as information that relates to the proceedings or to an award made in the proceedings and includes:
 - (a) the existence of the proceedings;
 - (b) the statement of claim, statement of defence, and all other pleadings, submissions, and statements;
 - (c) any evidence (whether documentary or other) supplied to the Arbitral Tribunal;
 - (d) any notes made by the Arbitral Tribunal of oral evidence or submissions given before the Arbitral Tribunal;
 - (e) any transcript of oral evidence or submissions given before the Arbitral Tribunal;
 - (f) any rulings of the Arbitral Tribunal; and
 - (g) any award of the Arbitral Tribunal,but excludes any matter that is otherwise in the public domain.
- (3) Subject to (4) below, a party may disclose Confidential Information –
 - (a) for the purpose of making an application to any competent court of any State to recognise, enforce or challenge the award;
 - (b) pursuant to the order of, or a subpoena issued, by a court of competent jurisdiction;
 - (c) for the purpose of pursuing or enforcing a legal right or defending a claim;
 - (d) where disclosure is made to a third party for the purpose of satisfying any legal obligation of disclosure owed (under any applicable law) to that third party;
 - (e) in compliance with the request or requirement of any competent regulatory body or other authority;
 - (f) where disclosure is necessary to ensure that a party to the arbitral proceedings has a full opportunity to present its case and the disclosure is no more than reasonable for that purpose (which may include disclosure to legal and other professional advisers as well as potential witnesses and other persons assisting in the preparation of the case);
 - (g) if a party wishes to disclose information or documents already in that party’s possession prior to the commencement of the arbitration;
 - (h) with the consent of all the other parties to the arbitration; or
 - (i) pursuant to an order by the Arbitral Tribunal on application by a party with proper notice to the other parties.
- (4) Before a party discloses Confidential Information as authorised in (3) above, that party must provide to the other party/parties

seven (7) days' prior written notice of its intention to disclose, giving:

- (a) written details of the Confidential Information to be disclosed;
- (b) the party/parties to whom disclosure is intended to be made; and
- (c) the reasons for the disclosure.

Provided that, where the disclosure of Confidential Information is sought to be made pursuant to (3)(f) above, the information to be furnished to the other party need only contain a general description of the Confidential Information sought to be disclosed and the classes of persons of persons to whom description is to be made (without identification of those persons). The disclosing party must use its best endeavours to obtain an undertaking of confidentiality, given in favour of the party opposing disclosure, from any individual or entity to whom disclosure of any Confidential Information may be made. The terms of such undertaking shall be agreed in advance of such disclosure by the party opposing disclosure (who shall not be entitled to the names of the parties to whom disclosure is to be made). If there is a dispute in relation to the terms of the undertaking, this shall be referred to the Arbitral Tribunal for determination. If no such undertaking of confidentiality can be obtained, seven (7) days' notice shall be given to all other parties identifying the individual or entity concerned. If any objection is raised by any other party within the period of notice, the matter shall be referred to the Arbitral Tribunal to determine the extent of the Confidential Information that may be disclosed and any other steps that should be taken to preserve confidentiality.

Provided always that all the requirements of this clause (4) shall not apply in the following situations:

- (a) where disclosure of Confidential Information is made pursuant to (3)(a) above; or
 - (b) where the party seeking to disclose Confidential Information obtains the written consent (both to the particulars and extent of Confidential Information which is sought to be disclosed) of all other parties to the arbitration to do so.
- (5) If the other party/parties object(s) to disclosure pursuant to (4) above within the period of seven (7) days, no disclosure may be made until the issue has been resolved by the Tribunal in the manner set out in (6) below.
 - (6) If a question arises in the arbitral proceedings as to whether any Confidential Information should be disclosed, and at least one of the parties requests for the Arbitral Tribunal to

determine that question, the Arbitral Tribunal, after giving each of the parties an opportunity to be heard, may in its discretion make or refuse to make an order allowing all or any of the parties to disclose Confidential Information.

- (7) After the Arbitral Tribunal has become *functus officio*, its functions under this Procedural Order shall be exercised by the appropriate supervisory court at the seat of the arbitration.
- (8) These orders shall replace the provisions of Rule ** of [the applicable institutional rules].
- (9) The Arbitral Tribunal has the power to take appropriate measures including making an order to pay damages or costs if a party breaches any of the provisions of this Procedural Order.

III. Legal status of a procedural order on confidentiality

7 One issue which might arise at the outset is whether the consent of (either or both) the parties is required for the MPO to be binding on them. In principle, this should not be necessary since procedural orders are conventionally understood to be decisions of an arbitral tribunal (often dealing with administrative and logistical matters) that are given after considering the respective positions of the parties, and which may go against the wishes of one party and in favour of the other, even though they are not denominated as awards of any sort.¹² However, in the case of institutional arbitration (or where the rules of arbitration have been agreed by the parties in advance and contain provision(s) on confidentiality), it would be necessary for the reason given in (g) above to have the consent of both parties to model clause (8).¹³ The issue of consent may present less difficulty in practice than in theory. It is suggested that any preliminary meeting between the arbitral tribunal and the parties in this regard ought to be consultative in nature since an astute arbitral tribunal would have, foremost on its mind, the following consideration: “what are the confidentiality requirements that would

¹² See Gary Born, *International Commercial Arbitration* vol II (Kluwer Law International, 2009) at p 2354.

¹³ See commentary on model clause (8) below at para 60.

best serve the common interests of the parties in the present case?”¹⁴ When framed as such, it is more likely that the parties will actually agree to (and therefore abide by) any procedural order on confidentiality eventually issued.

¹⁴ See Meg Kinnear & Aïssatou Diop, “Use of the Media by Counsel in Investor-State Arbitration” in *ICCA Congress Series No 15, Rio (2010): Arbitration Advocacy in Changing Times* (Albert Jan van den Berg ed) (Kluwer Law International, 2011) at p 48–49: *Biwater Gauff v Tanzania* ICSID Case No ARB/05/22 (a dispute concerning the cancellation of a contract for water in Dar Es Salaam, Tanzania) is an example of a case where the tribunal adopted a customised solution which partially addressed the interests of both parties. Both parties complained to the tribunal that the opposing party had launched media campaigns which aggravated the dispute and undermined its procedural integrity. The claimant sought a provisional order on confidentiality, asking that the parties discuss all publications on a case-by-case basis and that they refrain from publishing pleadings, documents and correspondence in respect of the arbitration except by mutual agreement. In its Procedural Order No 3 dated 29 September 2006, the tribunal recognised the following considerations:

- (a) there was a need to balance the transparency of the proceedings with the procedural integrity of the arbitration;
- (b) there is no general duty of confidentiality in International Centre for Settlement of Investment Disputes arbitration absent an agreement between the parties on the issue; and
- (c) actual harm need not be established to justify a provisional order regulating the disclosure of information in the arbitration; accordingly, some form of control would be warranted where a sufficient risk of harm or prejudice exists.

Based on these considerations, the tribunal ruled as follows: it (a) allowed the parties to publish their own documents and the tribunal’s decisions as long as these did not exacerbate the dispute; (b) refused to allow the publication of documents produced by the opposing party and of correspondence between the parties; and (c) allowed general discussion about the case in public so long as such discussion was not used to antagonise the parties, exacerbate their differences, unduly pressure either party or render resolution of the dispute more difficult.

8 However, the more interesting issue is a conceptual one, *viz*, does the arbitral tribunal have the jurisdiction and power to prohibit or allow future disclosures of matters and documents raised in the arbitration to third parties? Here, an important distinction has to be drawn between the following: (a) a provision on confidentiality in the underlying contract between the parties; and (b) the issue of disclosure arising as a result of the arbitration clause under which the parties arbitrate. In the case of (a), it is clear that the arbitral tribunal would be restricted by the parties' agreement and cannot (by way of a procedural order or otherwise) prohibit or allow future disclosures to third parties (*ie*, anyone other than the contracting parties themselves) beyond or contrary to what the parties have agreed. In the case of (b), this is likely to fall within the jurisdiction of the arbitral tribunal because the issue of such disclosure would not arise but for the fact of the arbitration itself. It is generally accepted that the procedural jurisdiction of the arbitral tribunal extends to all matters in connection with the reference to arbitrate,¹⁵ *ie*, every arbitral tribunal has the inherent power to govern the manner in which the arbitration is conducted.¹⁶ It is therefore only a logical extension (and application) of this principle that the arbitral tribunal should be able to lay down rules governing (at least for the duration for the arbitration) the regime of disclosure to third parties. In other words, matters coming under (b) above are only candidates for confidentiality by reason of them being raised in the arbitration; therefore, it follows that it must be within the arbitral tribunal's jurisdiction to hold (even against one party's wishes) that such matters will be confidential upon such terms as the arbitral tribunal sees fit.

¹⁵ See Simon Crookenden QC, "Who Should Decide Confidentiality Issues?" (2009) 25(4) *Arb Int'l* 603 at 608.

¹⁶ In England, this power is to be found in s 34 of the English Arbitration Act 1996 (c 23); in Singapore, see Art 19(2) of the UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006), which has the force of law by virtue of s 3(1) of the International Arbitration Act (Cap 143A, 2002 Rev Ed).

9 That the arbitral tribunal has the power to regulate the conduct of its own proceedings is, for present purposes, subject only to two general limitations: (a) any laws of the seat or laws of other countries which would otherwise have mandatory application in the instant case; and (b) any rules which the parties have agreed are to bind the arbitral tribunal. The second is self-explanatory and commonly includes the rules of arbitral institutions, which are typically incorporated by reference in the agreement to arbitrate.¹⁷ The primacy of the law of the seat is well-established, and was described in the following terms by the International Law Association in its report:¹⁸

The first law to consider in order to determine the existence of confidentiality obligations will usually be the law of the seat of the arbitration, since this law governs most aspects relating to the conduct of the arbitration and the duties of the parties and the rights and duties of the arbitrators. The law of the seat is arguably the first source of the rules dictating the extent to which the parties, and where relevant the arbitral institution, are free to lay down specific rules on the subject as well as the default rules governing confidentiality in the absence of party agreement.

10 It was also recognised by the International Law Association in its report that, in addition to the law of the seat, the laws of other jurisdictions would have to be taken into account in certain situations where they would apply mandatorily:¹⁹

Regardless of the confidentiality regime of the law of the seat of the arbitration and of the law governing the arbitration confidentiality agreement, confidentiality obligations may often be affected by the laws of other countries, particularly when it comes to mandatory exceptions to confidentiality. The law governing the corporate obligations of a party, the law of country where a party's securities are traded or where a party is engaged in certain types of activities

¹⁷ See commentary on model clause (8) below at para 60.

¹⁸ International Law Association, "Confidentiality in International Commercial Arbitration" The Hague Conference (2010) at p 11.

¹⁹ International Law Association, "Confidentiality in International Commercial Arbitration" The Hague Conference (2010) at p 12.

or transactions or regulatory obligations and, of course, the law of the place of enforcement of the award are some obvious examples.

11 One example of a case where procedural directions on confidentiality made by an arbitrator were set aside by the courts at the place where the arbitration was seated is *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (“Cockatoo Dockyard”).²⁰ There, the Commonwealth sued Cockatoo Dockyard Pty Ltd (“Cockatoo Dockyard”), claiming that it had breached a lease granted to it to keep, maintain and yield up Cockatoo Island (located near Sydney) in good repair and condition. The Commonwealth claimed that it was entitled to damages from Cockatoo Dockyard based on the cost of repairing the island to a standard suitable for future residential use. The case was referred to arbitration pursuant to the parties’ agreement, and Cockatoo Dockyard applied to the arbitrator for directions to secure the confidentiality of documents relevant to the arbitration. This application was resisted by the Commonwealth, which challenged the arbitrator’s power to make the directions sought. The arbitrator subsequently made a blanket confidentiality order in the following terms (subject to a *proviso* allowing disclosure to the parties’ legal advisers, *etc*):

1. Direct that neither party to the proceedings disclose or grant access to:
 - (a) any documents or other material prepared for the purposes of this arbitration;
 - (b) any documents or other material, whether prepared for the purposes of this arbitration or not, which reveal the contents of any document or other material which was prepared for the purposes of this arbitration;
 - (c) any documents or material produced for inspection on discovery by the other party for the purposes of these proceedings;
 - (d) any documents or material filed in evidence in these proceedings.

²⁰ (1995) 36 NSWLR 662.

12 It was ordered by the Court of Appeal of New South Wales²¹ that procedural directions numbers 1(a), 1(b) and 1(d) (above) on confidentiality issued by the arbitration be set aside on the grounds that the arbitrator had no power to issue the said directions. Kirby P (with whom Priestley JA agreed on these points) held that, by making the said procedural directions, the arbitrator “failed to take into account the limits of the procedural powers afforded to him both by the contract and by s 14 of the [Commercial Arbitration Act 1984²²]”.²³ Whilst Kirby P’s reasoning is couched in the language of an arbitrator having acted in excess of his jurisdiction, it is clear that the directions issued by the arbitrator were unlawful because the arbitrator failed to have proper regard to the public interest considerations which arose in that case.²⁴

Where an arbitrator, in the course of giving a procedural direction, goes beyond the establishment of procedures necessary for the commercial arbitration between the parties and makes orders which impinge upon the public’s legitimate interests, the arbitrator goes outside the arbitration ... where the Court concludes that the direction made has gone beyond the purpose of the arbitration proceedings, and is thus extra-jurisdiction and unlawful, it will, in a proper case, provide relief. In my view, this is such a case.

... In my view, [the order made by the arbitrator] is impermissibly wide. ... Effectively, it puts a lid on the direct or indirect use of material prepared for the arbitration, no matter how significant that material may be to the public at large. For all this Court knows, it is both significant and urgent that the material should be made available, for the protection of public health and the restoration of the environment, both to the State Environmental Protection Authority and to other Federal and State agencies or even to the public generally.

²¹ Comprising Kirby P, Priestley JA and Meagher JA (dissenting).

²² Act 160 of 1984.

²³ *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662 at 680.

²⁴ *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662 at 679–681.

... The arbitrator's directions go beyond the control of the use of documents produced under the obligations of the arbitration. They extend to controlling the use by the Commonwealth of its own documents. They had the effect of limiting the operation of the Freedom of Information Act in a way which is contrary to, and in my view larger than, that envisaged by s 46 of that Act. They purport to remove from public debate matters of legitimate public concern.

13 Some of these considerations were also foreshadowed in the slightly earlier decision of the High Court of Australia in *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)*,²⁵ where it was recognised that competing public interest values might prevent certain kinds of disputes from being kept confidential (although this discussion did not take centre stage in that case because the remarks in question were made by way of *obiter dicta*).²⁶

14 The *Cockatoo Dockyard* case involved the setting aside by the courts at the seat of arbitration of procedural directions made by an arbitrator in excess of his jurisdiction and powers.²⁷ However, it is submitted that the facts of the case also lend themselves to the possibility of an arbitral tribunal seated outside of Australia having to consider the effects of the Freedom of Information Act²⁸ and any other laws (whether contained in

²⁵ (1995) 128 ALR 391.

²⁶ *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* (1995) 128 ALR 391 at 402–403, *per* Mason CJ; and 407–408, *per* Brennan J.

²⁷ One noted commentator has interpreted the decision in *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662 as standing for the proposition that “arbitral tribunals do not have jurisdiction to lay down rules as to confidentiality that are to apply to the particular arbitration”: see Simon Crookenden QC, “Who Should Decide Confidentiality Issues?” (2009) 25(4) *Arb Int'l* 603 at 604. It is suggested that the better view is that this case does not establish a blanket rule (*ie*, one which prohibits a tribunal from making procedural rulings on confidentiality) as such, but merely demonstrates that such directions may be set aside where they are contrary to the law of the seat of arbitration or the laws of another jurisdiction which would have a mandatory effect on one or more of the parties.

²⁸ Act No 3 of 1982.

statute or otherwise) which would be binding on or otherwise constrain the actions of an Australian public sector party to the arbitration. On that basis, similar orders on confidentiality made by a foreign seated arbitral tribunal (even if contained in an award) would still not be recognised and enforced in Australia since the same public interest considerations would arise. For the foregoing reasons, the application of a tight confidentiality regime is likely to be neither practical nor lawful in the vast majority of cases where public sector parties are concerned. Any directions or orders on confidentiality in such a situation would have to make provision (whether by way of exceptions to the rule of confidentiality or otherwise) for any mandatorily applicable laws. In practice, most national legal systems would compel disclosure of particular aspects of the arbitration (including its existence and outcome) where public sector or government organisations (and even listed companies) are involved – model clauses (3)(d) and (3)(e) of the MPO already contemplate the possibility that such disclosure may have to be made by a party to the arbitration, either spontaneously or upon request from an appropriate authority.

15 In sum, our conclusion is that in the absence of:

- (a) any positive or mandatory law which would prevent an arbitral tribunal from declaring that confidentiality shall govern its proceedings (or particular aspects of it); and
- (b) any provisions on confidentiality contained within the rules of the arbitral institution to which the parties have agreed (and assuming the parties have not agreed to waive their application),

an arbitral tribunal may direct that confidentiality shall govern its proceedings.

16 The next question which logically arises for consideration is whether the law of the seat would prohibit or otherwise constrain an arbitral tribunal from granting an exception to its own order directing the preservation of confidentiality. We answer this question in the negative. First, a typical procedural order directing the preservation of confidentiality would (from its inception) contain exceptions within that order (as is the case with the MPO), so confidentiality is effectively directed upon terms.

Second, national laws on confidentiality in arbitration are (with a few exceptions)²⁹ generally undeveloped,³⁰ so (subject to exceptions) it is difficult to conceive of any national law that would preclude an arbitral tribunal from giving permission to a party to the arbitration to disclose information to a third party.³¹ As an example, in England (and also in Singapore, where the English common law position has been followed),³² case law has established that there is an implied term of confidentiality in the agreement to arbitrate which is subject to certain exceptions – in this regard, it has been observed by the English Court of Appeal in *John Forster Emmott v Michael Wilson & Partners Ltd*³³ (“*Emmott*”) that “disputes about [the limits of the obligation of confidentiality in arbitration] are within the scope of the arbitration agreement and should be determined by the arbitral tribunal”.³⁴ As is apparent from the following passage in *Emmott*, this is understood to mean that the arbitral tribunal would in fact be working as a common law court in defining the limits and exceptions to the obligation of confidentiality in any particular case (and would therefore have the power to authorise disclosure in accordance with the law of the seat, *ie*, English law):³⁵

It follows from this way of developing the law through implied obligations, that a dispute in relation to scope of the implied term of confidentiality and privacy between the parties relates to the interpretation of the terms of the arbitration agreement, in exactly the same way as would a dispute over the scope of an express term incorporated for example through an institutional rule. ... It follows

²⁹ See n 11 above.

³⁰ See International Law Association, “Confidentiality in International Commercial Arbitration” The Hague Conference (2010), Annex 1, “A. Summary of National Laws”.

³¹ There may of course be laws relating to national security or official secrecy which might prevent such disclosure.

³² See n 3 above.

³³ [2008] EWCA Civ 184; [2008] Bus LR 1361.

³⁴ *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] Bus LR 1361 at 1380; [2008] EWCA Civ 184 at [84], *per* Lawrence Collins LJ.

³⁵ *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] Bus LR 1361 at 1387–1388; [2008] EWCA Civ 184 at [119], *per* Thomas LJ.

from this that the decision on the ambit of the obligations as between the parties to the arbitration agreement should ordinarily, during the currency of the arbitration, primarily be one for the arbitral tribunal.

17 Finally, for the avoidance of doubt, although an English or Singaporean arbitral tribunal is unlikely to have the power or a free hand to override the implied obligation of confidentiality in the sense of creating new exceptions (in advance of an application by a party based on specific facts before the arbitral tribunal) where none currently exists,³⁶ the exceptions to the confidentiality rule set out in model clause (3) are likely to be in compliance with the law since they are based on the pre-existing exceptions to confidentiality already recognised in England (and Singapore),³⁷ and merely present the latter in a practical manner.

³⁶ See Michael Hwang SC & Katie Chung, "Defining the Indefinable: Practical Problems of Confidentiality in Arbitration" (2009) 26(5) J Int Arb 609 at 622: "[T]he question remains as to whether or not a court or tribunal order for disclosure overrides the obligation of confidentiality."

³⁷ See *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 at 326–327, *per* Potter LJ:

English law has recognised the following exceptions to the broad rule of confidentiality: (i) consent, that is, where disclosure is made with the express or implied consent of the party who originally produced the material; (ii) order of the court, an obvious example of which is an order for disclosure of documents generated by an arbitration for the purposes of a later court action; (iii) leave of the court [and] (iv) disclosure when, and to the extent to which, it is reasonably necessary for the protection of the legitimate interests of an arbitrating party. In this context, that means reasonably necessary for the establishment or protection of an arbitrating party's legal rights *vis-à-vis* a third party in order to found a cause of action against that third party or to defend a claim, or counterclaim, brought by the third party.

See also Michael Hwang SC & Katie Chung, "Defining the Indefinable: Practical Problems of Confidentiality in Arbitration" (2009) 26(5) J Int Arb 609 at 612.

Each of the nine exceptions to confidentiality set out in model clause (3) is considered individually below.

IV. The Model Procedural Order on Confidentiality in greater detail

A. Model clauses (1) and (2)

- (1) Except as the parties expressly agree in writing (whether in the arbitration agreement or otherwise) or leave is given by the Arbitral Tribunal, the parties undertake to keep confidential all Confidential Information. [Additionally, the provisions of this Procedural Order shall continue in force notwithstanding the termination of the arbitration.]
- (2) In this Procedural Order, “Confidential Information” is defined as information that relates to the proceedings or to an award made in the proceedings and includes:
 - (a) the existence of the proceedings;
 - (b) the statement of claim, statement of defence, and all other pleadings, submissions, and statements;
 - (c) any evidence (whether documentary or other) supplied to the Arbitral Tribunal;
 - (d) any notes made by the Arbitral Tribunal of oral evidence or submissions given before the Arbitral Tribunal;
 - (e) any transcript of oral evidence or submissions given before the Arbitral Tribunal;
 - (f) any rulings of the Arbitral Tribunal; and
 - (g) any award of the Arbitral Tribunal,but excludes any matter that is otherwise in the public domain.

18 These are the basic provisions of the MPO which establish and define the obligation of confidentiality. Model clauses (1) and (2) need to be read together since the first states the duty of confidentiality and the second defines the scope or breadth of that duty (*ie*, to which documents and materials the duty of confidentiality extends).

19 The last sentence of model clause (1) (enclosed in square brackets above) contemplates that the provisions of the MPO are to continue to bind the parties to the arbitration even after its termination. However, this wording is optional and should only be used in the case where the MPO is adopted with the consent of the parties – only in that situation would all the provisions of the MPO continue to remain in force (since the

MPO would then be binding by virtue of mutual agreement). In all other cases (*ie*, where the MPO is not adopted by consent), alternative steps³⁸ would have to be taken to ensure that the provisions in the MPO remain binding on the parties subsequent to the termination of the arbitration.

20 Model clause (2), in its present form as shown above, provides for the maximum scope of confidentiality over the materials that would be generated in the course of the arbitration. It is adapted from Article 35.3 of the Arbitration Rules of the Singapore International Arbitration Centre³⁹ (“SIAC Rules”) and section 15(1) of the Australian International Arbitration Act 1974 as amended in 2010⁴⁰ (“IAA 1974”). However, a high degree of confidentiality is not always sought by the parties or required by the circumstances of the dispute. The paradigm is International Centre for Settlement of Investment Disputes arbitration, where there is clearly a public interest in any arbitration by an investor against a government, especially if the claim is for a large sum of damages.⁴¹ It is for this reason that investment arbitrations are often reported relatively freely; its awards are rarely secret and inevitably find their way into the public domain.⁴² In such cases (as well as arbitrations involving a party which is in the public sector or a government organisation, *eg*, the

³⁸ See commentary on model clause (7) below at paras 55–59.

³⁹ 4th Ed, 1 July 2010.

⁴⁰ Act No 136 of 1974.

⁴¹ See Meg Kinnear & Aïssatou Diop, “Use of the Media by Counsel in Investor-State Arbitration” in *ICCA Congress Series No 15, Rio (2010): Arbitration Advocacy in Changing Times* (Albert Jan van den Berg ed) (Kluwer Law International, 2011) at p 40–51, where the authors observed, *inter alia*, that: “the single most significant development in international investment arbitration is the increasing transparency of the process” and that there is jurisprudence in the form of:

... a long line of investment awards [which] clearly [state] that there is no presumption of confidentiality in investment arbitration ... That said, tribunals usually pair this acknowledgement with an admonition to the parties that public disclosure, including interaction with the media, should not jeopardize the orderly unfolding of the individual case.

⁴² See Michael Hwang SC & Katie Chung, “Defining the Indefinable: Practical Problems of Confidentiality in Arbitration” (2009) 26(5) *J Int Arb* 609 at 618.

Cockatoo Dockyard case), where a lower level of confidentiality is required, model clause (2) can be tailored accordingly.

21 For the avoidance of doubt, model clause (2) contains a rider that “any matter that is otherwise in the public domain” does not amount to confidential information. This provision is necessary so that material which would not otherwise fall within the definition of confidential information does not so become by virtue of one (or both) parties producing it in the arbitration.

B. Model clause (3): The exceptions to confidentiality

(3) Subject to (4) below, a party may disclose Confidential Information –

22 For the reasons given earlier, the difficulty lies not with defining the rule of confidentiality but in enumerating all its exceptions. Model clause (3) therefore sets out the principal exceptions which are likely to recur most often, but is not (and does not purport to be) an exhaustive list of all possible exceptions. As referenced below, these are adapted from legislation and the rules of various arbitral institutions.

23 Model clause (3) contains, at the beginning, a qualification that any disclosure pursuant to the MPO would have to be done in accordance with the procedure for disclosure as set out in model clause (4), which is elaborated on further below.

24 No attempt is made to define “disclosure” in the MPO, but it is noted that section 15(1) of the IAA 1974 refers to its plain meaning: “disclose, in relation to confidential information, includes giving or communicating the confidential information in any way”.

(1) Model clause (3)(a)

(a) for the purpose of making an application to any competent court of any State to recognise, enforce or challenge the award

25 This is a clear exception to the confidentiality rule since the winning party in an arbitration must be allowed to disclose the contents of the

award if it has to proceed with enforcement action to obtain its rights under the award. This was recognised in the English case of *Hassneh Insurance Co of Israel v Stuart J Mew*,⁴³ where Colman J held that the duty of confidentiality is subject to the following exceptions.

- (a) Disclosure of the award (including its reasons) is permitted where it is reasonably necessary for the protection of an arbitrating party's rights *vis-à-vis* a third party.
- (b) An arbitrating party may bring the award and reasons into court for the purpose of invoking the supervisory jurisdiction of the court over arbitration awards and for the purpose of enforcement of the award itself.

26 In *Emmott*, Lawrence Collins LJ likewise recognised that: "It is plain that there are limits to the obligation of confidentiality. An award may fall to be enforced, or challenged, in a court".⁴⁴

27 Model clause (3)(a) is adapted from Article 35.2(a) of the SIAC Rules; Article 30(1) of the London Court of International Arbitration Rules⁴⁵ ("LCIA Rules"); Article 43(1) of the Swiss Rules of International Arbitration⁴⁶ ("Swiss Rules"); Article 18(2)(b) of the Rules of Arbitral Procedure of the Indonesia National Board of Arbitration ("BANI Rules"); Article 73(a) of the World Intellectual Property Organisation Arbitration Rules⁴⁷ ("WIPO Rules"); Article 18(2)(b) of the Australian Centre for International Commercial Arbitration Rules 2005 ("ACICA Rules"); Article 39.1 of the Hong Kong International Arbitration Centre Administered Arbitration Rules⁴⁸ ("HKIAC Administered Rules"); section 23D(6) of the IAA 1974; and Article 3(13) of the International

⁴³ [1993] Lloyd's Rep 243 at 249. See Michael Hwang SC & Katie Chung, "Defining the Indefinable: Practical Problems of Confidentiality in Arbitration" (2009) 26(5) J Int Arb 609 at 613.

⁴⁴ *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] Bus LR 1361 at 1380; [2008] EWCA Civ 184 at [85].

⁴⁵ Effective 1 January 1998.

⁴⁶ Effective 1 June 2012.

⁴⁷ Effective 1 October 2002.

⁴⁸ Effective 1 September 2008.

Bar Association Rules on the Taking of Evidence in Commercial Arbitration⁴⁹ (“IBA Rules”).

(2) *Model clause (3)(b)*

(b) pursuant to the order of, or a subpoena issued, by a court of competent jurisdiction

28 Although the scenario described by this provision does not (strictly speaking) fall under any the four principal exceptions to confidentiality established at English common law,⁵⁰ Thomas LJ in *Emmott* noted that a “clear instance” in which the obligation of confidentiality would not apply is where a party to the arbitration exercises its right to “provide information about the arbitration which it is compelled by law to provide”.⁵¹

29 Model clause (3)(b) is adapted from Article 35.2(b) of the SIAC Rules; Article 74(a) of the WIPO Rules; Article 18(2)(c) of the ACICA Rules and section 23D(8) of the IAA 1974.

(3) *Model clause (3)(c)*

(c) for the purpose of pursuing or enforcing a legal right or defending a claim

30 This provision is derived from Potter LJ’s fourth principal exception to the obligation of confidentiality in *Ali Shipping Corp v Shipyard Trogir* (“*Ali Shipping*”).⁵² His Lordship described that exception in the following terms:⁵³

... disclosure when, and to the extent to which, it is reasonably necessary for the protection of the legitimate interests of an arbitrating party. In this context, that means reasonably necessary for the establishment or protection of an arbitrating party’s legal

⁴⁹ 29 May 2010.

⁵⁰ See n 37 above.

⁵¹ *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] Bus LR 1361 at 1391; [2008] EWCA Civ 184 at [129].

⁵² [1999] 1 WLR 314.

⁵³ *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 at 327.

rights *vis-à-vis a third party* in order to found a cause of action against *that third party* or to defend a claim, or counterclaim, *brought by the third party*. [emphasis added]

31 However, it is doubtful whether the qualification referring to a “third party” is necessary (or indeed desirable) since legal proceedings may be brought by or against the opposing party in the arbitration itself (as opposed to a third party who is not involved in the arbitration). For example, this is typically the case in construction or project management contracts where there may be multiple contracts between two parties. These words are therefore omitted from model clause (3)(c).⁵⁴

32 Model clause (3)(c) is adapted from Article 35.2(c) of the SIAC Rules; Article 43(1) of the Swiss Rules; Article 30(1) of the LCIA Rules; Article 75 of the WIPO Rules; section 23D(5) of the IAA 1974; and section 14C(b)(i)(B) of the New Zealand Arbitration Act 1996 (“AA 1996”).⁵⁵ The text of the first three precedents does not contain any such qualification, *ie*, the exception to confidentiality is not limited to the pursuance or enforcement or a legal right against a “third party”.

(4) *Model clause (3)(d)*

(d) where disclosure is made to a third party for the purpose of satisfying any legal obligation of disclosure owed (under any applicable law) to that third party

33 As stated above, the position in England as articulated by Thomas LJ in *Emmott* is that disclosure may be permitted when an arbitrating party is compelled by law to do so, or would otherwise be under a legal duty to make such disclosure.⁵⁶ A typical example of the latter scenario

⁵⁴ See also Michael Hwang SC & Katie Chung, “Defining the Indefinable: Practical Problems of Confidentiality in Arbitration” (2009) 26(5) *J Int Arb* 609 at 624–625.

⁵⁵ 1996 No 99. As amended by the Arbitration Amendment Act 2007 (2007 No 94).

⁵⁶ See commentary on model clause (3)(b) above at paras 28–29.

(specifically recognised in *Emmott*)⁵⁷ is an insurance contract, to which the doctrine of *uberrimae fide* (*ie*, utmost good faith) applies; this means that the insured party must disclose all material facts to the insurer.

34 Model clause (3)(d) is a well-recognised exception to confidentiality, and is adapted from Article 35.2(d) of the SIAC Rules; Article 30(1) of the LCIA Rules; Article 43(1) of the Swiss Rules; Article 34 of the American Arbitration Association International Arbitration Rules⁵⁸ (“AAA Rules”); Article 40(2) of the Japan Commercial Arbitration Association Commercial Arbitration Rules⁵⁹ (“JCAA Rules”); Article 73(a) of the WIPO Rules; Article 18.2(d) of the ACICA Rules; Article 39.1 of the HKIAC Administered Rules; and section 23D(9) of the IAA 1974.

(5) *Model clause (3)(e)*

(e) in compliance with the request or requirement of any competent regulatory body or other authority

35 Model clause (3)(e) is based on the same underlying principle as model clause (3)(d), *ie*, disclosure should be permitted when an arbitrating party is under an obligation to do so. However, model clause (3)(e) is necessary because some competent regulatory authorities do not derive their powers from statutory sources (*eg*, those with only contractual sanctions). This exception to the obligation of confidentiality was also recognised in *Emmott*.⁶⁰

⁵⁷ *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] Bus LR 1361 at 1380; [2008] EWCA Civ 184 at [85], *per* Lawrence Collins LJ: “The existence and details of an arbitration claim may need to be disclosed to insurers, or to shareholders, or to regulatory authorities.”

⁵⁸ Effective 1 September 2000.

⁵⁹ Effective 1 January 2008.

⁶⁰ *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] Bus LR 1361 at 1380; [2008] EWCA Civ 184 at [85]. See also *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] Bus LR 1361 at 1391; [2008] EWCA Civ 184 at [129], *per* Thomas LJ: “A clear instance is the right of a party to provide information about the arbitration which it is compelled by law to provide, such as to a regulator or in annual accounts.”

36 This provision is likewise adapted from Article 35.2(e) of the SIAC Rules; Article 43(1) of the Swiss Rules; Article 40(2) of the JCAA Rules; Article 73(a) of the WIPO Rules; Article 18.2(e) of the ACICA Rules; Article 39.1 of the HKIAC Administered Rules; and section 23D(9) of the IAA 1974.

(6) *Model clause (3)(f)*

- (f) where disclosure is necessary to ensure that a party to the arbitral proceedings has a full opportunity to present its case and the disclosure is no more than reasonable for that purpose (which may include disclosure to legal and other professional advisers as well as potential witnesses and other persons assisting in the preparation of the case)

37 This exception is intended to allow a party to the arbitration to conduct its case strategically, and is adapted from section 23D(4) of the IAA 1974 and section 14C(b)(i)(A) of the AA 1996. Although there is no express provision as such in the English cases, it is clear as a matter of common sense that a party may disclose confidential information to third parties (which could include potential witnesses or anyone who would be able to provide factual information on the matters in issue) if this is required for the party to prepare its case.⁶¹ In addition, the exception would (due in part to necessity) also extend to a broader category of persons encountered in everyday situations so as to include the taking of advice from persons who may not be professionals (*eg*, friends or

⁶¹ See Michael Hwang SC & Katie Chung, "Defining the Indefinable: Practical Problems of Confidentiality in Arbitration" (2009) 26(5) J Int Arb 609 at 627:

Where the disclosure of arbitration documents is made to professional or other advisers and persons assisting in the conduct of the arbitration, this should be treated as a legitimate exception to the obligation of confidentiality. Any disclosure to lawyers who are not involved in the arbitration should not be a problem because lawyers are subject to legal professional privilege in any case. Any disclosure made to persons assisting in the conduct of the arbitration should also be an exception to the obligation of confidentiality.

relatives); service providers like the managers of the hearing room (eg, Maxwell Chambers or the hotel business centre); the party's insurers; or even the printing shop to which documents prepared for the arbitration are sent for printing.⁶²

38 The key is that any disclosure under model clause (3)(f) would have to go towards preparation of one's case, and must be reasonable for that purpose. Accordingly, there is a requirement of proportionality which controls under model clause (3)(f) – this was contemplated by Potter LJ in *Ali Shipping* (albeit in the slightly different context of an exception to confidentiality where disclosure is necessary to protect the legitimate interests of an arbitrating party):⁶³

English law has recognised the following exceptions to the broad rule of confidentiality: ... (iv) disclosure when, and to the extent which, it is reasonably necessary for the protection of the legitimate interests of an arbitrating party ... I do not think it is helpful or desirable to seek to confine the exception more narrowly than one of 'reasonable necessity' ... I would not detach the word 'reasonably' from the word 'necessary', ... When the concept of 'reasonable necessity' comes into play in relation to the enforcement or protection of a party's legal rights, it seems to me to require a degree of flexibility in the court's approach. For instance, in reaching its decision, the court should not require the parties seeking disclosure to prove necessity regardless of difficulty or expense. It should approach the matter in the round, taking account of the nature and purpose of the proceedings for which the material is required, the powers and procedures of the tribunal in which the proceedings are being conducted, the issues to which the evidence or information sought is directed and the practicality and expense of obtaining such evidence or information elsewhere.

⁶² See Michael Hwang SC & Katie Chung, "Defining the Indefinable: Practical Problems of Confidentiality in Arbitration" (2009) 26(5) *J Int Arb* 609 at 626: "The authorities do not discuss everyday situations which would most certainly be exceptions to the obligation of confidentiality, but one can conceive of a myriad of such everyday situations."

⁶³ *Ali Shipping Corp v Shipyard Trogir* [1999] 1 *WLR* 314 at 326–328.

39 The concept of proportionality or “reasonable necessity”⁶⁴ is also recognised in the IAA 1974. Section 23D states, in material part, as follows:

- (4) The information may be disclosed if it is necessary to ensure that a party to the arbitral proceedings has a full opportunity to present the party’s case and the disclosure is no more than reasonable for that purpose.
- (5) The information may be disclosed if it is necessary for the establishment or protection of the legal rights of a party to the arbitral proceedings in relation to a third party and the disclosure is no more than reasonable for that purpose.
- (6) The information may be disclosed if it is necessary for the purpose of enforcing an arbitral award and the disclosure is no more than reasonable for that purpose.
- (7) The information may be disclosed if it is necessary for the purposes of this Act, or the Model Law as in force under subsection 16(1) of this Act, and the disclosure is no more than reasonable for that purpose.

40 A condition for disclosure under model clause (3)(f) is that the disclosing party must, pursuant to model clause (4), use its best endeavours to obtain undertakings of confidentiality (*ie*, not to disclose the information in question) from the persons to whom disclosure of confidential information is to be made, the terms of such undertakings to be agreed in advance between the parties to the dispute. This is not framed as an absolute obligation to secure undertakings of confidentiality

⁶⁴ See also Art 73 of the World Intellectual Property Organization Rules (effective 1 October 2002), which states in material part as follows:

- (a) *Except to the extent necessary* in connection with a court challenge to the arbitration or an action for enforcement of an award, no information concerning the existence of an arbitration may be unilaterally disclosed by a party to any third party unless it is required to do so by law or by a competent regulatory body, and then only:
 - (i) *by disclosing no more than what is legally required ...* [emphasis added].

simply because in some situations (especially where fact witnesses are concerned) it might be impossible to do so.⁶⁵

(7) *Model clause (3)(g)*

(g) if a party wishes to disclose information or documents already in that party's possession prior to the commencement of the arbitration

41 This provision is only logical since a party cannot be banned from disclosing a document which is: (a) in that party's possession prior to the arbitration; and (b) not confidential prior to the arbitration, simply because it is submitted as evidence in the arbitration. However, if the document in question is otherwise already in the public domain, then it would not be regarded as confidential information in the first place (as defined in model clause (2) above) – in those cases, the exception to confidentiality in model clause (3)(g) would not even have to be invoked.

(8) *Model clause (3)(h)*

(h) with the consent of all the other parties to the arbitration

42 This provision is uncontroversial, and is recognised (in some form or another) by the following: Article 30(1) of the LCIA Rules; Article 32(5) of the United Nations Commission of International Trade Law ("UNCITRAL") Arbitration Rules 1976;⁶⁶ Article 48(5) of the

⁶⁵ See International Law Association, "Confidentiality in International Commercial Arbitration" The Hague Conference (2010) at p 21:

[E]xpert witnesses, stenographers and other non-parties who enter into a contract or engagement letter are often prepared to accept a confidentiality commitment in that document. The situation may be more complicated with fact witnesses or other non-parties who participate in the arbitration without any form of agreement.

⁶⁶ GA Res 31/98, UN GAOR, 31st Sess (15 December 1976). However, the 2010 edition of the UNCITRAL Arbitration Rules Rules GA Res 65/22, UN GAOR 65th Sess (2010) does not contain any provisions on the confidentiality of the arbitration.

International Centre for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings⁶⁷; Article 43(1) of the Swiss Rules; Article 34 of the AAA Rules; Articles 74(a) and 75 of the WIPO Rules; Article 18.2 of the ACICA Rules; Article 39.1 of the HKIAC Administered Rules; and section 23D(2) of the IAA 1974.

43 However, what may be tricky is the interpretation of consent, since consent may be either express or implied. For example, in a case before the Singapore High Court, *AAV v AAZ*,⁶⁸ the plaintiffs alleged that the defendant was in repudiatory breach of the arbitration agreement because the defendant disclosed confidential information pertaining to the arbitration to the authorities and certain individuals. The defendant argued, *inter alia*, that the plaintiffs had waived the right to confidentiality because they had commenced, in open court, an originating motion to challenge the impartiality of the arbitrator. After considering the respective positions of the parties, Chan Seng Onn J concluded that:⁶⁹

... the parties agreed by their conduct not to insist on confidentiality in the arbitration from the time the [originating motion] was commenced, and that the plaintiffs did not then again assert their right to confidentiality until the commencement of the present suit. Indeed, this mutual waiver would also fall within the category of exceptions to confidentiality based on consent ... Thus even if the mutual waiver was only suspensory, the defendant's disclosure fell within this suspensory period and was thus not in breach of confidentiality.

(9) *Model clause (3)(i)*

- (i) pursuant to an order by the Arbitral Tribunal on application by a party with proper notice to the other parties

44 This provision sets out the residual power of the arbitral tribunal to grant permission to disclose confidential information on an *ad hoc* basis

⁶⁷ Amended 10 April 2006.

⁶⁸ [2011] 1 SLR 1093 at [110]–[137].

⁶⁹ *AAV v AAZ* [2011] 1 SLR 1093 at [137].

after considering the respective positions of the parties on the issue. It seeks to address the issues raised earlier, *ie*, the categories of exceptions to the obligation of confidentiality are not hermetically sealed and provision should be made for an arbitral tribunal to consider each application for disclosure on a case-by-case basis.⁷⁰ The model clause on confidentiality proposed by the International Law Association (which is intended to operate on the basis of consent between the parties) contains a similar provision:⁷¹

The arbitral tribunal may permit further disclosure of Confidential Information where there is a demonstrated need to disclose that outweighs any party's legitimate interest in preserving confidentiality.

45 This aspect of the MPO is designed to address a shortcoming concerning confidentiality which is present in virtually all the institutional rules and national legislation (save for those which are referenced below in this paragraph), *ie*, these do not say who will determine whether disclosure ought to be permitted in a case which does not fall within the defined exceptions to confidentiality.⁷² Similar provisions are to be found only in Article 35.2(f) of the SIAC Rules; section 23E(1) of the IAA 1974; and section 14D(2) of the AA 1996.

46 Model clause (3)(i) is intended to be read in conjunction with model clause (6), which sets out the basic procedure for the arbitral tribunal to deal with an application for the disclosure of confidential information.

⁷⁰ See *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] Bus LR 1361 at 1385; [2008] EWCA Civ 184 at [107], *per* Lawrence Collins LJ: In my judgment the content of the obligation may depend on the context in which it arises and on the nature of the information or documents at issue. *The limits of that obligation are still in the process of development on a case-by-case basis.* [emphasis added]

⁷¹ International Law Association, "Confidentiality in International Commercial Arbitration" The Hague Conference (2010) at p 21.

⁷² On the issue of who should be the arbiter of disputes as to confidentiality, see the commentary on model clause (6) below at paras 49–54.

C. Model clauses (4) and (5)

- (4) Before a party discloses Confidential Information as authorised in (3) above, that party must provide to the other party/parties seven (7) days' prior written notice of its intention to disclose, giving:
- (a) written details of the Confidential Information to be disclosed;
 - (b) the party/parties to whom disclosure is intended to be made; and
 - (c) the reasons for the disclosure,
- provided that, where the disclosure of Confidential Information is sought to be made pursuant to (3)(f) above, the information to be furnished to the other party need only contain a general description of the Confidential Information sought to be disclosed and the classes of persons to whom description is to be made (without identification of those persons). The disclosing party must use its best endeavours to obtain an undertaking of confidentiality, given in favour of the party opposing disclosure, from any individual or entity to whom disclosure of any Confidential Information may be made. The terms of such undertaking shall be agreed in advance of such disclosure by the party opposing disclosure (who shall not be entitled to the names of the parties to whom disclosure is to be made). If there is a dispute in relation to the terms of the undertaking, this shall be referred to the Arbitral Tribunal for determination. If no such undertaking of confidentiality can be obtained, seven (7) days' notice shall be given to all other parties identifying the individual or entity concerned. If any objection is raised by any other party within the period of notice, the matter shall be referred to the Arbitral Tribunal to determine the extent of the Confidential Information that may be disclosed and any other steps that should be taken to preserve confidentiality.
- Provided always that all the requirements of this clause (4) shall not apply in the following situations:
- (a) where disclosure of Confidential Information is made pursuant to (3)(a) above, since any party to the arbitration may do so as of right; and
 - (b) where the party seeking to disclose Confidential Information obtains the written consent (both to the particulars and extent of Confidential Information which is sought to be disclosed) of all other parties to the arbitration to do so.
- (5) If the other party/parties object(s) to disclosure pursuant to (4) above within the period of seven (7) days, no disclosure

may be made until the issue has been resolved by the Tribunal in the manner set out in (6) below.

47 These provisions provide for a mechanism for the invocation of a permitted exception to be tested before it is exercised, in the sense that the party seeking to make disclosure would be required to give notice to the other side, and also to allow the other side to object before the matter is argued before the arbitral tribunal. Understandably, parties would be reluctant to agree to these provisions in many situations since the requirement of seven days' notice prior to disclosure may add to the delay and costs of the arbitration (where disclosure is challenged). These provisions could also be problematic in cases where it is contemplated that disclosure may need to be made at short notice on a regular basis (*eg*, to a related entity in the same group of companies as the party to the arbitration). Accordingly, allowance has been made for the following situations, which would not be subject to the notice period stipulated in model clause (4):

- (a) the disclosure of confidential information pursuant to model clause (3)(a), since any party would be legally entitled to do so without giving notice; and
- (b) the disclosure of confidential information where the party seeking to disclose confidential information has (after providing the opposite side with both the particulars and extent of confidential information which is sought to be disclosed) obtained the written consent of all other parties to the arbitration to do so – a situation in which there is unlikely to be a dispute.⁷³

48 It is also provided in model clause (4) that, where disclosure is sought to be made pursuant to model clause (3)(f), the party seeking disclosure must use its best endeavours to obtain an undertaking of confidentiality from any individual or entity to whom disclosure of confidential information is to be made. However, as is evident from the

⁷³ This provision overlaps with model clause (3)(h), but the latter provision is broader and is also intended to include situations where consent is implied – this is not always plain on the facts, and may require a determination by the tribunal.

text in model clause (4), it does not follow that permission to disclose ought to be denied automatically where the disclosing party is unsuccessful in obtaining such undertakings. Model clause (4) provides for recourse to the arbitral tribunal in such circumstances. This is intended to cover the situation where a witness of fact refuses to give an undertaking of confidentiality – it may not be appropriate that an arbitrating party should, for that reason, be precluded from calling that person as a witness. Rather, it should be possible for the witness to appear by the giving of appropriate directions as to what information can be given to the witness and how that witness' evidence is taken to preserve confidentiality. A similar process would apply for a witness testifying under a subpoena.

D. Model clause (6)

- (6) If a question arises in the arbitral proceedings as to whether any Confidential Information should be disclosed, and at least one of the parties requests for the Arbitral Tribunal to determine that question, the Arbitral Tribunal, after giving each of the parties an opportunity to be heard, may in its discretion make or refuse to make an order allowing all or any of the parties to disclose Confidential Information.

49 This provision applies where there is a contentious application for the disclosure of confidential information, and is primarily intended to provide for the situation referred to in model clause (3)(i), but would also be applicable to that described in model clause (5). Model clause (6) should therefore be read in conjunction with the latter two provisions.

50 The pertinent question to ask here is who should be the arbiter of disputes as to confidentiality during the course of the arbitration. The most practicable solution is that the arbitral tribunal before which the dispute is brought should deal with issues of confidentiality and disclosure arising in the arbitration. The real concerns here are with:

- (a) the enforceability of orders on confidentiality made by the arbitral tribunal (and the related question of the jurisdiction of the arbitral tribunal to make such orders);⁷⁴ and
- (b) what happens after the arbitral tribunal becomes *functus officio* (*ie*, how should disputes as to confidentiality be resolved after the termination of the arbitration).

51 The second question is dealt with separately below.⁷⁵

52 On the first question, the English position in *Emmott*⁷⁶ is that the arbitral tribunal seized of the dispute would have jurisdiction (and indeed would be the appropriate arbiter) to determine the limits of the obligation of confidentiality between the parties because such obligation arises only as a result of the agreement to arbitrate and subsequent referral of the dispute to arbitration. Australia and New Zealand have also adopted the same position in their recent legislation: see section 23E(1) of the IAA 1974 and section 14D(2) of the AA 1996 respectively – both of which empower an arbitral tribunal to allow (or deny) the disclosure of confidential information pursuant to an application by a party to do so.⁷⁷ Model clause (6) may therefore be invoked not only in cases where it is uncertain whether the intended disclosure of confidential information by a party falls within a recognised or pre-defined exception to confidentiality, but also allows an arbitral tribunal to permit disclosure where the justice of the case requires or where it would be otherwise

⁷⁴ See International Law Association, “Confidentiality in International Commercial Arbitration” The Hague Conference (2010) at p 17:

As with all legal obligations, one of the fundamental questions relates to the possibility of enforcement. *This raises the issue of who has the power to adjudicate on the existence and the extent of a confidentiality obligation in a given circumstance*, to authorize or prohibit the disclosure of certain information and to decide on the consequences and remedies in case of breach. This is an area on which the sources are mostly silent. [emphasis added]

⁷⁵ See commentary on model clause (7) below at paras 55–59.

⁷⁶ *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] Bus LR 1361 at 1387–1388; [2008] EWCA Civ 184 at [119], *per* Thomas LJ.

⁷⁷ On the applicability of these provisions, see n 11 above.

appropriate to do so. In other words, the arbitral tribunal would be able to tailor the exact scope of the obligation of confidentiality and its exceptions to the case in question, so there is indeed no “one-size-fits-all” definition of the confidentiality rule or its exceptions.

53 We now examine the theoretical basis of the arbitral tribunal’s jurisdiction to determine issues of confidentiality. Simon Crookenden QC has argued that in order to answer the question of who decides the issue of confidentiality (an issue concerning the arbitral tribunal’s jurisdiction), the source of the obligation of confidentiality first needs to be identified.⁷⁸ The answer to this question suggested by Crookenden QC (with which we agree) is as follows:⁷⁹

English law treats the obligation of confidentiality as being an implied contractual obligation arising out of the nature of arbitration itself ... the confidentiality obligation arises under the particular reference to arbitration rather than under the agreement to refer. No obligation of confidentiality can arise unless and until there is a reference to arbitration. ... The tribunal’s substantive jurisdiction is limited to disputes referred, whereas the procedural jurisdiction extends to all matters in connection with the reference which, in accordance with the applicable curial law, are within the powers of the tribunal to determine. ... The tribunal has power (subject to any specific agreement of the parties) to decide all procedural and evidential matters. ... It is suggested that, despite the lack of examples in the case law, the obligation of a confidentiality is best regarded as an implied obligation of the particular reference to arbitration that gives rise to a substantive and not merely a procedural contractual right which, if breached, can give rise to a claim for damages and, in an appropriate case, can found a claim for a declaration or an injunction. Such a claim would, it is suggested, be within the scope of most common form agreements to refer. Breach of an agreement to refer that forms part of but has an existence independent of the principal contract are usually within the scope of

⁷⁸ See Simon Crookenden QC, “Who Should Decide Confidentiality Issues?” (2009) 25(4) *Arb Int’l* 603 at 606.

⁷⁹ Simon Crookenden QC, “Who Should Decide Confidentiality Issues?” (2009) 25(4) *Arb Int’l* 603 at 606–609.

the agreement to refer. In the same way, breaches of the contractual obligations that arise on a particular reference, which arise out of but have an existence independent of the agreement to refer, would, it is suggested, be within the scope of agreements to refer all disputes 'arising out of' or 'in connection with' the principal contract containing the agreement to refer.

- 54 In sum, and for the reasons given above, it is submitted as follows.
- (a) The English common law position is that the obligation of confidentiality is implied in every agreement to arbitrate.
 - (b) Since the obligation of confidentiality arises out of the nature of the arbitration itself, the arbitral tribunal would be competent to rule on all aspects of the duty of confidentiality in a case where the standard form of arbitration agreement is adopted.⁸⁰
 - (c) The jurisdiction of the arbitral tribunal includes, *inter alia*, the making of procedural directions to facilitate the preservation of confidentiality and permissible disclosures since the procedural jurisdiction of the arbitral tribunal extends to all matters connected with the arbitration.⁸¹

⁸⁰ See also International Law Association, "Confidentiality in International Commercial Arbitration" The Hague Conference (2010) at p 17:

Inssofar as such obligations arise directly or by implication from the arbitration agreement it would seem that they fall within the jurisdiction of the arbitrators, although it cannot be excluded that proceedings can also be brought before a national court in parallel to those before the arbitral tribunal. Of course, the powers of the arbitrators in this respect will reach only as far as the assumed breaches of the duties of confidentiality are attributable directly to the parties — since only they are bound by the arbitration agreement.

See also p 19:

If the parties have agreed to arbitral confidentiality, the arbitral tribunal has jurisdiction over disputes between the parties regarding the agreed confidentiality.

⁸¹ In this regard, Art 19(2) of the UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) ("Model Law") provides that:

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- (d) The arbitral tribunal would additionally have the jurisdiction to award sanctions for the breach of confidentiality since English law recognises the doctrine of confidentiality (of which confidentiality in arbitration is one facet) as generally giving rise to substantive rights and obligations as between the party entitled to confidentiality and those under an obligation to preserve confidentiality.⁸²

E. Model clause (7)

(7) After the Arbitral Tribunal has become *functus officio*, its functions under this Procedural Order shall be exercised by the appropriate supervisory court at the seat of the arbitration.

55 This provision is essentially a forum selection clause since it confers jurisdiction on the courts at the seat of the arbitration to adjudicate

Failing [agreement between the parties on the procedure to be followed by the arbitral tribunal in conducting the proceedings], the arbitral tribunal may, subject to the provisions of [the Model Law], conduct the arbitration in such a manner as it considers appropriate ...

See Howard Holtzmann & Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International, 1989) at p 564:

The UNCITRAL Secretariat observed that Article 19, along with Article 18, was the ‘Magna Carta of Arbitral Procedure’ and said that these Articles might be regarded as ‘the most important provision[s] of the model law.’ ... Moreover, this principle is at the heart of modern systems of arbitration; it expresses a profound confidence in the ability of parties and arbitrators to conduct the arbitration in a fair and orderly manner so as to arrive at a just resolution of a dispute.

See also Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at para 5.14:

In general terms, the arbitral tribunal enjoys a very broad power to determine the appropriate procedure. Indeed, this broad power is one of the defining features of arbitration over courts where a fixed procedure exists.

⁸² See commentary on model clause (9) below at paras 61–62, where possible sanctions for breach of confidentiality are discussed.

disputes in relation to confidentiality and its exceptions arising from the MPO. For this reason, model clause (7) has to be made with the consent of all parties to the dispute.⁸³ However, we foresee that once the parties accept the arbitral tribunal as being the appropriate referee of all disclosure and confidentiality disputes within an arbitration, it will not be difficult to persuade them that they need to agree on an external party to fulfil that role after the end of the arbitration so that any dispute as to confidentiality arising after the award is issued may be resolved.

56 We pause at this juncture to consider the duration of any obligation of confidentiality because model clause (7) presupposes that duty to preserve confidentiality continues to remain in force even after the end of the arbitration. As far as English and Singapore law are concerned, the obligation of confidentiality is indefinite (assuming none of the exceptions apply), so the question of duration would not arise if the issue is brought before English or Singapore courts. However, the position is less certain under other legal systems; this has therefore led the International Law Association to the following conclusion in its report:⁸⁴

⁸³ The model clause proposed by the International Law Association is likewise effective only with the consent of all parties to the arbitration. See International Law Association, “Confidentiality in International Commercial Arbitration” The Hague Conference (2010) at p 21:

This confidentiality provision survives termination of the contract and of any arbitration brought pursuant to the contract. This confidentiality provision may be enforced by an arbitral tribunal or any court of competent jurisdiction and an application to a court to enforce this provision shall not waive or in any way derogate from the agreement to arbitrate.

⁸⁴ International Law Association, “Confidentiality in International Commercial Arbitration” The Hague Conference (2010) at p 18. For this reason, the International Law Association has made the following recommendation at pp 18–19:

Due to the current absence of universally recognized standards and to the variety of sources that may impact on the situation, these and other uncertainties will often be largely unavoidable. Parties will simply have to take stock of this state of things and be prepared for different

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The duration of confidentiality obligations, as regards both the moment when it arises and when it ends, is equally the subject of uncertainty and is not dealt with in the sources.

It is for this reason that the words in model clause (1) set out within the square brackets were inserted – this sentence provides that the obligation of confidentiality shall bind the parties even after the termination of the arbitration. Since this amounts to an agreement between the parties to preserve confidentiality, this order can only be made with the consent of all the parties to the arbitration.

57 The interplay between the forum in which the dispute as to confidentiality is heard (after the arbitration has come to an end) and the duration of the confidentiality obligation requires us to consider what would happen in each of the following four situations:

- (a) where model clause (7) is adopted (by consent) and an application is brought before the courts at the seat of the arbitration;
- (b) where model clause (7) is adopted (by consent) and an application is brought before the courts elsewhere;
- (c) where model clause (7) is not adopted and an application is brought before the courts at the seat of the arbitration; and
- (d) where model clause (7) is not adopted and an application is brought before the courts elsewhere.

58 Scenarios (a) and (b) above are the most straightforward – since model clause (7) is effectively a forum selection clause, the courts at the seat of arbitration are likely to accept jurisdiction (to act as the arbiter of confidentiality in accordance with the provisions of the MPO) in the case of (a), and would typically decline jurisdiction in the case of (b).⁸⁵ In

outcomes, also having regard to the different rules that may reasonably be held to apply. ... The parties can, however, by agreement provide for confidentiality and determine the scope, extent and duration of the obligation as well as the available remedies.

⁸⁵ *Dicey, Morris and Collins on The Conflict of Laws* vol 1 (Lawrence Collins *et al*/eds) (Sweet & Maxwell, 14th Ed, 2006) at pp 513–514.

scenario (c), if the seat of arbitration is England or Singapore,⁸⁶ the obligation of confidentiality would continue to subsist even after the termination of the arbitration, and the courts there would therefore be able to determine any disputes as to confidentiality. These disputes would be determined in accordance with the position at common law and not the provisions in the MPO since procedural orders (by definition) do not continue to bind the parties after the arbitration has come to an end.⁸⁷ Accordingly, there would not be difficulty either in enforcing the obligation of confidentiality or in seeking permission to disclose confidential information in such a situation. As for scenario (d), there is no certainty at all that the courts of a foreign country (*ie*, not the courts at the seat of the arbitration) would continue to recognise and uphold the obligation of confidentiality since the laws of that country may not even provide for confidentiality in arbitration in the first place. This is especially so if the words in model clause (1) marked in square brackets⁸⁸ are not adopted (*eg*, because one or more parties have withheld their consent to the inclusion of those words). In that case, if confidentiality is to be preserved even after the termination of the arbitration, the arbitral tribunal should enshrine the confidentiality order in its award. It is submitted that an order made as to confidentiality in the arbitral tribunal's award may be recognised and enforced pursuant to Article III of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁸⁹ The arbitral

⁸⁶ The obligation of confidentiality is also likely to subsist after the termination of the arbitration for an arbitration seated in Australia or New Zealand, provided the statutory provisions on confidentiality are applicable to the dispute: see n 11, above.

⁸⁷ However, this is unlikely to give rise to a different result in practice since the provisions of the MPO are drafted based on the common law exceptions to confidentiality.

⁸⁸ See commentary on model clause (1) above at paras 18–21.

⁸⁹ Article III of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959) (“New York Convention”) states as follows:

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the

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tribunal's decision on confidentiality, once encapsulated in the award, constitutes a binding determination as between the parties – as opposed to procedural directions, which do not have the status of an award and may not be binding once the final award has been made.⁹⁰ Accordingly, the parties would be bound to maintain the obligation of confidentiality (subject to exceptions similarly stipulated in the award) even after the arbitral tribunal has become *functus officio*.

59 However, before any such award can be made, it must be considered whether an arbitral tribunal would be acting within its jurisdiction in making an award containing orders directing the

following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

It is submitted that in cases where the obligation or scope of the duty of confidentiality is disputed, any award containing the tribunal's orders on confidentiality will be recognised and enforced in accordance with Art III of the New York Convention. See Domenico Di Pietro, "What Constitutes an Arbitral Award under the New York Convention?" in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Emmanuel Gaillard & Domenico Di Pietro eds) (Cameron May Ltd, 2008) at p 150:

It is advocated that only orders which finally settle one or more of the issues which have validly come within the jurisdiction of the arbitral tribunal should qualify for recognition and enforcement under the [New York Convention]. ... According to the so-called 'finality test', the awards that qualify for recognition and enforcement under the [New York Convention] are all the awards which finally adjudicate one of the several likely disputes which have been submitted to the jurisdiction of an arbitral tribunal.

In cases where there is no dispute as to confidentiality, the tribunal may issue a consent award on confidentiality which would equally be capable of recognition and enforcement under Art III of the New York Convention.

⁹⁰ See Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at para 9.19.

preservation of confidentiality as well as the scope of that duty. Where the parties have chosen a seat of arbitration, the laws of which ensure the confidentiality of the arbitration (*eg*, England or Singapore, and perhaps also Australia or New Zealand),⁹¹ an arbitral tribunal has the inherent power to make an award on the issue of confidentiality as a natural consequence of the substantive duty of confidentiality contracted for (through their choice of the seat) by the parties. The reason is straightforward – the jurisdiction of an arbitral tribunal is not restricted to the granting of substantive remedies; procedural reliefs may also be granted in the award provided these are made in accordance with the law of the seat of the arbitration⁹² (whereas the law applicable to the merits

⁹¹ See n 11 above.

⁹² See Aron Broches, “Recourse Against the Award; Enforcement of the Award” in *ICCA Congress Series No 2, Lausanne (1984): UNCITRAL’s Project for a Model Law on International Commercial Arbitration* (Pieter Sanders ed) (Kluwer Law International, 1984) at p 208 cited in Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at para 9.05:

‘Award’ means a final award which disposes of all issues submitted to the arbitral tribunal and any other decision of the arbitral tribunal which finally determines any question of substance or the question of its competence or any other question of procedure but, in the latter case, only if the arbitral tribunal terms its decision an award.

See also Julian Lew, Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at para 24-70:

A wide range of remedies are available to arbitrators. The prevailing view is that every remedy that is available in litigation should be available in arbitration as well. The issue as to the classification of remedies as procedural or substantive will determine whether the relevant applicable law is the law governing the arbitration or the law applicable to the merits.

For example, see s 12(1)(a) of the New Zealand Arbitration Act 1996 (1996 No 99), which permits an arbitral tribunal (unless otherwise agreed by the parties) to “award any remedy or relief that could have been ordered

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determines what substantive reliefs may be granted). These orders on confidentiality would be in the nature of a declaratory relief, which is generally understood as establishing the legal position definitively and has a binding effect on the parties as such.⁹³

F. Model clause (8)

(8) These orders shall replace the provisions of Rule ** of [the applicable institutional rules].

60 The MPO is designed as a substitute for the applicable rules of the arbitral institution (assuming one has been agreed between the parties) since most arbitral institutions do not have rules which address the issue of confidentiality and its exceptions comprehensively. As explained earlier, this provision has been inserted to guard against a dispute in the event that the orders contained within the MPO are inconsistent with the rules of the arbitral institution selected by the parties. In other words, it would be preferable to start with a clean slate since the MPO is intended to be comprehensive. The wording in model clause (8) would therefore be a necessary pre-condition for the application of the orders contained within the MPO in those cases. Although any modification to institutional rules usually requires careful consideration,⁹⁴ the MPO has been crafted as a

by the High Court if the dispute had been the subject of civil proceedings in that court”.

⁹³ See Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at para 9.63; and Julian Lew, Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at para 24-76:

A tribunal may be asked to make a declaratory award or an award which contains a declaration about the rights of the parties. This may happen as a matter of the law governing the arbitration proceedings or as a result of an agreement of the parties.

⁹⁴ See Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (Kluwer Law International, 3rd Ed, 2010) at p 59:

It is usually possible to modify aspects of an institution’s arbitration rules by agreement. For example, subject to mandatory law, parties can

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standalone framework on confidentiality which could supplement (without being inconsistent with) the rules of virtually any arbitral institution.

G. Model clause (9)

(9) The Arbitral Tribunal has the power to take appropriate measures including making an order to pay damages or costs if a party breaches any of the provisions of this Procedural Order.

61 Any duty to preserve confidentiality (whether for the duration of the arbitration or subsequent to the termination of the arbitration) would be toothless if the arbitral tribunal did not have the appropriate powers to sanction breaches of that duty. In every case where an arbitral tribunal has jurisdiction over a dispute as to confidentiality, it would be able to exercise the full range of powers conferred upon it by law.⁹⁵ Model clause (9) therefore merely describes those powers of the arbitral tribunal which are already extant in law. For an arbitration seated in England or Singapore, it is submitted that an arbitral tribunal (or even a court, if such an issue arises before it) would be able to award damages for breach

generally alter time limits, provide expressly for certain types of discovery (or for no discovery), prohibit the arbitrators from granting certain kinds of relief, and the like. ... Beyond this, however, great care should be exercised in adopting and drafting modifications to institutional rules. Leading institutional arbitration rules are the product of detailed consultation and review by experienced practitioners and institutional administrators. Adopting changes to their products can either disrupt existing mechanisms or produce unforeseen results. Moreover, there are elements of institutional arbitration rules which may not be subject to modification by the parties' agreement (*eg*, aspects of the role of the ICC International Court of Arbitration). Finally, when drafting an arbitration agreement that modifies institutional rules, care should be taken to ensure that the modifications produce a clear and specific change, rather than merely creating a confusing or unworkable conflict between any additional provisions and the text of the institutional rules themselves.

⁹⁵ See commentary on model clause (6) above at paras 49–54.

of confidentiality in the arbitration,⁹⁶ provided that the harm so caused is monetarily ascertainable.⁹⁷ The effectiveness of model clause (9) in other jurisdictions where the duty of confidentiality is not recognised is uncertain since this provision does not clothe an arbitral tribunal with powers beyond those existing in law. In other words, an arbitral tribunal may only make an order or award to pay damages for the breach of confidentiality where this is permissible under the law of the seat of arbitration.⁹⁸ However, it is far less controversial (and indeed generally accepted) that an arbitral tribunal has the power to allocate costs at the end of the arbitration. Model clause (9) provides that an arbitral tribunal may punish a breach of confidentiality by means of a costs sanction;⁹⁹ this part of model clause (9) is unlikely to be problematic.¹⁰⁰

⁹⁶ Simon Crookenden QC, “Who Should Decide Confidentiality Issues?” (2009) 25(4) *Arb Int'l* 603 at 606–609.

⁹⁷ See *Confidentiality in International Commercial Arbitration* (Ileana Smeureanu ed) (International Arbitration Law Library vol 22) (Kluwer Law International, 2011) at p 180.

⁹⁸ See *Confidentiality in International Commercial Arbitration* (Ileana Smeureanu ed) (International Arbitration Law Library vol 22) (Kluwer Law International, 2011) at p 181. See also International Law Association, “Confidentiality in International Commercial Arbitration” The Hague Conference (2010) at p 20:

Where an arbitral tribunal has jurisdiction over an arbitral confidentiality dispute, it may make use of the entire range of powers conferred on it by law, rules or agreement. For example it may order injunctive or declaratory relief, award damages, bar the introduction into the record of evidence derived from a confidentiality breach, treat the breach as a breach of the underlying contract or grant any other remedies appropriate in the circumstances and available to it. However, such power would not extend to making awards or orders against persons who are not party to the arbitration.

⁹⁹ See, *eg*, Meg Kinnear & Aissatou Diop, “Use of the Media by Counsel in Investor-State Arbitration” in *ICCA Congress Series No 15, Rio (2010): Arbitration Advocacy in Changing Times* (Albert Jan van den Berg ed) (Kluwer Law International, 2011) at p 49:

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62 Model clause (9) is derived from Article 35.4 of the SIAC Rules, which states as follows: “The Tribunal has the power to take appropriate measures, including *issuing an order or award for sanctions* or costs, if a party breaches the provisions of this Rule” [emphasis added]. The words “including making an order to pay damages” have been substituted for the italicised text because of the difficulties associated with the imposition of penal sanctions¹⁰¹ (as opposed to general damages for the breach of

Ultimately, a tribunal might award costs against a party whose conduct with respect to media communications and confidentiality orders is inappropriate. In one case, *Pope & Talbot v Canada*, a NAFTA tribunal awarded costs against claimants where claimants’ counsel provided the media with a document that had been sent in error by an administrative officer of the respondent and where this error should have been obvious to counsel. In that case, the tribunal ordered the claimant to pay \$10,000 forthwith and expressed its wish that claimants’ counsel voluntarily pay this sum personally. [citations omitted]

¹⁰⁰ On a related point, it has also been suggested that a tribunal may draw adverse inferences against the disclosing party based on the disclosures made in breach of confidentiality, but that “this would require a very particular set of circumstances to fall within the correct ambit of the doctrine of adverse inferences”: see Meg Kinnear & Aïssatou Diop, “Use of the Media by Counsel in Investor-State Arbitration” in *ICCA Congress Series No 15, Rio (2010): Arbitration Advocacy in Changing Times* (Albert Jan van den Berg ed) (Kluwer Law International, 2011) at p 49.

¹⁰¹ See *Confidentiality in International Commercial Arbitration* (Ileana Smeureanu ed) (International Arbitration Law Library vol 22) (Kluwer Law International, 2011) at p 181:

Few jurisdictions recognize, for instance, punitive damages. Assuming that this option would be available under domestic legislation, the case for punitive damages for gross or outrageous breaches of confidentiality has been rarely recognised in legal literature. ... It is well-established that punitive damages cannot be granted for breach of contract, but this is precisely what a breach of confidentiality would entail. It is nonetheless hard to imagine what would make a breach of confidentiality so egregious as to require such a drastic sanction. ... Plus, punitive damages per se are not recognized in civil law jurisdictions.

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confidentiality, which are intended to compensate quantifiable loss caused by such breaches).

V. Conclusion

63 The reader is now aware that existing institutional rules do not adequately address the problems associated with confidentiality and its exceptions. In particular, virtually all of these do not provide a holistic solution capable of dealing with unexpected situations where a hitherto unrecognised exception to confidentiality needs to be created. The MPO is intended as a practical and effective solution that can be taken by arbitrating parties to address these shortcomings. The advantage of this solution is that the parties may now tailor the scope of the obligation of confidentiality to the circumstances of the case so as to meet their particular requirements. Most importantly, parties who adopt the MPO will no longer be constrained to justify disclosure by attempting to fit a given situation into the limited exceptions to confidentiality which are currently provided for in institutional rules or national legislation. In time to come, it is hoped that both counsel and arbitrators will appreciate that a code on confidentiality in international arbitration needs to be developed through a collaborative effort (similar to how the International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration were created and are now accepted as "soft law"). Our MPO is intended to be the first contribution towards the development of that code, but it is certainly not the last word.

See also Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at paras 9.46–9.51.

Background to the Essay 5

This was an extended case note on the case I had been involved as counsel which led to my first paper on Confidentiality. Because the case itself had been immunised against publicity under section 23 of the International Arbitration Act and reported under the name of *AAV v AAZ*, I had to be careful not to identify the characters in the case in the article and sent a draft to my opponent for his review before publication. I also had the opportunity of giving a short talk on this case in a public seminar in Singapore and invited my opponent to be present (which he kindly accepted) so that he could remind me in case I transgressed the boundaries of confidentiality in discussing the legal issues which arose. I was pleased that this article was accepted for publication by *Arbitration International*, which is my favourite arbitration journal. Nicholas Thio, who had worked with me on the case in question, was the obvious choice as co-author.

I wish to extend my thanks to *Arbitration International* for kindly granting me permission to republish this paper in this book.

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A CONTEXTUAL APPROACH TO THE OBLIGATION OF CONFIDENTIALITY IN ARBITRATION IN SINGAPORE: AN ANALYSIS OF THE DECISION OF THE SINGAPORE HIGH COURT IN *AAV V AAZ*

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Contents

I.	Facts.....	211
II.	Juridical basis and scope of obligation of confidentiality	213

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III.	The exceptions to confidentiality and disclosure of confidential information where the public interest so requires.....	217
IV.	Section 39 of the CDTSCA	225
V.	Disclosure with the consent of all the parties to the arbitration.....	229
VI.	Conclusion.....	230
VII.	Postscript.....	232

1 *AAZ v AAZ* (“*AAZ*”)¹ is the first (and to date the only) decision in Singapore which has comprehensively considered the common law jurisprudence on the implied obligation of confidentiality in arbitration. Significantly, the High Court examined both the juridical basis as well as the scope of the obligation of confidentiality in arbitration. Observing that the jurisprudence on this subject is not uniform, Chan Seng Onn J indicated that the approach taken in the landmark decision of the English Court of Appeal in *John Forster Emmott v Michael Wilson & Partners Ltd* (“*Emmott*”)² was to be taken as the basis for future developments in this branch of the law. It is of interest here that two of the established exceptions to confidentiality, *viz*, disclosure of matters (a) where the public interest so requires; and (b) with the consent of all the parties to the arbitration were considered by the court. The court explained in *AAZ* that the “public interest” exception was multi-faceted in the sense that varied situations could conceivably fall under that head, but the outcome would be different in each case depending on the context and the various considerations in play. In this regard, the particular question with which the court was faced was a novel one (which had hitherto not been considered by common law courts elsewhere), *viz*, whether the defendant breached the duty of confidentiality by disclosing materials relating to the arbitration to the authorities. Additionally, the court also had the

¹ [2011] 1 SLR 1093. This was the decision of Chan Seng Onn J at first instance. The unsuccessful plaintiffs subsequently appealed against his Honour’s decision but their appeal was dismissed (without a reasoned judgment) by the Court of Appeal. The principal author acted for the defendant in these proceedings.

² [2008] EWCA Civ 184; [2008] Bus LR 1361, discussed in *AAZ v AAZ* [2011] 1 SLR 1093 at [33].

opportunity to consider whether section 39 of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act³ (“CDTSCA”) would confer immunity on the defendant in relation to any alleged breach of the obligation of confidentiality.

I. Facts

2 The facts of the case, so far as material, are these. AAY and two others (plaintiffs) were employees of CCZ, a wholly owned subsidiary of AAZ (defendant). After the plaintiffs’ sudden resignation from CCZ, the defendant sold CCZ’s third-party distributorship division to the plaintiffs under a sale and purchase agreement (“SPA”), which provided for the arbitration of any disputes arising therefrom.

3 The plaintiffs rejoined CCZ soon after the SPA was signed. The defendant, believing that the plaintiffs had conspired to depress CCZ’s net asset value, commenced, *inter alia*, arbitration against the first and second plaintiffs in 1994, with which it ultimately decided not to proceed (“1994 Arbitration”).

4 In 1997, the defendant’s president and chief executive officer, XZ, received new information providing further grounds for suspecting conspiracy on the part of the plaintiffs. In 1998, the defendant commenced a suit against the plaintiffs on grounds which included fraudulent misrepresentation and conspiracy (“Suit X”). The plaintiffs applied to stay or dismiss the suit in favour of the 1994 Arbitration. Following negotiations, the parties agreed, by an order of court made with the consent of the plaintiffs and the defendant (“Consent Order”), to abandon the 1994 Arbitration and to refer the entire dispute to arbitration as follows:

The whole of this action in [Suit X], and all of the issues and claims comprised or embraced in the Statement of Claim filed herein on the 10th day of October 1998, shall be referred to and be tried before an arbitrator in Singapore under the International Arbitration Act

³ Cap 65A, 2000 Rev Ed.

(Cap 143A), and shall be determined and finally resolved by arbitration before such arbitrator under the said Act.

5 Importantly, the Consent Order did not make any express provision for confidentiality of the said arbitration (“1998 Arbitration”).

6 The governing law of the arbitration was Singapore law and its seat was Singapore.

7 The tribunal in the 1998 Arbitration issued a partial award on liability on 30 June 2005 (“Partial Award”), finding the plaintiffs liable for breach of fiduciary duty, fraudulent misrepresentation and conspiracy. The plaintiffs applied to set aside the Partial Award but were unsuccessful.

8 During the 1998 Arbitration which continued thereafter, the defendant made a report to the Commercial Affairs Department (“CAD”),⁴ disclosing documents relating to the arbitration (including the Partial Award) to the CAD in so doing. The defendant then informed the plaintiffs of the report made to the CAD.

9 The plaintiffs subsequently took the position that the defendant had repudiated the arbitration agreement by, *inter alia*, making the report to the CAD. The plaintiffs’ argument was that confidentiality was a condition of the agreement to arbitrate, and that its breach amounted to a repudiation of the latter which they had accepted. Accordingly, the plaintiffs commenced an action against the defendant seeking:

- (a) an order to set aside the Consent Order and to discharge the arbitration agreement;
- (b) a declaration that the plaintiffs were discharged from their unperformed primary obligations under the same;
- (c) an injunction restraining the arbitration; and
- (d) damages, interest and costs.

10 The defendant argued in response, *inter alia*, that:

- (a) disclosure to the CAD was justified in the public interest;

⁴ The CAD is a division of the Singapore Police Force and is the principal white-collar crime investigation agency in Singapore.

- (b) section 39 of the CDTSCA conferred immunity on the defendant for any alleged breach of the obligation of confidentiality since the matters raised in the complaint to the CAD showed that the defendant had *prima facie* evidence which, if proved, would show that certain criminal offences falling under the Second Schedule of the CDTSCA had been committed by the plaintiffs; and
- (c) the plaintiffs had waived their right to confidentiality by applying to set aside the Partial Award (on grounds of apparent bias on the part of the arbitrator) without first applying for that hearing to take place “otherwise than in open court”,⁵ *ie*, behind closed doors.

II. Juridical basis and scope of obligation of confidentiality

11 Having concluded that “confidentiality was not an express term of the arbitration agreement”,⁶ the court proceeded to examine the implied obligation of confidentiality in arbitration. The court began by considering the English authorities on the subject, prefacing its review of the authorities with the comment that:⁷

The existence of an obligation of confidentiality has been emphatically recognised by the English courts, though with some ambivalence over its precise legal basis, scope and exceptions.

The court observed⁸ that in *Hassneh Insurance Co of Israel v Steuart J Mew* (“*Hassneh Insurance*”),⁹ Colman J held that the obligation of confidentiality in arbitration was implied “based on custom or business

⁵ See, International Arbitration Act (Cap 143A, 1995 Rev Ed) s 22.

⁶ *AAZ v AAZ* [2011] 1 SLR 1093 at [25]–[32]. Although the tribunal, in its decision on security for costs of 15 December 1999, made reference to the Singapore International Arbitration Centre (“SIAC”) Arbitration Rules (2nd Ed, 22 October 1997) (“SIAC Rules”), there was no express adoption of these Rules. The court subsequently found that there had been no general adoption of the SIAC Rules; accordingly, Art 34.6 of the SIAC Rules providing for confidentiality did not apply to the arbitration.

⁷ *AAZ v AAZ* [2011] 1 SLR 1093 at [36].

⁸ *AAZ v AAZ* [2011] 1 SLR 1093 at [37].

⁹ [1993] 2 Lloyd’s Rep 243 at 246.

efficacy". However, the court noted¹⁰ that in *Ali Shipping Corp v Shipyard Trogir* ("*Ali Shipping*"),¹¹ Potter LJ disagreed with Colman J's characterisation of the obligation of confidentiality as an implied term based on custom or business efficacy, holding instead that it arose as a matter of law. In *Ali Shipping*, Potter LJ explained that this distinction was not merely academic:¹²

The distinction [between an implied term necessary to give business efficacy to a particular contract and a term which the law will imply as a necessary incident of a definable category of contractual relationship] is of some practical consequence in this case. That is because considerations of business efficacy, particularly when based notionally upon the 'officious bystander' test, are likely to involve a detailed examination of the circumstances existing at the time of the relevant contract, in this case the original agreement to arbitrate, whereas the parties have indicated their presumed intention simply by entering into a contract to which the court attributes particular characteristics.

12 In *Emmott, Hassneh Insurance* was disapproved on this point. The court in *Emmott* confirmed that the implied obligation of confidentiality "arises, not as a matter of business efficacy, but is implied as a matter of law".¹³ In *AAZ*, the court accordingly concluded as follows:¹⁴

It thus appears that the discussion has come almost a full circle, the obligation having been characterised in turn as an implied term based on custom or the officious bystander test, then as an implied term in law, and finally as a substantive rule of arbitration law masquerading as an implied term ...

13 Although the point just considered (*ie*, the juridical basis of the obligation of confidentiality) appears have been settled for the time being, the court in *AAZ* cautioned against a blanket rule of confidentiality. The conceptual analysis begins with *Associated Electric Gas and Insurance*

¹⁰ *AAZ v AAZ* [2011] 1 SLR 1093 at [40].

¹¹ [1999] 1 WLR 314.

¹² *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 at 326.

¹³ [2008] EWCA Civ 184 at [81].

¹⁴ *AAZ v AAZ* [2011] 1 SLR 1093 at [54].

Services Ltd v European Reinsurance Co of Zurich (“*Associated Electric*”),¹⁵ in relation to which the court in *AAY* noted that “Lord Hobhouse ... expressed some reservations about the analysis of the duty of confidentiality as an implied term”.¹⁶ In this regard, Lord Hobhouse held as follows in *Associated Electric*:¹⁷

Potter LJ, ... affirming the privacy of arbitration proceedings, went on to characterise a duty of confidentiality as an implied term and then to formulate exceptions to which it would be subject ... Their Lordships have reservations about the desirability or merit of adopting this approach. It runs the risk of failing to distinguish between different types of confidentiality which attach to different types of document or to documents which have been obtained in different ways and elides privacy and confidentiality. Commercial arbitrations are essentially private proceedings and unlike litigation in public courts do not place anything in the public domain. This may mean that the implied restrictions on the use of material obtained in arbitration proceedings may have a greater impact than those applying in litigation. But when it comes to the award, the same logic cannot be applied. An award may have to be referred to for accounting purposes or for the purpose of legal proceedings ... or for the purposes of enforcing the rights which the award confers ... Generalisations and the formulation of detailed implied terms are not appropriate.

14 Lord Hobhouse’s view in *Associated Electric* was echoed in Singapore by Lai Siu Chiu J in *International Coal Pte Ltd v Kristle Trading Ltd* (“*Kristle Trading*”),¹⁸ where her Honour considered as follows:¹⁹

The principles that can be extracted from the last English authority cited above, *viz*, the Privy Council decision in *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* ...

¹⁵ [2003] 1 WLR 1041.

¹⁶ *AAY v AAZ* [2011] 1 SLR 1093 at [41].

¹⁷ *Associated Electric Gas and Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 WLR 1041 at 1050, cited by *AAY v AAZ* [2011] 1 SLR 1093 at [41].

¹⁸ [2009] 1 SLR(R) 945.

¹⁹ *International Coal Pte Ltd v Kristle Trading Ltd* [2009] 1 SLR(R) 945 at [84], referred to in *AAY v AAZ* [2011] 1 SLR 1093 at [51].

were that (unlike the approach taken by Potter LJ in *Ali Shipping Corporation v Shipyard Trogir* ...) there should be no generalisations of what the duty of confidentiality encompassed as each case should be evaluated in the context of its circumstances. Further, following the approach taken by Colman J in *Hassneh Insurance Co of Israel v Steuart J Mew*, a distinction has to be drawn between different types of confidentiality attaching to different types of documents. Arbitration awards were also to be treated differently from the materials used or disclosed in the course of arbitration proceedings.

15 Of the approach taken in *Kristle Trading*, the court in *AAZ* observed as follows:²⁰

²⁰ *AAZ v AAZ* [2011] 1 SLR 1093 at [52]–[53]. Chan Seng Onn J elaborated at [53] as follows:

For example, confidentiality would not be an absolute bar to a party to litigation seeking discovery of documents generated in an arbitration. In that case the court would compel disclosure only if it considered it relevant and necessary for the fair disposal of the case. Second, should a party to an arbitration seek the court's assistance to obtain through a witness summons material deployed in another arbitration (see *London & Leeds Estates Ltd v Paribas Ltd (No 2)* [1995] 1 EGLR 102), the court would take into account the strong policy in favour of confidentiality in an arbitration, though confidentiality would not necessarily be an absolute bar either. Third, with regard to issues arising about the disclosure of documents on the court file relating to an arbitration, or whether the judgment of a court given in relation to an arbitration should be published, the privacy of arbitration would be an important but not decisive factor. The court would therefore exercise its discretion with privacy or confidentiality being 'an important factor in the balance' (*Emmott* at [77]). As for the fourth kind of case in which a party to an arbitration might have an interest, commercial or otherwise, in disclosing documents generated in an arbitration (including the award) to third parties (as in *Hassneh [Insurance]* ([37] ...) and *Insurance Co v Lloyd's Syndicate* [1995] 1 Lloyd's Rep 272) or in another arbitration (as in *Ali Shipping* and *Associated Electric*), disclosure would be permissible to the extent to which it was reasonably necessary for the establishment or protection of an arbitrating party's legal rights vis-à-vis a third party to found a cause of action or defend a claim.

Lai J thus appeared to adopt the general principle in *Associated Electric* that the duty of confidentiality should be evaluated in the context of the circumstances of each case, bearing in mind also that different types of confidentiality would apply to different types of documents.

The court in *Emmott* similarly noted that in different contexts the obligation of confidentiality would operate to result in different consequences. ...

16 As foreshadowed above, the court in *AAY* subsequently arrived at the conclusion that the “scope, nature and application [of the implied obligation of confidentiality in Singapore] must be determined in the context of each case and the nature of the information or documents at issue”.²¹ Accordingly, “the court will recognise and enforce confidentiality only to the extent that it is reasonable to do so”.²² Notwithstanding the recognised exceptions to confidentiality at common law (see below), the court further observed that the obligation of confidentiality had an “amorphous scope and exceptions as well as [an] elusive juridical basis”.²³

III. The exceptions to confidentiality and disclosure of confidential information where the public interest so requires

17 In *Ali Shipping*,²⁴ Potter LJ observed that the following categories of exceptions to the obligation of confidentiality had been recognised in England:²⁵

- (a) disclosure with consent, *ie*, where disclosure is made with the express or implied consent of the party which originally produced the material in question;²⁶

²¹ *AAY v AAZ* [2011] 1 SLR 1093 at [54].

²² *AAY v AAZ* [2011] 1 SLR 1093 at [57].

²³ *AAY v AAZ* [2011] 1 SLR 1093 at [54].

²⁴ *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 at 326–328.

²⁵ See *AAY v AAZ* [2011] 1 SLR 1093 at [59].

²⁶ Contrary to what was said by Potter LJ in *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314, a correct interpretation of the obligation of

- (b) disclosure pursuant to an order of court or with the leave of the court;
- (c) disclosure when and to the extent which it is reasonably necessary for the protection of the legitimate interests of an arbitrating party (understood to mean “reasonably necessary for the establishment or protection of an arbitrating party’s legal rights *vis-à-vis* a third party in order to found a cause of action against that third party or to defend a claim, or counterclaim, brought by the third party”);²⁷ and
- (d) disclosure where the public interest so requires.²⁸

18 The court in *AAV* returned to the same theme by sounding a familiar refrain when it cautioned against an overgeneralisation in the formulation of the exceptions to confidentiality.²⁹ Stressing that a contextual approach to the obligation of confidentiality and its exceptions was required, the court held that:³⁰

There is thus no comprehensive list of exceptions to the obligation of confidentiality; but neither does the court have a general discretion to lift confidentiality. Indeed while the court in *Emmott* recognised that there were limits to the obligation of confidentiality, it stressed that the possible exceptions to confidentiality must also be discussed in their appropriate context.

confidentiality would require the consent of all the parties to the arbitration and not just the party which produced the material in question.

²⁷ *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 at 327. Although Potter LJ expressly defined this exception as being for the benefit of an arbitrating party’s rights against third parties, there seems to be no logical reason why it should not be for the benefit of its rights against the other arbitrating party. Accordingly, most institutional rules define this exception on the broader basis, *eg*, Art 35.2(c) of the Singapore International Arbitration Centre Arbitration Rules (4th Ed, 1 July 2010); Art 43(1) of the Swiss Rules of International Arbitration (June 2012); and Art 30(1) of the London Court of International Arbitration Arbitration Rules (effective 1 January 2008). The court in *AAV v AAZ* [2011] 1 SLR 1093 made no decision on this point.

²⁸ Potter LJ noted that this exception was only “tentatively recognised” in one decision, *ie*, *London & Leeds Estates Ltd v Paribas (No 2)* [1995] 1 EGLR 102.

²⁹ *AAV v AAZ* [2011] 1 SLR 1093 at [60]–[61].

³⁰ *AAV v AAZ* [2011] 1 SLR 1093 at [63].

19 However, the court nevertheless made express reference to the exceptions to confidentiality already recognised at common law and suggested that these would remain the starting point for any analysis:³¹

In sum, an examination of exceptions to confidentiality would probably still begin with a reference to the established categories, taking into account the context and circumstances of the case, including the nature of the document(s) sought to be disclosed, to whom disclosure is sought to be made, and for what purpose.

20 Following from the approach laid down above, the court turned to consider the issue of whether the defendant breached the duty of confidentiality by disclosing materials relating to the arbitration to the CAD. Referring, *inter alia*, to *Initial Services Ltd v Putterill*,³² where it was emphasised that there could be “no confidence as to the disclosure of iniquity”, the court held that there can be no liability for disclosure of wrongdoing to the appropriate authorities:³³

The basis for this is that confidentiality is a lesser interest than the public interest of having criminal wrongdoing revealed to the relevant authorities for their investigation. Disclosure to the appropriate authorities where there is reasonable suspicion of criminal conduct is thus an exception to the obligation of confidentiality which can be broadly categorised as falling within the public interest.

21 Although the plaintiffs submitted that the disclosure by the defendant should be proscribed as it undermined the public interest in encouraging arbitrations and confidentiality, and also would give rise to the risk that an arbitrating party may use the threat of him providing copies of document to the authorities as an improper bargaining tool in the litigation,³⁴ the court did not find these arguments persuasive. The

³¹ *AAY v AAZ* [2011] 1 SLR 1093 at [64].

³² [1968] 1 QB 396.

³³ *AAY v AAZ* [2011] 1 SLR 1093 at [72].

³⁴ Relying on Paul Matthews & Hodge Malek, *Disclosure* (Sweet & Maxwell, 3rd Ed, 2007): see *AAY v AAZ* [2011] 1 SLR 1093 at [65].

court referred instead to a passage from *Clerk & Lindsell on Torts*,³⁵ which was cited by the defendant:³⁶

A much quoted dictum is: 'The true doctrine is that there is no equity in the disclosure of iniquity.' Although this has never been doubted, it is merely an example of the broader principle that the disclosure of confidential information will not be restrained where there is a just cause or excuse for disclosing it. It does not extend only to the detection or prevention of wrongdoing. The defence of public interest certainly covers 'matters carried out or contemplated in breach of the country's security, or in breach of law, including statutory duty, fraud, or otherwise destructive of the country or its people, including matters medically dangerous to the public: and doubtless other misdeeds of similar gravity' but it is not limited to these categories. The general principle is that disclosure should be made to the one who has a proper interest in receiving the information.

22 At the same time, the court also sought to clarify the distinction between an exception to the obligation of confidentiality and a defence to a breach of confidentiality:³⁷

The question is whether disclosure of confidential information arising out of arbitration to the *relevant authorities* where there is reasonable suspicion of criminal conduct, would be a breach of confidentiality at all – in other words, does the disclosure fall within an exception to confidentiality or does it operate as a defence? If it were an exception, then the scope of the obligation of confidentiality would not even extend to cover disclosure to the proper authorities and the plaintiffs would not be able to establish a *prima facie* case of breach without showing that the exception did not apply. If it were a defence, then the burden would be on the defendant to prove the defence and justify the disclosure which would not be in *breach* of the obligation of confidentiality.

... The correct characterisation of disclosure to the relevant authorities must be that of an exception, as the jurisprudence has

³⁵ Anthony Dugdale & Michael Jones, *Clerk & Lindsell on Torts* (Sweet & Maxwell, 19th Ed, 2006) at paras 28–32.

³⁶ *AAV v AAZ* [2011] 1 SLR 1093 at [66].

³⁷ *AAV v AAZ* [2011] 1 SLR 1093 at [70] and [71].

reflected. Lawrence Collins LJ put it beyond doubt in *Emmott* ... at [103]: 'It is clear that where the public interest reasonably requires it, there is *no obligation* to keep a matter private. ...'

[emphasis in original]

23 The court found, as a matter of fact, that the defendant had "ample legitimate grounds to make a complaint [to the CAD] based on the arbitrator's finding in the [P]artial [A]ward that the plaintiffs had committed ... dishonest and fraudulent acts". These included, *inter alia*, the setting up of a rival company FFZ to compete with CCZ while the plaintiffs were still employed by CCZ, the diversion of business and staff resources from CCZ to FFZ, the removal of documents and confidential records from CCZ around July 1992, the procurement of breaches of CCZ's exclusive distributorship agreements as well as that of the resignation of employees of the marketing and distribution division of CCZ and the fabrication of evidence.³⁸

24 On the basis of the foregoing, the court found that the disclosure of materials relating to the arbitration (including the Partial Award) by the defendant to the CAD fell within the exception of disclosure to the appropriate authorities because "there was reasonable cause to suspect criminal conduct".³⁹ Noting the plaintiffs' submission that the defendant's complaint was actuated by an improper and illegitimate motive, *ie*, to coerce the plaintiffs into a settlement on the defendant's terms, the court held that the defendant's motive for making the complaint was irrelevant since it had a "reasonable and probable cause" for so doing based on the arbitrator's findings in the Partial Award. Instead, the court agreed with the defendant's submission that the "existence of a bad motive, in the case of an act which is not otherwise illegal, will not convert that act into a civil wrong".⁴⁰

³⁸ *AAY v AAZ* [2011] 1 SLR 1093 at [81].

³⁹ *AAY v AAZ* [2011] 1 SLR 1093 at [83].

⁴⁰ Anthony Dugdale & Michael Jones, *Clerk & Lindsell on Torts* (Sweet & Maxwell, 19th Ed, 2006) at pp 31–32; see *AAY v AAZ* [2011] 1 SLR 1093 at [82].

25 Although the circumstances of the case did not require the court to consider the existence and scope of a further potential exception to confidentiality, *viz.* disclosure to the public at large (as opposed to disclosure to the relevant enforcement authority) where the public interest so requires, the court nevertheless considered (albeit by way of *obiter dicta*) that such disclosure would only be allowed if the public interest outweighed the importance of the confidentiality which attached to the information in question:⁴¹

I would venture to suggest that where disclosure to the public *at large* is sought to be justified on the grounds of public interest, this justification should instead operate as a defence, and the court would have to undertake a balancing exercise weighing the interest in protecting confidentiality against the public interest in disclosure to the public at large. The burden would then be on the defendant to show that such disclosure is necessary in the public interest to the extent that it should be excused from breaching confidentiality. Disclosure to the public at large (for example to the press or over the internet) would completely destroy confidentiality and the defendant must show a compelling public interest to justify such disclosure. It cannot be said that there is *no obligation* of confidentiality where the information in question is of public interest. A balancing exercise must be undertaken to weigh the importance of this public interest against the interest of protecting confidentiality and it must be for the defendant to convince the court that disclosure is justified. [emphasis in original]

26 This is itself an illustration of the measured and contextual approach to confidentiality which was advocated by the court in *AAZ*, since it implicitly acknowledges that it would be impossible to pre-determine the outcome in any given situation. Rather, whether disclosure ought to be permitted would fall to be determined based on the facts and competing interests in each case. The court took pains to stress that the decision in *AAZ* ought not to be regarded as establishing a general public interest exception to confidentiality, observing that the “development of other

⁴¹ *AAZ v AAZ* [2011] 1 SLR 1093 at [72].

aspects of public interest exceptions will have to be considered as appropriate cases arise”.⁴²

27 Since the decision in *AAY*, *Emmott* was considered and applied by the English High Court (Chancery Division) in the more recent decision of *Milsom v Ablyazov*.⁴³ That case concerned an application by the court-appointed receivers of certain assets of the defendant for the production by the defendant of specified classes of documents produced in arbitration proceedings in which companies beneficially owned by the defendant participated. The defendant had been involved in heavy litigation brought by JSC BTA Bank, headquartered in Kazakhstan, of which he was formerly the chairman. The bank alleged that the defendant had misapplied its funds and successfully obtained a worldwide freezing order against the defendant. An order of receivership was obtained in support of that freezing order as it was found that the defendant had the intention to make it difficult for the bank to enforce the freezing order and might use the corporate structure by which his assets were held to breach the freezing order. The issue in this case was whether a temporary undertaking by the receivers not to disclose any of the documents sought to any third party without seven working days’ notice to the defendant’s solicitors (specifying the information or documents intended to be disclosed) ought to be discharged. The defendant argued that the notice regime ought to be made permanent on the grounds that, *inter alia*, his rights to confidentiality in the arbitration process would be undermined if such order was not made. Briggs J began by referring to Lawrence Collins LJ’s speech in *Emmott*, which discussed the limits of the obligation of confidentiality in arbitration, including its exceptions. Briggs J noted that “arbitration confidentiality or privacy is not absolute” and that its preservation was only the “starting point and may be overridden where either the public interest or ... the interests of justice require”.⁴⁴ Based on the factual situation before the court, his Lordship

⁴² *AAY v AAZ* [2011] 1 SLR 1093 at [72].

⁴³ [2011] EWHC 955 (Ch).

⁴⁴ *Milsom v Ablyazov* [2011] EWHC 955 (Ch) at [30]. In *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184; [2008] Bus LR 1361, Lawrence Collins LJ observed that in addition to disclosure

rejected the defendant's argument and held that the "interests of justice would be better served by the effective preservation by the receivers of [the defendant's] assets".⁴⁵ It is apparent from the judgment that his Lordship did not consider the defendant's proposed notice regime to be an appropriate form of restriction to impose on the receivers in the particular circumstances of the case:⁴⁶

The getting in and preservation of, or of the value of, complex commercial assets such as those that are the subject of this receivership demands on occasion speed, flexibility and the need in unpredictable circumstances to take steps requiring the use of disclosed information which would, to use Mr Miles QC's word, be hamstrung if attended by a prior requirement either to give [the defendant] notice or to apply to the court on every occasion where the need for that use should arise. The need to use the information may arise, for example, in the middle of a meeting or when the Receivers are pursuing enquiries abroad. The proposed restriction is, quite simply, completely impracticable.

The decision in *Milson v Abyazov* is therefore yet another illustration of the application of the principles considered in both *AAZ* and *Emmott*. In this regard, the *dicta* of Lawrence Collins LJ in *Emmott* remain the touchstone of any decision on confidentiality in arbitration faced by a court or tribunal:⁴⁷

In my judgment, the content of the obligation may depend on the context in which it arises and on the nature of the information or documents at issue. The limits of that obligation are still in the process of development on a case-by-case basis.

where the interests of justice so require, an additional exception to confidentiality would also be disclosure where required by the public interest: *Milsom v Abyazov* [2011] EWHC 955 (Ch) at [107]. However, in *AAZ v AAZ* [2011] 1 SLR 1093, the court noted (at [81]) that the latter two exceptions are "discrete but not mutually exclusive".

⁴⁵ *Milsom v Abyazov* [2011] EWHC 955 (Ch) at [32].

⁴⁶ *Milsom v Abyazov* [2011] EWHC 955 (Ch) at [37].

⁴⁷ [2008] EWCA Civ 184 at [107].

IV. Section 39 of the CDTSCA

28 The defendant argued, alternatively, that it was compelled to make the disclosure and complaint to the CAD because it had reasonable grounds to suspect that the plaintiffs had committed “serious offence[s]”⁴⁸ as defined in the Second Schedule of the CDTSCA.⁴⁹ Accordingly, the defendant submitted that the section 39(6) of the CDTSCA would confer immunity for any alleged breach of confidentiality.⁵⁰ Section 39 of the CDTSCA states in material part as follows:

⁴⁸ See s 3(3) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed).

⁴⁹ However, the obligation to disclose or report as set out in s 39(1) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) (“CDTSCA”) is subject to the following qualifications. First, sub-s 4 provides, *inter alia*, that information subject to “legal privilege” does not need to be disclosed. In this regard, “legal privilege” refers to both legal professional privilege and litigation privilege (see s 39(9) of the CDTSCA). Second, sub-s 5 provides that it is a “defence” to a charge under s 39 of the CDTSCA if there is “a reasonable excuse for not disclosing the information or other matter in question”. Third, sub-s 7 likewise provides that it is a “defence” to a charge under s 39 of the CDTSCA if the person charged was in employment at the material time and “disclos[es] the information or other matter in question to the appropriate person in accordance with the procedure established by his employer for the making of such disclosures”.

⁵⁰ In England, similar provisions may be found in the following: Serious Organised Crime and Police Act 2005 (c 15) (UK); Serious Crimes Act 2007 (c 27) (UK); Proceeds of Crime Act 2002 (c 29) (UK) (“PCA 2002”); and Terrorism Act 2000 (c 11) (UK) (“TA 2000”). In particular, s 330 of the PCA 2002 and s 19 of the TA 2000 provide that it is an offence, in certain circumstances, for a person to fail to disclose the commission of certain offences (including money laundering, use and possession of money or other property for terrorism and fund raising for terrorism) where he knows or suspects that those offences had been committed. However, s 337 of the PCA 2002 is similar to s 39(6) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) in that it grants immunity for any disclosure which would otherwise be a

(continued on next page)

Duty to disclose knowledge or suspicion

- 39.—(1) Where a person knows or has reasonable grounds to suspect that any property —
- (a) in whole or in part, directly or indirectly, represents the proceeds of;
 - (b) was used in connection with; or
 - (c) is intended to be used in connection with,
- any act which may constitute drug trafficking or criminal conduct, as the case may be, and the information or matter on which the knowledge or suspicion is based came to his attention in the course of his trade, profession, business or employment, he shall disclose the knowledge or suspicion or the information or other matter on which that knowledge or suspicion is based to a Suspicious Transaction Reporting Officer as soon as is reasonably practicable after it comes to his attention.
- (2) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$20,000.
- ...
- (4) Subsection (1) or (2) does not make it an offence for an advocate and solicitor or his clerks or employees or an interpreter to fail to disclose any information or other matter which are items subject to legal privilege.
- (5) It is a defence to a charge of committing an offence under this section that the person charged had a reasonable excuse for not disclosing the information or other matter in question.
- (6) Where a person discloses in good faith to a Suspicious Transaction Reporting Officer —
- (a) his knowledge or suspicion of the matters referred to in subsection (1) (a), (b) or (c); or
 - (b) any information or other matter on which that knowledge or suspicion is based,
- the disclosure shall not be treated as a breach of any restriction upon the disclosure imposed by law, contract or rules of

breach of confidentiality (see also s 338 of the PCA 2002). Section 21B of the TA 2000 likewise grants immunity for any disclosure which would otherwise be a breach of confidentiality.

professional conduct and he shall not be liable for any loss arising out of the disclosure or any act or omission in consequence of the disclosure.

- (7) Without prejudice to subsection (5) or (6), in the case of a person who was in employment at the time in question, it is a defence to a charge of committing an offence under this section that he disclosed the information or other matter in question to the appropriate person in accordance with the procedure established by his employer for the making of such disclosures.
- (8) A disclosure to which subsection (7) applies shall not be treated as a breach of any restriction imposed by law, contract or rules of professional conduct.

...

29 Several issues were canvassed before the court.

30 First, it was argued by the defendant that it was not necessary for it to have been apprised of all the facts of a suspicious transaction to establish “reasonable grounds” for reporting it under the CDTSCA. Although the court expressed no firm view on this issue, it noted the following comments of the Senior Minister of State for Home Affairs, Associate Professor Ho Peng Kee, which were made in Parliament:⁵¹

However, some have misinterpreted [section 39 of the CDTSCA] to mean that the suspicion must relate to a specific predicate offence under the [CDTSCA] before it is reportable. This is not necessary. A suspicious transaction report should be made when there is knowledge or reason to suspect that something is amiss with a particular transaction, and there is no requirement to link this to a specific [CDTSCA] predicate offence. A suspicious transaction report is not a specific complaint or allegation of criminal wrongdoing.

31 Second, the court considered the question of whether the suspected criminal conduct of the plaintiffs fell within the scope of the CDTSCA. The defendant contended that the plaintiffs’ suspected conduct constituted,

⁵¹ *Singapore Parliamentary Reports, Official Report* (19 September 2007) vol 83 at cols 1970–1971 (Ho Peng Kee, Senior Minister of State for Home Affairs); see *AAY v AAZ* [2011] 1 SLR 1093 at [104].

inter alia, aggravated cheating under section 420 read with section 415 of the Penal Code.⁵² However, the court held that the latter offence, alleged to have been committed by the defendants between 1989 to 1992, did not fall within the scope of the CDTSCA until 1999 because the Second Schedule to the CDTSCA was added only by the Drug Trafficking (Confiscation of Benefits) (Amendment)⁵³ Act. Accordingly, it was determined that the CDTSCA did not apply since the defendant failed to show that the alleged crimes fell within the scope of the CDTSCA when they were committed.⁵⁴ Although section 3(3) of the CDTSCA, which sets out the scope of application of the Act, provides that the Act “shall apply to any serious offence ... *whether committed before or after 13th September 1999*” [emphasis added], it is likely that the court’s (unarticulated) view was that section 3(3) of the CDTSCA would have a retrospective effect if read literally. To elaborate, if a certain offence was committed well before 1999, but only became a “serious offence” within the meaning of the CDTSCA on 13 September 1999, a person who had known about the commission of that offence all the while (but who had failed to report the offence) would suddenly become guilty of an offence under the CDTSCA.

32 Separately, it is submitted that the operation of the CDTSCA gives rise to an ironic (and perhaps unintended) result. The irony here is that although there is no clear requirement that the alleged offence reasonably suspected to have been committed has *prima facie* to fulfil all the ingredients of any of the offences scheduled under the CDTSCA, section 39(6) of the CDTSCA would only confer immunity for breach of confidentiality in cases where the offence alleged is one which does fall within the definition of “serious offence[s]”⁵⁵ under the CDTSCA. The

⁵² Cap 224, 1985 Rev Ed.

⁵³ Act 25 of 1999.

⁵⁴ *AAV v AAZ* [2011] 1 SLR 1093 at [106].

⁵⁵ Section 3(3) of the Corruption, Drugs Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) sets out the scope of the application of the Act as follows: “This Act shall apply to any serious offence or foreign serious offence whether committed before or after 13th September 1999.”

outcome is artificial and unsatisfactory, because this would mean that an arbitrating party contemplating disclosure would have to work backwards (or “reverse engineer”) to determine (prior to disclosure) whether the suspicious conduct in question could conceivably constitute any one of the offences scheduled under the CDTSCA – this would itself require a consideration of the ingredients of the various scheduled offences.

33 Third, the plaintiffs made the novel submission that the defendant could not invoke a common law exception to confidentiality should the statutory exception (*ie*, that set out in section 39(6) of the CDTSCA) not be available to it. In other words (according to the plaintiffs), the CDTSCA regulates the manner in which any public interest exception would apply, so the same requirements (as those set out in section 39 of the CDTSCA) would have to be met before any breach of confidentiality could be excused in relation to lesser offences than those scheduled in the CDTSCA. This submission was rejected by the court. It was held that the CDTSCA merely imposes an obligation to report knowledge of certain serious crimes (the failure of which to do so invites a criminal sanction), but is not otherwise a substitute for the general right of those who have knowledge of other offences to make police reports.⁵⁶ Indeed, the position cannot be otherwise because nothing in the CDTSCA suggests that the intention of Parliament was to repeal the pre-existing common law rules on the situations in which disclosure of matters concerning an arbitration may be permitted.

V. Disclosure with the consent of all the parties to the arbitration

34 Finally, the defendant further argued that the plaintiffs had waived their right to confidentiality over, *inter alia*, the Partial Award by commencing and prosecuting in open court an originating motion to set aside the Partial Award on grounds of apparent bias on the part of the arbitrator. The court observed that in matters relating to arbitration, any party to the proceedings would be able to make an application under

⁵⁶ *AAY v AAZ* [2011] 1 SLR 1093 at [106].

section 22 of the International Arbitration Act⁵⁷ (“IAA”) for the proceedings to be “heard otherwise than in open court”. The court further observed that either party to the proceedings could have made an application under section 22 of the IAA, but neither party in fact did so. It could thus be said that the plaintiffs elected to bring a challenge in open court and the defendant consented tacitly by also omitting to make the same application. The court found that as a result, the parties had “effectively *agreed* by their conduct ... that confidentiality would be waived in respect of the [documents disclosed in the Originating Motion]” [emphasis in original].⁵⁸ In other words, this was a case where both parties had given their implied consent to the disclosure of information which would otherwise be confidential.⁵⁹ Accordingly, this was a further ground for holding that the defendant did not breach the obligation of confidentiality.

VI. Conclusion

35 The salient points in *AAV* may be summarised as follows.

- (a) The starting point for any analysis on the obligation of confidentiality in arbitration ought to be the approach espoused by *Emmott*, *viz*, that there can be no one-size-fits-all rule to confidentiality which specifies all the situations in the future in which confidential information in the arbitration may be disclosed.⁶⁰ Rather, the facts and context of any given case have to be examined individually to determine whether disclosure ought to be permitted in that situation. Depending on the information or documents

⁵⁷ Cap 143A, 1995 Rev Ed.

⁵⁸ *AAV v AAZ* [2011] 1 SLR 1093 at [128].

⁵⁹ However, see the discussion in *AAV v AAZ* [2011] 1 SLR 1093 at [125] and [137] on the issue of whether the mutual waiver of confidentiality was only suspensory in nature (and therefore operated only for a limited duration).

⁶⁰ See generally Michael Hwang SC & Katie Chung, “Defining the Indefinable: Practical Problems of Confidentiality in Arbitration” (2009) 26(5) *J Int Arb* 609. See also Michael Hwang SC & Nicholas Thio, “A Proposed Model Procedural Order on Confidentiality in International Arbitration: A Comprehensive and Self Governing Code” (2012) 29(2) *J Int Arb* 138.

sought to be disclosed and the various considerations both in favour of and militating against disclosure, the obligation of confidentiality will operate to result in different consequences.

- (b) The first exception to confidentiality which was held to be applicable was the disclosure of confidential information to the appropriate authorities where there is reasonable cause to suspect criminal conduct. In such cases, it would clearly be in the public interest (whether for the preservation of law and order, national security, the protection of the public from danger, *etc*) that disclosure should be made to the authority which has a proper interest in receiving such information. However, this does not mean that disclosure to the *public at large* would be permitted in such situations since this would (in addition to being of questionable necessity) have the effect of destroying the confidentiality of the subject-matter in question. In these cases, the courts would have to balance the interest of the public with the factors in favour of maintaining confidentiality in order to decide whether disclosure ought to be permitted.
- (c) The second exception to confidentiality which was successfully invoked by the defendant was the disclosure of confidential information where all the parties to the arbitration have given their consent. However, this issue is not always straightforward since consent may be either express or implied (*eg*, by conduct), and the latter situation may involve tricky questions of interpretation (as the discussion in *AAY* itself shows).
- (d) However, the operation of the statutory defence to a breach of confidentiality contained in section 39 of the CDTSCA remains an open question since the court did not answer the substantive legal question posed on this issue, *ie*, whether a breach of confidentiality may be excused on the grounds that disclosure is compelled by section 39(1) of the CDTSCA. It was not necessary for the court to consider this issue since it decided that the CDTSCA was not applicable in the circumstances in the first place.

36 It is clear that *AAY* will not answer all the questions that issues of confidentiality pose, but it will certainly be a platform for all future courts (and tribunals) to develop the law of confidentiality in arbitration. What is

perhaps ironic about the case, when one looks at the case in context, is the nature of the relief sought by the plaintiffs. If (as the plaintiffs had argued) the defendant had indeed committed a repudiatory breach of the arbitration agreement and the plaintiffs had accordingly been successful in obtaining their requested reliefs, the defendant would have been left with no alternative but to pursue its claims in court – the inevitable result of which would be the removal of any of the privacy and confidentiality afforded by arbitration which the plaintiffs so desired.⁶¹

37 The decision in *AAZ* serves as express confirmation that the obligation of confidentiality in arbitration will apply as a default to arbitrations seated in Singapore where the parties have not specified expressly the private and/or confidential nature of the arbitration. Although parties desiring privacy but anticipating publicity remain well-advised to agree prospectively on the obligation of confidentiality, there would be “no need to do so when Singapore is to be the seat of arbitration because confidentiality will apply as a substantive rule of arbitration law, not through the IAA or the [Arbitration Act⁶²], but from the common law”.⁶³

VII. Postscript

38 This article has discussed certain theoretical aspects of the obligation of confidentiality, but much less academic ink has been spilt on

⁶¹ *AAZ v AAZ* [2011] 1 SLR 1093 at [101]. However, in this case, a fresh action before the courts would arguably have been time barred, which would have meant that the Partial Award would be a *brutum fulmen* and unenforceable.

⁶² Cap 10, 2002 Rev Ed.

⁶³ *AAZ v AAZ* [2011] 1 SLR 1093 at [55]. Of course, if parties elect to adopt the Singapore International Arbitration Centre Rules (4th Ed, 1 July 2010) to govern their arbitration, then a certain measure of confidentiality will be achieved by Art 35 of those Rules. However, Art 35 is a less than complete confidentiality regime: see Michael Hwang SC & Katie Chung, “Defining the Indefinable: Practical Problems of Confidentiality in Arbitration” (2009) 26(5) *J Int Arb* 609.

the question of the application of confidentiality in practice. During the trial in *AAZ* (“the Confidentiality Suit”), the plaintiffs applied successfully for the action for breach of confidentiality to be heard “*in camera*” pursuant to sections 22 and 23 of the IAA. In addition, the plaintiffs also sought an order that “any judgment pronounced or delivered in [the Confidentiality Suit] not be made available for public inspection”. The court reserved its decision on the latter request and therefore made no immediate order in that regard. After Chan J handed down his judgment in the Confidentiality Suit, a dispute arose between the parties as to whether that judgment ought to be published.⁶⁴ The plaintiffs submitted that there was an absolute bar to publication of the judgment because proceedings had been *in camera*, citing authorities on the meaning of this term in other contexts. On the other hand, the defendant’s position was, *inter alia*, that the true meaning of the order of court which required the proceedings to be heard “*in camera*” was that it was (pursuant to section 22 of the IAA) merely an order for the proceedings to be “heard otherwise than in open court”. Accordingly, there was no prohibition against the publication of the judgment. The defendant therefore applied under Order 20, rule 11 of the Rules of Court⁶⁵ (“ROC”) for the order of court to be so amended. The court accepted the defendant’s submission and agreed that its “true meaning and manifest intention in making the order which was recorded in the Order of Court was that it was an order made pursuant to ss 22 and 23 of the IAA and O 69A r 3(1)(a) of the ROC”.⁶⁶ Consequently, the “*in camera*” order was “an accidental slip or omission which could be amended under O 20 r 11 of the ROC” (also known as the slip rule).⁶⁷ The implication of this finding is therefore that the correct terminology for an order to be issued pursuant to section 22 of the IAA should be for the proceedings to be heard not “*in camera*” but to “be heard otherwise than in open court”.

⁶⁴ See *AAZ v AAZ* [2011] 2 SLR 528.

⁶⁵ Cap 322, R 5, 2006 Rev Ed.

⁶⁶ *AAZ v AAZ* [2011] 2 SLR 528 at [19].

⁶⁷ *AAZ v AAZ* [2011] 2 SLR 528 at [17].

39 Having disposed of the plaintiffs' preliminary objection to the publication of the judgment, the court turned to consider the issue of whether and how the judgment ought to be published. The court began by noting the applicable statutory provisions, which were sections 22 and 23 of the IAA:

Proceedings to be heard otherwise than in open court

22. Proceedings under this Act in any court shall, on the application of any party to the proceedings, be heard otherwise than in open court.

Restrictions on reporting of proceedings heard otherwise than in open court

23.—(1) This section shall apply to proceedings under this Act in any court heard otherwise than in open court.

(2) A court hearing any proceedings to which this section applies shall, on the application of any party to the proceedings, give directions as to whether any and, if so, what information relating to the proceedings may be published.

(3) A court shall not give a direction under subsection (2) permitting information to be published unless —

(a) all parties to the proceedings agree that such information may be published; or

(b) the court is satisfied that the information, if published in accordance with such directions as it may give, would not reveal any matter, including the identity of any party to the proceedings, that any party to the proceedings reasonably wishes to remain confidential.

(4) Notwithstanding subsection (3), where a court gives grounds of decision for a judgment in respect of proceedings to which this section applies and considers that judgment to be of major legal interest, the court shall direct that reports of the judgment may be published in law reports and professional publications but, if any party to the proceedings reasonably wishes to conceal any matter, including the fact that he was such a party, the court shall —

(a) give directions as to the action that shall be taken to conceal that matter in those reports; and

(b) if it considers that a report published in accordance with directions given under paragraph (a) would be likely to reveal that matter, direct that no report shall be

published until after the end of such period, not exceeding 10 years, as it considers appropriate.

40 At this juncture, the plaintiffs continued to argue against allowing publication of the judgment. They submitted, *inter alia*, that the publication of the judgment would defeat the general principle in Singapore's arbitration law that arbitrations are not only private but also confidential. The court rejected the plaintiffs' submission, reasoning that sections 23(2) and 23(3)(b) of the IAA read together gave it the discretion to direct that the judgment be published in this case since a redacted version of the judgment had been approved by both parties. The court was of the view that the redactions (which anonymised all the persons and entities named in the judgment) would be adequate to conceal the identities of the parties and other matters which the plaintiffs wished to remain confidential.⁶⁸ Accordingly, it ordered that the redacted version of the judgment could be published.⁶⁹

41 It is apparent that underpinning the court's decision was its preference for the view that the "public interest in ensuring appropriate standards of fairness in the conduct of arbitrations militated in favour of a public judgment, even though the hearing might have been private".⁷⁰ Referring to *Department of Economics, Policy and Development of the*

⁶⁸ *AAY v AAZ* [2011] 2 SLR 528 at [24].

⁶⁹ As an additional ground for allowing publication of the judgment, the court found that s 23(4) of the International Arbitration Act (Cap 143A, 1995 Rev Ed) was applicable since the judgment in question was one of "major legal interest". The court explained that this was so because the judgment had considered the decision in *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184; [2008] Bus LR 1361, which had "never been discussed by a Court in Singapore". Also, the judgment contained a "comprehensive discussion on the law of confidentiality in arbitration and set out the legal position on the implied obligation of confidentiality in arbitration": *AAY v AAZ* [2011] 2 SLR 528 at [28].

⁷⁰ *AAY v AAZ* [2011] 2 SLR 528 at [30].

City of Moscow v Bankers Trust Co, the court noted (with approval) the *dicta* of Mance LJ, who held as follows:⁷¹

Further, even though the hearing may have been in private, the court should, when preparing and giving judgment, bear in mind that any judgment should be given in public, where this can be done without disclosing significant confidential information ... Arbitration is an important feature of international, commercial and financial life, and there is legitimate interest in its operation and practice. The desirability of a public judgment is particularly present in any case where a judgment involves points of law or practice which may offer future guidance to lawyers or practitioners.

⁷¹ *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co* [2005] QB 207 at [39], cited by *AAV v AAZ* [2011] 2 SLR 528 at [30].

Background to Essay 6

This is a paper jointly written by myself and Yeo Chuan Tat for a book, *The Asian Leading Arbitrators' Guide to International Arbitration*, published in 2007. I had done a number of lectures before on this topic as it is a favourite topic on the conference circuit, but they were usually relatively bland and descriptive rather than provocative. As this paper was being commissioned for publication in a book where the other contributors were all giants in the field, I felt that a fresh approach was needed. Chuan Tat and I sat down and planned the paper together, making sure that our coverage would be comprehensive over the Asian region, and discussed in some detail some of the prominent cases that had been decided by courts in the region, demonstrating their attitude to arbitral awards.

I wish to extend my thanks to JurisNet for kindly granting me permission to republish this paper in this book.

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RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

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Contents

I.	Introduction	238
II.	Enforcement of international arbitral awards – The elements of a sound legal framework.....	241
III.	Deviations from the norms in Asia	246
A.	Failure of the Legislature to enact implementing legislation.....	247

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B.	Seizing of jurisdiction by the courts so as to deny the arbitral process	258
C.	Disruption of arbitral proceedings by the grant of anti-suit injunctions by the courts.....	264
	(1) The Pertamina disputes	264
	(2) Hubco case	267
D.	Asserting jurisdiction to set-aside arbitral awards when court of enforcement is not the situs of the arbitration	271
E.	Broad reliance on the public policy exception by the courts	272
F.	Review of merits of the case by the courts	290
G.	Lack of familiarity with arbitration and the enforcement of international arbitral awards by the courts	292
H.	Attitude of local protectionism in the courts	298
IV.	Conclusion	301

I. Introduction

1 The recognition and enforcement of arbitral awards is of fundamental importance in the arbitral process. Proper recognition and enforcement¹ of arbitral awards serves both as a means of ensuring the

¹ While conceptually there are differences between *recognition* of an award and *enforcement* of an award, such differences are not significant for the purposes of this paper. The various generally-accepted principles underlying the enforcement of awards in international arbitration apply equally to the recognition of awards, given that recognition of an award is a prerequisite of the enforcement of awards (but not *vice versa*). Any potential problems faced in the enforcement of arbitral awards will similarly be problems faced in the recognition of awards. Accordingly, references to recognition and enforcement in this paper will, in the interest of economy, be to “enforcement”. For a discussion of the differences between “recognition” and “enforcement” of an arbitral award, see Alan Redfern *et al*, *Law and Practice of International Commercial Arbitration* (Oxford University Press, 5th Ed, 2009) at paras 11.20–11.24. Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009).

effectiveness of the arbitral process, and also as a key factor favouring the use of arbitration in preference to other modes of dispute resolution.²

2 Parties choose arbitration as a dispute resolution process with the expectation that, absent a settlement, an award will be rendered at the end of the arbitral process. The end-product of the arbitral process, the award, is clearly of utmost importance to the parties, and the successful party expects the award to be performed without undue delay. Unless parties can be relatively certain that they will be able to enforce the award at the end of the arbitral proceedings (if not complied with voluntarily), “an award in their favour will be only a pyrrhic victory”³ and would render the arbitral process largely meaningless. Put another way, there is “no point in having arbitration friendly laws, well drafted arbitration rules, and competent arbitrators and counsel, if no effective enforcement mechanism is available, whether or not it is actually used”.⁴

3 The relative extensiveness and ease of enforceability of the arbitral award compared to foreign court judgments is also, in itself, a principal advantage of arbitration over litigation. This advantage (of arbitration arises because “the network of international and regional treaties providing for the recognition and enforcement of international awards is more widespread and better developed than corresponding provisions for

² Lord Mustill, “The History of International Commercial Arbitration” in *The Leading Arbitrators’ Guide to International Arbitration* (Lawrence Newman & Richard Hill eds) (New York: Juris Publishing, 2004) at p 12, discussing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959) and its effect on the enforcement of awards.

³ Julian Lew, Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003) at p 688.

⁴ Gabrielle Kaufmann-Kohler, “Enforcement of Awards – A Few Introductory Thoughts” in *ICCA Congress Series No 12 Beijing, May 2004: New Horizons in International Commercial Arbitration and Beyond* (Albert Jan van den Berg gen ed) (The Hague: Kluwer Law International, 2004) at p 287.

the recognition and enforcement of foreign judgments”.⁵ In particular, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958⁶ (“the New York Convention”), adopted by more than 130 countries worldwide, has been described as “the single most important pillar on which the edifice of international arbitration rests”.⁷

4 Treaties and conventions form part of the legal framework for recognition and enforcement of arbitral awards which ensures effective and reliable enforcement. A sound legal framework is indispensable in ensuring the recognition and enforcement of awards; “a meaningful arbitral award is conditional upon an effective and reliable enforcement mechanism”.⁸ The “legal framework” of enforcement includes not only the black-letter law encapsulated in these treaties and various national laws, but also, crucially, encompasses the underlying scheme and principles of the arbitration treaties (particularly, the New York Convention), judicial understanding of such principles, and judicial attitude towards the enforcement of arbitral awards (and arbitration in general).

5 Statistics evidence the effectiveness of the legal frameworks in place for the enforcement of arbitral awards. Albert Jan van den Berg notes that “it is a well-established fact that the vast majority of arbitral awards is internationally enforced”.⁹ However, while there is an international

⁵ Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at para 11.31. For a good summary of the multilateral and bilateral conventions in relation to the enforcement of foreign arbitral award, see Julian Lew, Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003) at pp 693–696.

⁶ 330 UNTS 3 (10 June 1958; entered into force 7 June 1959).

⁷ J Gillis Wetter, “The Present Status of the International Court of Arbitration of the ICC: An Appraisal” (1990) 1 *Am Rev Int'l Arb* 91.

⁸ Tao Jingzhou, *Arbitration Law and Practice in China* (The Hague: Kluwer Law International, 2004) at p 131.

⁹ Albert Jan van den Berg, “Why are Some Awards Not Enforceable?” in *ICCA Congress Series No 12, Beijing (2004): New Horizons in International* (continued on next page)

policy favouring the enforcement of international arbitral awards, and increasingly rare to find “horror stories” of non-enforcement in published cases,¹⁰ exceptions unfortunately persist. In Asia, where the advent and practice of international arbitration is more recent, there have been cases of non-enforcement which are contrary to international standards and practices in relation to the enforcement of arbitral awards.¹¹

6 This paper will first set out in the next section the elements of a sound legal framework generally adopted by countries around the world for the enforcement of international arbitral awards. In particular, the broad principles generally accepted in enforcement proceedings will be set out. An analysis of the various ways in which the practices of Asian countries have deviated from the norms of a sound legal framework for enforcement of international arbitral awards (with reference to non-enforcement cases in Asia) causing problems in enforcement will then follow.

II. Enforcement of international arbitral awards – The elements of a sound legal framework

7 Clearly, an important element of a sound legal framework for the effective enforcement of international arbitral awards is facilitative legislation which provides, for example, minimum conditions for enforcement such as those found in the New York Convention. Article IV of the New York Convention “is set up to facilitate the request for enforcement by requiring a minimum of conditions to be fulfilled by the

Commercial Arbitration and Beyond (Albert Jan van den Berg gen ed) (The Hague: Kluwer Law International, 2004) at p 291.

¹⁰ Lucy Reed, “Experience of Practical Problems of Enforcement” in *ICCA Congress Series No 9, Paris (1998): Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Albert Jan van den Berg gen ed) (The Hague: Kluwer Law International, 1999) at p 557.

¹¹ A more detailed discussion of the generally accepted enforcement policy of the courts towards international arbitration awards will be discussed in greater detail in paras 7–19.

party seeking enforcement”.¹² One of the most important features of the New York Convention is that the party seeking enforcement of an award no longer has to prove compliance with various conditions, but has only to satisfy the requirements in Article IV, which constitute *prima facie* evidence that he is entitled to obtain enforcement of the award. It is then up to the resisting party to prove that enforcement should not be granted.

8 This position is best contrasted with the previous position under the predecessor to the New York Convention, the Geneva Convention on the Execution of Foreign Arbitral Awards¹³ of 1927 (“Geneva Convention 1927”), which requires the party seeking enforcement to also supply proof that the award had become “final” in the country in which it was made (which, in practice, amounted to the need to acquire leave for enforcement in that country, the so-called “double exequatur”). In addition, “when necessary”, the party seeking enforcement had to show proof that the award was an award falling under the Geneva Convention 1927, that the award had been made pursuant to a valid submission agreement (under the applicable law), and that “the award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure”. As a commentator has noted:¹⁴

... the transformation of most of the ‘positive’ conditions [for enforcement] into ‘negative’ conditions [to resist enforcement] was prompted by the desire to ease the conditions to be fulfilled by the party seeking enforcement as much as possible.

9 In addition, the New York Convention expressly provides that, even if the grounds for refusal of recognition and enforcement are proved to

¹² Albert Jan van den Berg, *The New York Convention of 1958* (Deventer: Kluwer Law and Taxation Publishers, 1981) at p 246.

¹³ Signed 27 September 1927, Geneva.

¹⁴ Albert Jan van den Berg, *The New York Convention of 1958* (Deventer: Kluwer Law and Taxation Publishers, 1981) at p 247.

exist, the enforcing court is not *obliged* to refuse enforcement.¹⁵ This is reflected by the employment of permissive rather than mandatory language in Articles V(1) and V(2) of the New York Convention.

Article V

1. 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 ... [sets out the grounds for refusal]

2. Recognition and enforcement of an arbitral award *may also be refused* if the competent authority in the country where recognition and enforcement is sought finds that ... [sets out further grounds for refusal]

[emphasis added]

10 Accordingly, even if one of the grounds enumerated in Article V is satisfied, the court has the discretion to enforce the award. In the Hong Kong case of *China Nanhai Oil Joint Service Corp Shenzhen Branch v Gee Tai Holdings Co Ltd*, the Hong Kong Supreme Court stated:¹⁶

[T]he grounds of opposition are not to be inflexibly applied. The *residual discretion* enables the enforcing Court to achieve a just result in all the circumstances ... [emphasis added]

11 These aspects of the facilitative nature of the New York Convention are usually faithfully imported into the national legislation of the signatory state.

12 However, facilitative black-letter law is by itself a necessary but not sufficient condition for effective enforcement. A supportive and well-educated judiciary which appreciates the nature of arbitration in the

¹⁵ It is noted in Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at para 11.59, fn 64, that this interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959) is “generally accepted, both in court decisions and by experienced commentators”.

¹⁶ *China Nanhai Oil Joint Service Corp Shenzhen Branch v Gee Tai Holdings Co Ltd* [1994] HKCFI 215 at [49].

commercial world and applies the generally accepted principles of enforcement of international arbitral awards is a key condition for effective enforcement of awards, and this important factor is satisfied in most countries. The generally accepted principles of enforcement (which are interrelated) are as follows.

13 First, the key principle in the enforcement of international arbitral awards is the *pro-enforcement bias* which the courts ought to adopt, so as to facilitate the enforcement of an award. This pro-enforcement bias is also clearly manifested by the provisions of the New York Convention.¹⁷ Most of the other broadly accepted principles in the enforcement of international arbitral awards may be said to flow from this fundamental principle.

14 Second, under Article V(1) of the New York Convention and a necessary consequence of the changes from the Geneva Convention 1927 discussed above, the party resisting enforcement of the arbitration award now has the burden of proof to show the existence of the grounds for refusal set out in Article V(1) of the New York Convention.

15 Third, it is generally accepted that there should not be a review of the merits of the arbitral award by the enforcement court. The New York Convention and the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on International Commercial Arbitration¹⁸ (“the Model Law”) discourage any form of judicial review of an arbitral award on its merits.¹⁹ Accordingly, where enforcement is sought under the New York Convention or the Model Law, courts will be especially wary of parties seeking to introduce “back-door” appeals on the merits.

16 There may be arguments favouring the review of arbitral decisions in order to guard against egregious mistakes of law, as there is ample judicial *dicta* (but little decided case law) in support of the proposition

¹⁷ Albert Jan van den Berg, *The New York Convention of 1958* (Deventer: Kluwer Law and Taxation Publishers, 1981) at p 267.

¹⁸ UN Doc A/40/17, annex I; UN Doc A/61/17, annex I (21 June 1985; amended 7 July 2006).

¹⁹ See, *eg.* Albert Jan van den Berg, *The New York Convention of 1958* (Deventer: Kluwer Law and Taxation Publishers, 1981) at pp 269–273.

that patently unreasonable awards can amount to a violation of public policy.²⁰ However, there are “serious disadvantages in having a system of arbitration that gives an unrestricted right of appeal from arbitral awards”.²¹ The decisions of the courts may override the decisions of an arbitral tribunal specifically chosen by the parties, thereby violating the principle of party autonomy. The appeal process may also be used to delay the payment on the award. The New York Convention and the Model Law have come down strongly on the side of finality in the arbitral process over judicial control of arbitral decisions by excluding appeals on the merits of the case.

17 Fourth, as the grounds of refusal of enforcement of an award are concerned, these grounds should be construed *narrowly*. Albert Jan van den Berg states:²²

As far as the grounds for refusal of enforcement of the award as enumerated in Article V [of the New York Convention] are concerned, it means that they *have to be construed narrowly*. More specifically, concerning the grounds of refusal in Article V(1) to be proven by the respondent, it means that their existence should be accepted in serious cases only; obstructions by respondents on trivial grounds should not be allowed. Concerning the ground for refusal of Article V(2) to be applied by the court on its own motion, it means that a court should accept a public policy violation in extreme cases only, thereby using the distinction between domestic and international public policy. [emphasis in original]

18 This principle of enforcement (or principle of resisting non-enforcement) is also clearly recognised in leading texts on international

²⁰ See Michael Hwang SC & Amy Lai, “Do Egregious Errors Amount to a Breach of Public Policy?” (2005) 71(1) *Arbitration* 1 at 1 and Michael Hwang SC, “Do Egregious Errors Amount to a Breach of Public Policy? – Further Developments” (2005) 71(4) *Arbitration* 364 at 364.

²¹ Alan Redfern & Martin Hunter with Nigel Blackaby & Constantine Partasides, *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell, 4th Ed, 2004) at pp 422–423.

²² Albert Jan van den Berg, *The New York Convention of 1958* (Deventer: Kluwer Law and Taxation Publishers, 1981) at pp 267–268.

arbitration. In *Law and Practice of International Commercial Arbitration*, the learned authors note that “the intention of the New York Convention and of the Model Law is that the grounds for refusing recognition and enforcement of arbitral awards should be applied restrictively”.²³

19 Whether the above principles are applied in practice depends largely on the judicial climate in relation to arbitration and, accordingly, the enforcement of arbitral awards. Indeed, the main factor interfering with the application of these principles of enforcement in Asia is a non-supportive judicial climate for enforcement. The causes of a non-supportive judicial climate include the lack of understanding by the courts of the arbitral process and the correct application of treaties or statutes on enforcement, and an interventionist attitude towards the arbitral process. Such a judicial climate may have resulted from a lingering suspicion of the arbitral process by the courts, mere lack of familiarity, and/or an attitude of local protectionism.

III. Deviations from the norms in Asia

20 This part of the paper analyses the key ways in which the practice of Asian countries towards the enforcement of arbitral awards deviate from the sound legal framework for enforcement present in most countries (discussed in the previous section of this paper). While attempting to set out the most prevalent pitfalls which await an unsuspecting party seeking to enforce an arbitral award in Asia,²⁴ this analysis lays no claim to

²³ Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at para 11.60. See also Julian Lew, Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003) at p 706.

²⁴ It may also be observed that the final two potential dangers (paras 115–135) discussed might actually be the *causes* of various other potential deviations discussed. Accordingly, the cases earlier cited in paras 21–114 may also be examples relevant to the discussion in paras 115–135. This paper does not attempt to draw a strict distinction between these *causes* and the *consequences of these causes*, but (as noted above in the main text) instead

(continued on next page)

comprehensiveness, its purpose being the illustration of the ways in which various Asian countries have deviated from widely-accepted norms in the enforcement of international arbitral awards.

A. Failure of the Legislature to enact implementing legislation

21 Proper facilitative legislation is, in practice, a necessity (at least in Asia) for the effective enforcement of international arbitral awards. There are various examples in Asia where countries have failed to enact implementing legislation so as to fulfill treaty obligations and facilitate the enforcement of international arbitral awards, which have resulted in various problems in enforcement.²⁵

22 In Indonesia, there was initially a lack of effective implementing legislation although Indonesia acceded to the New York Convention in 1981. Nine years passed before implementing regulations were promulgated.²⁶ Even when the implementing legislation was finally enacted, the implementing legislation was defective and “contrary to the New York Convention”,²⁷ as enforcement of a foreign arbitral award was made contingent on a statement from the Indonesian diplomatic mission in the jurisdiction in which the award was rendered to the effect that such

discusses them together a potential problems which a party may face in enforcement of international arbitral awards in Asia.

²⁵ The problems discussed in this section can be divided into two categories. First, where there is an *absence* of complementing legislation in relation to the enforcement of awards. Second, where the national implementing legislation, though present, is not on all fours with the treaty which the country had acceded to (*eg*, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (330 UNTS 3) (10 June 1958; entered into force 7 June 1959).

²⁶ Supreme Court Regulation No 1 of 1990.

²⁷ This was noted by Lucy Reed, “Experience of Practical Problems of Enforcement” in *ICCA Congress Series No 9, Paris (1998): Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Albert Jan van den Berg gen ed) (The Hague: Kluwer Law International, 1999) at p 564.

country had diplomatic relations with Indonesia, and that Indonesia and such country were contracting states to an international convention regarding implementation of foreign arbitral awards.²⁸ The need for such a statement from the Indonesian diplomatic mission violates the minimum conditions for enforcement stipulated in the New York Convention, and would doubtless have also caused delays in the enforcement proceedings.

23 On 12 August 1999, Indonesia promulgated its new and comprehensive Arbitration and Dispute Resolution Act (“Arbitration Law”).²⁹ This new Arbitration Law does not remove the problems noted above, as the requirements for the applications for a foreign-rendered award remain largely similar. Another potential problem which may arise from the new Arbitration Law is that it does not specify a time limit for the courts to issue orders for the enforcement of international arbitral awards. However, it must be noted that the courts have acted very promptly in the enforcement of foreign awards, in some cases issuing exequatur within less than a month of request.³⁰

24 The lack of facilitative legislation also caused delays in the enforcement of arbitral awards in Hong Kong.³¹ These delays were due

²⁸ Indonesia has availed itself to the reciprocity reservation found in Art I(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959) (“New York Convention”) when signing up to the New York Convention, and accordingly reserves the applicability of the New York Convention to “awards made only in the territory of another Contracting State”.

²⁹ Law No 30 of 1999.

³⁰ Karen Mills, “Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration”, a presentation for the Inaugural International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitrators, Kuala Lumpur (28 February–1 March 2003) at p 5.

³¹ On 7 January 2013, representatives from Hong Kong and Macau signed the *Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards between the Hong Kong Special Administrative Region and the Macao Special Administrative Region*. This arrangement provides for mutual

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to the lack of implementing legislation for the enforcement of judgments from the People's Republic of China ("China") after China resumed sovereignty over Hong Kong in 1997. Prior to 1997, the enforcement of arbitral awards between Hong Kong and China was governed by the New York Convention. However, problems arose following the creation of the Hong Kong Special Administrative Region in July 1997, as the New York Convention is an international treaty struck between sovereign states and only applies to foreign rendered arbitral awards.

25 As a result of the lacuna governing the enforcement of arbitral awards between China and Hong Kong, delays arose in the enforcement of arbitral awards rendered in Hong Kong in China and *vice versa*. An example is the case of *Hong Kong Heung Chun Cereal & Oil Food Co Ltd v Anhui Cereal & Oil Food Import & Export Co* ("Anhui Cereal").³² In response to an application for an enforcement of an arbitral award made in Hong Kong, the Supreme People's Court (in October 1998) noted that Hong Kong had become a Special Administrative Region since 1 July 1997 and, accordingly, the New York Convention should not apply. As there was no provision on how arbitral awards published in Hong Kong were to be enforced, *Anhui Cereal* would only resume hearing after the promulgation of such provisions. The case eventually resumed in April 2000. This was after the coming into force of the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region ("the Arrangement") and a Supreme People's Court's issuance of a judicial

recognition and enforcement of arbitral awards in both places. The content of the arrangement was made in accordance with the spirit of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ((10 June 1958) 330 UNTS 3 (entered into force 7 June 1959)) and is broadly similar to the existing arrangements on the same issue between Hong Kong and Macao with Mainland China respectively. In order to implement the arrangement, Hong Kong's existing Arbitration Ordinance (Cap 609) will need to be amended and the Arbitration (Amendment) Bill 2013 was gazetted on 28 March 2013.

³² Supreme People's Court (2003) Civil 4 Miscellaneous No 9. This case will be discussed in greater detail at paras 130–135.

interpretation which gave force of law to the Arrangement and provided the legal structure for its implementation, resulting from negotiations lasting for more than two years.³³

26 Furthermore, in China, various other problems exist in relation to the implementing legislation resulting in impediments to enforcement. A potential impediment to the enforcement of awards is found in the Supreme People's Court's Notice on the Implementation of China's Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1987 ("Notice on the New York Convention").³⁴ According to the Notice on the New York Convention, the enforcement of a foreign award "shall" be rejected, provided the existence of the grounds for refusal in the New York Convention can be proved by the respondent. This is in contrast to Article V of the New York Convention, which uses the permissive word "may", and therefore grants the enforcement court "a somewhat discretionary power to disregard the minor defects or minor irregularities with respect to arbitration procedure, thus favouring the enforcement of awards".³⁵

27 Accordingly, the Notice on the New York Convention ignores the discretionary element in the denial of enforcement, and results in a less pro-arbitration position than that envisaged by the New York Convention.

28 The Chinese legislation also differs from the New York Convention by prescribing for documentary requirements which differ from the minimum documentary requirements provided for under Article IV of the New York Convention.³⁶ As a result, "confusion often, arises in practice

³³ Tao Jingzhou, *Arbitration Law and Practice in China* (The Hague: Kluwer Law International, 2004) at p 172.

³⁴ Effective as of 10 April 2007.

³⁵ Wang Sheng Chang, "Enforcement of Foreign Arbitral Awards in the People's Republic of China" in *ICCA Congress Series No 9, Paris (1998): Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Albert Jan van den Berg gen ed) (The Hague: Kluwer Law International, 1999) at p 470. See also the discussion in paras 7–19 of this paper.

³⁶ See the discussion in paras 7–19 of this paper above.

as to the precise documentation and information needed for the IPC [that is, Intermediate People's Court] to accept an application for enforcement".³⁷ Under the Regulations of the Supreme People's Court Regarding Certain Issues in Relation to Enforcement ("the Enforcement Regulations"), the following documents are required:³⁸

- (a) The party seeking enforcement must submit original or notarised copies of the arbitral award and the arbitration agreement.
- (b) The party seeking enforcement must provide an application in writing, explaining the reasons for and description of the matters of the proposed enforcement and the object to be enforced. Information regarding the property of the party against whom enforcement is sought should also be supplied.
- (c) The applicant's proof of identity and (where appropriate) proof that the applicant is the successor or assignee of the judgment creditor under the award.
- (d) A power of attorney where the application is handled through a legal representative.
- (e) The applicant shall also supply "any other documents or identification as shall be required" by the court.

29 It has also been observed that, at times, a party seeking enforcement "may be required to provide documents not required by law, such as evidentiary documents relied upon by the arbitration tribunal in making its award".³⁹

30 One must also be wary of the fact that, under Chinese national legislation, Article 16 of the Arbitration Law of the People's Republic of

³⁷ Friven Yeoh, "Enforcement of Dispute Outcomes" in *Managing Business Disputes in Today's China* (Michael Moser ed) (The Hague: Kluwer Law International, 2007) at p 265.

³⁸ Friven Yeoh, "Enforcement of Dispute Outcomes" in *Managing Business Disputes in Today's China* (Michael Moser ed) (The Hague: Kluwer Law International, 2007) at pp 265–266.

³⁹ Friven Yeoh, "Enforcement of Dispute Outcomes" in *Managing Business Disputes in Today's China* (Michael Moser ed) (The Hague: Kluwer Law International, 2007) at p 266.

China⁴⁰ (“Arbitration Law of China”) states that an arbitration agreement shall contain “the arbitration commission chosen”. Accordingly, while *ad hoc* arbitration is not explicitly forbidden, no clear legal basis for such proceedings appears to exist in China.⁴¹ In addition, it is also unclear whether a clause providing for the conduct of foreign arbitral institutions (*eg*, the International Chamber of Commerce (“ICC”)) in China is valid because such foreign arbitral institution may not be an “arbitration commission” within the meaning of the Chinese law.⁴² There is

⁴⁰ Adopted 31 August 1994.

⁴¹ Other provisions of the Arbitration Law of the People’s Republic of China (1994) (“Arbitration Law of China”) indicate that *ad hoc* arbitration in China is not possible. For instance, Art 33 of the Arbitration Law of China provides that the arbitration commission shall confirm the formation of the tribunal. However, in the recognition of foreign arbitral awards pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (330 UNTS 3) (10 June 1958; entered into force 7 June 1959) and where the seat of the arbitration is outside of China, China does recognise the legitimacy of these foreign awards rendered abroad via *ad hoc* arbitration. The Circular on the Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China (1987) issued by the Supreme People’s Court expressly provides that China will recognise and enforce awards made in other contracting States, including administered and foreign *ad hoc* Convention awards. This is supported by Art 267 of the Civil Procedure Law of the People’s Republic of China (“Civil Procedure Law”) (9 April 1991), which requires the courts in China to follow any international convention entered by China in dealing with applications for recognition and enforcement of foreign arbitral awards.

⁴² Several inconsistent court decisions highlight that it is unclear if a mere reference to the International Chamber of Commerce Rules of Arbitration (“ICC Rules”) (January 2012) would be sufficient to deem the arbitration agreement valid. In *Lide Aisiwei'er Co, Ltd v Beijing Longdaide Information Technology* (Preliminary Civil Ruling No 31314 (2008) of the People’s Court of Haidian District, Beijing Municipality), where the parties disputed over whether there was a definite arbitration commission when the arbitration agreement only referred to the ICC Rules. The court noted that the ICC Court of Arbitration was an international arbitration agency affiliated with the ICC and the only agency that enforced the ICC Rules. Consequently,

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the parties were deemed to have agreed to the ICC Court of Arbitration administering the arbitration. Accordingly, the arbitration agreement was valid. This decision appears to be inconsistent with the opinion of the Supreme People's Court in *Zueblin Int'l GmbH v Wuxi Woco-Tongyong Rubber Engineering Co Ltd* (19 July 2006) ("*Zueblin*"). In this case, the arbitration clause read "Arbitration: ICC Rules, Shanghai shall apply". The Wuxi Intermediate People's Court, after approval from the SPC, refused to enforce the arbitral award on the ground that the arbitration agreement failed to specify an arbitration institution. This court reasoned that the ICC Rules did not contain an express provision stating that by choosing the ICC Rules the parties also choose the ICC Court of Arbitration to administer the arbitration. Since the arbitration clause did not designate a clear arbitration commission, it was therefore invalid. See also *Amoi Electronic Ltd v Societe de Production Belge AG* (20 March 2009), discussed in Tao Jingzhou, *Arbitration Law and Practice in China* (Kluwer Law International, 3rd Ed, 2012) at pp 187 and 188, where the Supreme People's Court held that although "the arbitration clause provided that the arbitration shall be conducted pursuant to the ICC Rules, it did not clarify the arbitration agency". Since the arbitration agency could not be determined under the ICC Rules and the parties did not enter into a supplementary agreement to specify the arbitration institution pursuant to Art 4 of the Chinese Supreme People's Court Interpretations on Certain Issues Relating to the Application of the PRC Arbitration Law 2006 ("SPC Interpretation 2006"), the arbitration clause was invalid. On the same reasoning, the Supreme People's Court in *Xiaxin Electronics Co, Ltd v Société de Production Belge AG* [2009] Min Min Di Zi No 7 (SPC, 2009) denied the validity of an arbitration clause which selected ICC Rules with the seat of arbitration alternating between Xiamen and Brussels.

In a more recent case, *Duferco SA v Ningbo Arts & Crafts Import & Export Co Ltd* [2008] Yong Zhong Jian Zi No 4 (Ningbo IPC, 22 April 2009) ("*Duferco*"), the court enforced an ICC award issued by an arbitral tribunal seated in Beijing. The court held that the respondent was barred from raising a challenge to the validity of the arbitration agreement based on Art 13 of the SPC Interpretation 2006. Several commentators have remarked that this decision concerns the timely objection to a tribunal's jurisdiction and does not indicate a change in the approach taken in *Zueblin*.

Article 4 of the SPC Interpretation 2006, provides that an arbitration agreement which merely stipulates the arbitration rules is invalid unless the

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accordingly the risk of non-enforcement of arbitral awards in the situations described above.

31 Problems in enforcement of arbitral awards owing to the lack of effective enforcement legislation have also arisen in Malaysia, as evidenced by the recent Court of Appeal decision, *Sri Lanka Cricket v*

arbitration institution may be determined based on the arbitration rules agreed upon between the parties (available at <<http://www.cietac.org/index/references.cms?references=law>>). In this regard, Art 1(2) of the ICC Rules 2012 states: “The [ICC] Court is the only body authorized to administer arbitrations under the Rules, including the scrutiny and approval of awards rendered in accordance with the Rules” and Art 6(2) states: “By agreeing to arbitration under the [ICC] Rules, the parties have accepted that the arbitration shall be administered by the Court”. It should thus be clear that by selecting the ICC Rules, it is possible to determine that the parties chose the ICC Court as the arbitration institution.

It is also not clear if a foreign arbitration institution satisfies the condition for an “arbitration commission” in Article 16 of the Arbitration Law of China. One possible restrictive interpretation is to read Art 16 together with Art 10 of the Arbitration Law of China. Article 10 generally provides that “arbitration institutions” may be established in municipalities directly under the central government and in municipalities that are the seats of the People’s Governments of provinces and autonomous regions. Foreign arbitration institutions would therefore not appear to qualify as “arbitration institutions” within the definition of Art 10. See Friven Yeoh & Fu Yu, “The People’s Courts and Arbitration – A Snapshot of Recent Judicial Attitudes on Arbitrability and Enforcement” (2007) 24(6) *J Int Arb* 635 at 647. The more liberal view is that Art 10 does not set out a definition of “arbitration institution” and the requirement in Art 16 for the specification of an “arbitration institution” is only meant to prohibit *ad hoc* arbitrations. It has been noted that a few Chinese officials have made remarks, in particular, Zhang Fuqi J of the Supreme People’s Court indicated that foreign arbitration institutions were no longer restricted by Chinese law from conducting arbitrations in the PRC since China’s accession to the World Trade Organization. See Kun Fan, *Arbitration in China, A Legal and Cultural Analysis* in the China and International Economic Law Series vol 5 (Hart Publishing Ltd, 2013) at p 47.

World Sport Nimbus Pte Ltd (“*Nimbus*”).⁴³ In *Nimbus*, the respondent (“*Nimbus*”) secured an award against the appellant (“*Sri Lanka Cricket*”) in an arbitration held in Singapore and sought to enforce the award in Malaysia. This was resisted by the appellant. The High Court allowed the respondent’s attempt to enforce the award in Malaysia, but upon appeal to the Court of Appeal, the High Court’s decision was set aside.

32 The rationale of the Court of Appeal’s decision was based on section 2(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985⁴⁴ (“1985 Act”) which provided as follows:

The Yang Di Pertuan Agong [*i.e.*, the King of Malaysia] may, by order in the Gazette, declare that any State specified in the order is a party to the said Convention, and that order shall, while in force, be conclusive evidence that that State is a party to the said Convention.

33 Although the word “may” was used in section 2(2) of the 1985 Act, the Court of Appeal held that, when read in the context of the provision and the whole 1985 Act, section 2(2) was *mandatory* in nature. Accordingly, if the Yang Di Pertuan Agong wished to extend the benefit of the summary method of enforcement (compared to the more onerous common law route for enforcement) provided in section 3(1) of the 1985 Act, then he must by Gazette Notification declare the country in which that award was made to be a party to the New York Convention and, if he did not, that benefit was not available to the party seeking enforcement. As there was no Gazette Notification that Singapore was a party to the New York Convention, the Court of Appeal refused to enforce the award.⁴⁵ This was despite the fact that Singapore was clearly a party to the New York Convention, and had also (as noted by the

⁴³ [2006] 3 MLJ 117.

⁴⁴ Act 320 of 1985.

⁴⁵ The Attorney General’s Chambers of Malaysia obtained leave to intervene in the appeal to the Federal Supreme Court but the case was settled, leaving the Court of Appeal decision regrettably unchallenged. It is understood that the AGC would have argued for the recognition of the Singapore award.

Court of Appeal) included Malaysia in its Gazette as a party to the New York Convention.

34 The effect of the decision is limited as the 1985 Act has now been repealed by section 51(1) of the Malaysian Arbitration Act 2005 (“the 2005 Act”),⁴⁶ which came into force on 15 March 2006. The relevant provision in the 2005 Act relating to the enforcement of awards under the New York Convention is section 38, which reads as follows:

Recognition and Enforcement

- 38.** (1) On an application to the High Court, an award made in respect of a domestic arbitration or an award from a foreign State shall, subject to this section and section 39 be recognized as binding and be enforced by entry as a judgment in terms of the award or by an action.
- (2) In an application under subsection (1) the applicant shall produce —
- (a) the duly authenticated original award or a duly certified copy of the award; and
 - (b) the original arbitration agreement or a duly certified copy of the agreement.
- (3) Where the award or arbitration agreement is in a language other than the national language or the English language, the applicant shall supply a duly certified translation of the award or agreement in the English language.
- (4) For the purposes of this Act, ‘foreign State’ means a State which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in 1958.

35 Section 38 no longer stipulates the need for a Gazette Notification before a country will be considered a party to the New York Convention and accordingly, there is no such requirement before the enforcement procedure under section 38 of the 2005 Act can be invoked with regard to an award made in a country which is a party to the New York Convention.

⁴⁶ Act 646 of 2005. This Act was amended by the Arbitration Amendment Act (2011) (Act A1395) but s 38 remains the same.

36 In the Philippines, although the New York Convention was ratified by the Philippine Senate under Senate Resolution No 71,⁴⁷ there was an absence of specific legislation governing the enforcement of awards until recently via the Republic Act 9285, which bears the full name of the Alternative Dispute Resolution Act of 2004 (“the ADR Act 2004”). It has been noted that “confusion as to the procedure to be followed [in the enforcement of arbitral awards]” had previously resulted due to the absence of specific legislation on the enforcement of arbitral awards.⁴⁸ The ADR Act 2004 now specifically provides that the basic procedure for recognition and enforcement is as laid down by the New York Convention.

37 Pakistan is another example in Asia of the failure to enact proper implementing legislation which could give rise to problems in the enforcement of awards. Pakistan has adopted the New York Convention, which is implemented into Pakistan law by the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance 2005.⁴⁹ However, this is a Presidential Ordinance (which was promulgated pursuant to Article 89 of the Pakistan Constitution) and not legislation. According to Article 89 of the Constitution, the President has limited power to legislate by Ordinance if the National Assembly is not in session and if the President is satisfied that conditions exist which render it necessary to take immediate action. However, while such an Ordinance will have the same force and effect as an Act of Parliament, it only lasts for a period of four months, after which it automatically lapses.

38 To date, the National Assembly has not passed a law in terms of the Ordinance implementing the New York Convention.⁵⁰ As a result, the

⁴⁷ 10 May 1965.

⁴⁸ Custodio O Parlade, Meijo University Institute for Socioeconomic Dispute Studies Project – Final Report (2004) on Philippines.

⁴⁹ No VIII of 2005.

⁵⁰ The Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 (Act No XVII of 2011) was passed on 19 July 2011 to fully implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ((330 UNTS 3) (10 June 1958; entered into force 7 June 1959) (“New York Convention”) in Pakistan. The local High Courts have exclusive jurisdiction in relation to all

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Ordinance must be renewed, or re-enacted, every four months. This has led to what appears, at first sight, to be repeat enactments of the New York Convention, as each new Ordinance implementing the New York Convention in Pakistan is in the same similar terms. Accordingly, there might be a real possibility of confusion by practitioners seeking to enforce arbitral awards in Pakistan, seeking to rely on the New York Convention, as they might proceed under the incorrect Ordinance (although these successive Ordinances are in similar terms). There is a real risk that an unsupportive or less favourable attitude towards arbitration may lead to the dismissal of an application to enforce where the application is brought under the wrong Ordinance, based on a mere technicality.⁵¹

B. Seizing of jurisdiction by the courts so as to deny the arbitral process

39 Another major problem in the successful rendering and subsequent enforcement of international arbitral awards in Asia is the tendency of some courts in Asia to unjustifiably retain jurisdiction over a dispute despite the existence of an agreement to arbitrate between the parties. Such an approach by the courts is contrary to Article 8(1) of the Model Law, which states:

Article 8. Arbitration agreement and substantive claim before court
(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement *shall*, if a party so requests

matters arising out of the New York Convention. Despite the streamlined procedure for the enforcement of foreign arbitral awards under the New York Convention, there is evidence that local courts fail to grasp the summary nature of enforcement proceedings and instead apply stringent requirements of the Code of Civil Procedure (Act No V of 1908) in enforcement proceedings, thereby delaying enforcement proceedings. See Mansoor Hassan Khan, "Pakistan" in *The Asia-Pacific Arbitration Review 2013* (Global Arbitration Review, 2013).

⁵¹ An example of such an occurrence is indeed discussed in this paper, see the discussion of *Sri Lanka Cricket v World Sport Nimbus Pte Ltd* [2006] 3 MLJ 117.

not later than when submitting his first statement on the substance of the diorite, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. [emphasis added]

40 While there is a distinction between the enforceability of an arbitration agreement and the enforcement of an arbitral award, the (unjustifiable) seizing of jurisdiction by the courts is relevant to a discussion of problems in the enforcement of awards for at least two reasons:

- (a) the very seizure of jurisdiction so as to prevent the arbitration from taking place leads to the consequence that there will not even be an award which resolves the dispute, which is a key expectation of parties entering into an arbitration agreement.
- (b) certain considerations which the courts have taken into account in not enforcing an arbitration agreement (for example, arbitrability), could equally be used by the courts in refusing to enforce an award.

41 An example of how some courts have deviated from the norms by retaining jurisdiction over a dispute is the Indonesian case of *PT Perusahaan Dagang Tempo v PT Roche Indonesia* (“*Tempo v Roche*”).⁵² In *Tempo v Roche*, PT Roche Indonesia (“Roche”) and its local distributor, PT Perusahaan Dagang Tempo (“Tempo”), entered into a distribution agreement which allowed Tempo to distribute Roche’s pharmaceutical products throughout Indonesia. The distribution agreement provided for

⁵² Decision of the District Court of South Jakarta (Pengadilan Negeri Jakarta Selatan) No 454/PDT.G/1999/PN.Jak.Sel (30 May 2000). Since this case, the Supreme Court of Indonesia in Supreme Court Decision No 325 KISip/1976, Mahkamah Agung, Tanggal (30 September 1983) and the Central Jakarta District Court in Judgment No 225/PDT.G.2005/PN.JKT.PST have upheld arbitration agreements. In Judgment No 225/PDT.G.2005/PN.JKT.PST, the Central Jakarta District Court refused to take jurisdiction over disputes subject to arbitration on the basis that it lies outside the court’s “absolute competence”. See further Michael Hwang SC & Fong Lee Cheng, “Relevant Considerations in Choosing the Place of Arbitration” (2008) 4(2) AIAJ 195 at 195–220 for a discussion on the attitude of the State and courts towards arbitration and how it affects the interpretation of arbitration agreements.

distribution of two categories of drugs: (a) prescription drugs; and (b) over-the-counter drugs. The distribution agreement contained a termination clause which permitted Roche to terminate the agreement by giving six months' notice. The distribution agreement also contained a dispute resolution clause which provided as follows:

In the event of any dispute arising among the parties in relation to, or in connection with this Agreement or a breach thereof which cannot be settled amicably shall be finally settled by arbitration to be conducted in the English language and to be held in Jakarta under the Rules of Arbitration of BANI in respect of such dispute by a panel comprised of 3 (three) persons appointed in the manner referred to below.

42 Roche then decided to terminate the part of the agreement relating to over-the-counter drugs, and gave six months' notice, without claiming any breach of contract by Tempo. Despite the arbitration clause in the agreement, Tempo brought an action before the District Court of South Jakarta, asserting that Roche could not terminate the agreement without Tempo's prior consent, and also because it was clear that Tempo had not breached the agreement. Roche claimed that the District Court did not have jurisdiction to hear the dispute, as the forum for dispute resolution should be arbitration in Jakarta before Badan Arbitrase Nasional Indonesia ("BANI"), *ie*, the Indonesian National Board of Arbitration, as provided for in the arbitration clause of the distribution agreement.

43 The District Court of South Jakarta rejected Roche's jurisdictional objection, and issued a ruling asserting jurisdiction to hear the case, notwithstanding the arbitration clause in the agreement. This was on the basis that the partial termination was an "act of tort" which was not arbitrable but fell within the jurisdiction of the courts. The District Court of South Jakarta held that arbitrators may only resolve disputes relating to technical and business matters and, as the dispute in *Tempo v Roche* concerned an "act of tort", only the courts and not any arbitral tribunal had jurisdiction over the dispute. In effect, the court reasoned that the dispute between the parties was "legal" by nature instead of "technical" and suggested that arbitration was limited only to "technical business

issues". This decision has been roundly criticised in various publications, an example of which is the following:⁵³

The South Jakarta District Court's decision, of course, is quite surprising. The Arbitration Law stipulates unambiguously that a state court is not competent to adjudicate a dispute that is within the scope of a written' arbitration agreement pertaining a commercial matter over which the parties have settlement authority. As far as we are aware, the South Jakarta District Court is the only court in the world that limits the jurisdiction of arbitration to 'technical business issues'. The Court either should have rejected the complaint and referred the matter to arbitration, or articulated some permissible basis for its retention.

44 The South Jakarta District Court then awarded Tempo "considerable damages"⁵⁴ on the basis of Roche's partial termination.

45 The decision of the Indonesian court is inconsistent with the general trend of recognising the wide scope of disputes which could be submitted for arbitration. A leading textbook notes as follows:⁵⁵

The concept of arbitrability has expanded considerably in recent decades as a consequence of a general policy favouring arbitration ... There are very few cases in which enforcement of an award has been refused for lack of arbitrability of the underlying dispute.

⁵³ Sebastian Pompe & Marie-Christine van Waes, "Arbitration in Indonesia" in *International Commercial Arbitration in Asia* (Philip McConaughay & Thomas Ginsburg eds) (New York: JurisNet LLC, 2nd Ed, 2006) at pp 123–124.

⁵⁴ Karen Mills, "Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration", a presentation for the Inaugural International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitrators, Kuala Lumpur (28 February–1 March 2003) at p 15.

⁵⁵ Julian Lew, Loukas Mistelis & Stefan Kröll *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003) at p 721.

46 Furthermore, as “it is generally accepted that arbitrability forms part of the general concept of public policy”,⁵⁶ this underlying problem of the courts jealously guarding its jurisdiction and lack of knowledge as to the proper approach to the enforcement of arbitral awards would also cause further problems in the sphere of refusal to enforce arbitral awards on the public policy ground, which is discussed in greater detail below.

47 Two cases involving Bankers Trust Co and Bankers Trust International⁵⁷ (“Bankers Trust”) have “brought further embarrassment to Indonesia’s reputation in the world of arbitration”.⁵⁸ These cases again exemplify the Indonesian courts’ insistence of retaining jurisdiction over a dispute despite the existence of an arbitration clause (as in *Tempo v Roche*). The two cases are virtually identical and will be discussed collectively. Bankers Trust entered into International Swaps and Derivatives Agreements (“ISDAs”) with an Indonesian company (“the Customer”). Each ISDA included an attached schedule which set out the standard terms and conditions (including an arbitration clause), which were specifically incorporated into the ISDAs by reference. In each case, the parties signed only the master agreement.

⁵⁶ Albert Jan van den Berg, *The New York Convention of 1958* (Deventer: Kluwer Law and Taxation Publishers, 1981) at p 360.

⁵⁷ *Bankers Trust Co & Bankers Trust International v PT Jakarta International Hotels and Development; Bankers Trust Co & Bankers Trust International v PT Mayora Indah*. Decision of the District Court of South Jakarta (Pengadilan Negeri Jakarta Selatan) No 454/Pdt.G/1999/PN Jak Sel (30 May 2000); and applications for Exequatur of international arbitrations No 001/Pdt/Arb Int/1999 with respect to LCIA award No 8199 of 18 June 1999; and No 004/Pdt/Arb Int/1999 with respect to LCIA award No 9128 of 19 October 1999.

⁵⁸ Karen Mills, “Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration”, a presentation for the Inaugural International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitrators, Kuala Lumpur (28 February–1 March 2003) at p 28. However, these are the only applications for enforcement of award which have been rejected by the Indonesian courts since the promulgation of the New Law.

48 Largely owing to the Asian economic crisis of 1997–1998, the Customer subsequently defaulted on its obligations to make payments under the swap agreements, and Bankers Trust commenced arbitration proceedings before the London Court of International Arbitration (“LCIA”). On the other hand, the Customer initiated proceedings in the South Jakarta District Court, seeking annulment of the ISDAs on, *inter alia*, the ground that the ISDAs were contrary to public policy claiming that swap trading was, in effect, gambling (which is strictly prohibited in Indonesia).

49 In the case before the Indonesian court, Bankers Trust argued that the South Jakarta District Court did not have jurisdiction because the parties had agreed to arbitration. However, the South Jakarta District Court held that since the arbitration clause was contained in an unsigned schedule to a signed ISDA master agreement, it had jurisdiction over the dispute, as there was no valid incorporation and the arbitration clause was therefore not binding upon the Customers. The South Jakarta District Court then went on to nullify the ISDA. Bankers Trust appealed the decision of the South Jakarta District Court.

50 One of the main criticisms of the decisions by the South Jakarta District Court and the Central District Court of Jakarta is that the master agreement of the ISDA very clearly referred to the attached schedule which contained the arbitration clause. The master agreement contained a clause which stated as follows:⁵⁹

The main tekst [*sic*] to the 1992 Agreements must be signed; however, the Schedule may, but need not to be signed.

51 Accordingly, the finding of the South Jakarta District Court was “exactly opposite to the finding of the LCIA that the schedule formed an integral part of the ISDA agreements and thus the parties had in fact

⁵⁹ Reproduced in Sebastian Pompe & Marie-Christine van Waes, “Arbitration in Indonesia” in *International Commercial Arbitration in Asia* (Philip McConaughay & Thomas Ginsburg eds) (New York: JurisNet LLC, 2nd Ed, 2006) at p 125. However, the authors caution that, as the relevant court decisions and related documents are not accessible to the public, the clause cited was sourced from the respective lawyers and publications regarding the case.

agreed to arbitration".⁶⁰ The decision by the South Jakarta District Court raises concerns about the Indonesian courts' tendency to retain jurisdiction over a dispute despite the existence of an agreement to arbitrate. The Indonesian courts' tendency to guard its jurisdiction with jealousy is clearly in contravention of widely practiced norms in the field of enforcement of international arbitral awards.

C. Disruption of arbitral proceedings by the grant of anti-suit injunctions by the courts

52 Certain courts in Asia have also deviated from the international norms of adopting a pro-arbitration and pro-enforcement bias by disrupting arbitral proceedings through the granting of anti-suit injunctions. Similar to the improper and unjustifiable seizure of jurisdiction discusses in the preceding subsection, the disruption of arbitral proceedings by way of anti-suit injunctions will also prevent any arbitral award from being made, and thereby frustrate the arbitral process. The (in)famous Pertamina disputes and the Pakistani Hubco case are examples of such deviations from the norms.

(1) The Pertamina disputes

53 The Pertamina disputes were arbitration cases involving power projects. These cases involved the use of injunctions and annulments by the Indonesian courts, and are highly controversial.

54 In the early 1990s, the Indonesia Ministry of Mines and Energy ("MME"), together with state-owned electric utility company ("PLN") and state petroleum monopoly ("Pertamina"), entered into contracts for the development of a number of geothermal private power projects. The first project discussed here is the Patuha and Himpurna project. Under the

⁶⁰ Karen Mills, "Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration", a presentation for the Inaugural International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitrators, Kuala Lumpur (28 February–1 March 2003) at p 29.

programme, the Indonesian Ministry of Finance (“MOF”) issued an undertaking to cause Pertamina and PLN to perform their obligations under the project documents as due (“an MOF Support Letter”). There were arbitration clauses contained in the agreements. For the Patuha and Himpurna project, Jakarta was specified as the place of arbitration.

55 As a result of the Asian financial crisis, the Indonesian government indefinitely postponed or cancelled many of the power projects. Unsuccessful efforts to resolve the suspension of its projects led to Patuha and Himpurna (two special-purpose Bermuda subsidiaries of subsidiaries of a US-based energy company, and the claimants in the arbitration) filing for arbitration against PLN in 1998.

56 The tribunal issued an award against PLN in May 1999. Having established the liability of PLN, Patuha and Himpurna then moved to arbitrate against the Republic of Indonesia itself under the MOF Support Letters. At this juncture, Pertamina sued in the Central Jakarta District Court seeking an injunction to halt the arbitration (in relation to the MOF Support Letters) against the Republic in the light of various alleged irregularities committed by the tribunal in the course of the arbitral proceedings. The Indonesian court issued the injunction sought by Pertamina in July 1999, imposing fines of US\$1m per day if the order was violated.

57 The injunction caused the arbitral tribunal to shift the location of future hearings from Jakarta to The Hague. The Indonesian government took several actions in response to the relocation of the proceedings, including filing an application to remove the tribunal chairman for bias, and requesting a Dutch court to enjoin the hearings in The Hague. These efforts were ultimately unsuccessful.

58 There is much controversy over the Patuha and Himpurna disputes.⁶¹ However, the fact remains that the Indonesian courts caused the arbitral

⁶¹ See the critical discussion of Mark Kantor, “The Limits of Arbitration” (2004) 1(2) TDM on the way the Pertamina disputes were handled. For a more sympathetic analysis of Pertamina and Indonesia’s actions in the arbitrations, see Karen Mills, “Enforcement of Arbitral Awards in Indonesia & (continued on next page)

tribunal to shift its location by issuing an injunction to halt the arbitration, thereby causing disruption to the arbitral process. This is contrary to the widely-accepted approach that generally, even if a tribunal had erred in the conduct and determination of the case during the course of the arbitration, the courts would not interfere with the arbitral process (*eg*, by the issuance of injunctions) but would instead correct the alleged wrongs at the enforcement stage, either by refusing enforcement or setting aside the award. This minimal judicial intervention of the arbitral process is exemplified by the Singapore case of *Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush* ("*Mitsui Engineering*"),⁶² which will be discussed below.

59 The second case involved the Karaha Bodas project, another project entered into by MME, PLN and Pertamina for the development of geothermal private power projects in the early 1990s. The situs of the arbitration for the Karaha Bodas project was Geneva, under the UNCITRAL Arbitration Rules. As noted above, there was a suspension of the projects, including the Karaha Bodas project, and Karaha Bodas filed for arbitration at the end of April 1998.

60 Eventually, an award was rendered in favour of Karaha Bodas, jointly and severally against Pertamina and PLN.⁶³

Pertamina also sought an injunction in this case from the Central Jakarta District Court after the issuance of the award. However, its efforts were ignored by the US, Hong Kong and Singapore courts in subsequent proceedings brought by the project company to attach Pertamina's offshore assets. Pertamina also unsuccessfully filed for annulment of the award by the Swiss courts.

Other Issues of Judicial Involvement in Arbitration", a presentation for the Inaugural International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitrators, Kuala Lumpur (28 February–1 March 2003) at pp 22–27 and 31–33.

⁶² [2004] 2 SLR(R) 14.

⁶³ Similar to the Pautha and Himpurna project, the Karaha Bodas case is also extremely controversial. See the discussion by the authors set out in n 61.

61 However, despite these decisions, Pertamina obtained from the Central Jakarta District Court an injunction prohibiting enforcement by Karaha Bodas of the arbitration award anywhere in the world, backed by daily fines of US\$500,000 for non-compliance. The court also annulled the arbitration award on the basis that the award was contrary to Indonesian law and contained procedural flaws.⁶⁴ The successful enforcement of the award therefore depended on the project company's ability to claim against Pertamina's foreign assets, and enforcement of the award was sought in the US, Canada, Hong Kong and Singapore. The parties have now settled the dispute, and Pertamina will pay US\$319m to Karaha Bodas.⁶⁵ The issuance of an injunction preventing Karaha Bodas from enforcing the arbitral award anywhere else in the world (and not merely refusing enforcement if and when enforcement is sought in Indonesia) is also contrary to the norms of international arbitration.

(2) *Hubco case*

62 In Pakistan, just as in Indonesia, arbitrations over disputes in power projects have become entangled in local court actions, with the Pakistan courts also issuing injunctions against parties from proceeding with arbitration. The (in)famous case involving Hub Power Co Ltd ("Hubco") and the Water and Power Development Authority ("WAPDA") of Pakistan (which was a state-owned utility) demonstrated yet again judicial hostility towards arbitration leading to problems in the enforcement of arbitral awards.

63 In the Hubco case, the Government of Pakistan invited the private sector to develop thermal power plants to generate and supply electricity to WAPDA. The agreement between Hubco and WAPDA specified English law as the governing law and provided for arbitration in London. The agreement was later amended twice ("the amending agreements"). The

⁶⁴ The annulment of the award by the Indonesian court is discussed further in paras 72–74 below.

⁶⁵ See John Aglion, "Pertamina Settles Power Dispute" *Financial Times* (22 March 2007).

dispute over the Hubco project in Pakistan included, among other allegations, those of corruption.

64 The numerous court and arbitration proceedings covered at least three years.⁶⁶ In June 2000, the Pakistani Supreme Court upheld an anti-arbitration injunction blocking Hubco from pursuing ICC arbitration in London over a variety of project disputes, which included disputes over the validity of the amending agreements, which were alleged to have been obtained through corruption or fraudulently. Hubco's case was that, no matter what the facts, even if there was *prima facie* evidence of criminal conduct, the requirements of public policy were fully satisfied by the prosecution of the wrongdoers in the pending criminal proceedings. In addition, under both Pakistani and English law, the arbitrators were the sole judge of their own competence, and fraud and corruption in the procurement of the amending agreements did not prevent arbitration on the issue as to the effect of those matters on the validity of the amending agreements.

65 The Supreme Court held, by a 3:2 majority, that "public policy" supported the injunction, as the allegations of corruption were *prima facie* evidence that the disputes should be first addressed in the Pakistani courts and not by international arbitrators, *ie*, these issues were not arbitrable. The majority judgment was a mere six pages long, and concentrated on reciting the so-called "facts" alleged by WAPDA which they found to be the basis for invoking public policy to defeat Hubco's right to arbitration. The majority judgment contained not a single reference to any case, whether cited by Hubco or WAPDA. By contrast, the minority judgment extended to over 60 pages, was fully reasoned, and cited a raft of case law.

⁶⁶ For a comprehensive discussion of the dispute, see Kairas N Kabraji, "Allegations of Corruption Vitiates International Commercial Arbitration – The Pakistan Experience", a paper prepared for the 17th LAWASIA Biennial Conference, Christchurch (4–8 October 2001).

66 The majority decision has been severely criticised. For example, one commentator noted as follows:⁶⁷

The judiciary (personified in the majority judgment of the Supreme Court) has apparently set its face against international commercial arbitration by invoking public policy and the development of the law has been diverted into barren lands where it can only wither away.

67 If the courts adopt a hostile and interventionist attitude towards arbitration, and would invoke the public policy ground as a means to blocking the arbitration proceeding itself, the courts could just as easily invoke this ground to defeat a party's application for the enforcement of an award. The issue of broad reliance on the public policy ground to refuse enforcement by various courts in Asia will be further discussed below.⁶⁸

68 In addition, the majority decision should be contrasted with the narrower approach taken by the English Court of Appeal in the case of *Fiona Trust & Holding Corp v Yuri Privalov* ("*Fiona Trust*").⁶⁹ In *Fiona Trust*, one party attempted to rescind a contract containing the arbitration clause as a whole following allegations of bribery. The Court of Appeal ruled that if the contract was alleged to be invalid for reasons of bribery, the arbitration clause survived unless the bribery relates *specifically to the arbitration clause*. Accordingly, in that case, the validity of the contract would be determined by the arbitrators and not the court. This ought to have been the approach taken by the Pakistan Supreme Court and, as the alleged fraud and corruption did not appear to be specifically in relation to the arbitration clause, the arbitral tribunal ought to have the jurisdiction to determine the validity of the amending agreements, and it was not contrary to public policy for the arbitral tribunal to do so.

⁶⁷ Kairas N Kabraji, "Allegations of Corruption Vitiates International Commercial Arbitration – The Pakistan Experience", a paper prepared for the 17th LAWASIA Biennial Conference, Christchurch (4–8 October 2001) at p 10.

⁶⁸ See paras 75–109.

⁶⁹ [2007] EWCA Civ 20; [2007] 2 Lloyd's Rep 267 (Decision dated 24 January 2007).

69 The above cases must also be contrasted with the norms in international arbitration today that courts will be pro-arbitration and less interventionist. A case which demonstrates this clearly is *Mitsui Engineering*, alluded to above. In *Mitsui Engineering*, Mitsui and Keppel were joint venture partners, but disputes arose between them and referred to arbitration. Easton was appointed as arbitrator and, after hearing evidence and receiving submissions on certain preliminary issues, the arbitrator issued a first interim award (“FIA”). Mitsui was dissatisfied with the FIA for various reasons, and challenged Easton’s position as arbitrator. Mitsui then applied for an interlocutory injunction to restrain Easton from “continuing or assisting in the prosecution or further prosecution or taking any further step” in the arbitration pending the intended application to remove him and set aside the FIA.

70 Woo Bih Li J in the Singapore High Court held that the court did not have the jurisdiction to grant the interlocutory injunction and dismissed the application. In reaching the decision, Woo J stated that Article 5 of the Model Law provided that “no court shall intervene except where so provided in this Law [*i.e.*, the Model Law]” and, as the Model Law did not provide for the interlocutory injunction in respect of an application challenging the arbitrator or to set aside the award, the court did not have the power to grant the interlocutory injunction.⁷⁰

⁷⁰ Woo Bih Li J also noted that the last clause of Art 13(3) of the UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) (“Model Law”), which allows an arbitrator to continue the arbitral proceedings and even make an award pending the outcome of the court’s ruling on the challenge, indicates that it is for the arbitrator and not the court to decide whether arbitral proceedings should be stayed pending a challenge of the arbitrator. The Court of Appeal in *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 affirmed that the purpose of Art 5 of the Model Law was to “satisfy the need for certainty as to when court action is permissible”. Accordingly, the court’s jurisdiction to interfere with an arbitral award is circumscribed by what is expressly provided for in the Model Law.

71 Woo J also noted in his judgment that the granting of an interlocutory injunction pending the determination of a setting aside application would be “contrary to the overall scheme of minimum court intervention”.⁷¹ Similarly, in the recent Singapore Court of Appeal decision in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd*, V K Rajah JA noted that:⁷²

... the current judicial climate ... dictates that courts should not without good reason interfere with the arbitral process, whether domestic or international [and] [i]t is incontrovertible that international practice has now radically shifted in favour of respecting and preserving the autonomy of the arbitral process in contrast to the earlier practice of enthusiastic curial intervention ...

D. Asserting jurisdiction to set-aside arbitral awards when court of enforcement is not the situs of the arbitration

72 In the case of *Karaha Bodas*, the facts which are discussed in the preceding section, the Central Jakarta District Court has also surely failed to properly apply the arbitration laws by annulling the award, even though Indonesia was not the seat of the arbitration for the *Karaha Bodas* arbitration.⁷³ Article V(1)(e) of the New York Convention reads as follows:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

...

(e) The award has not yet become binding on the parties, or has been *set aside or suspended by a competent authority of*

⁷¹ *Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush* [2004] 2 SLR(R) 14 at [40].

⁷² *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [59], a case in which the Court of Appeal set aside the lower court’s decision to set aside an arbitral award due to an alleged breach in the rules of natural justice.

⁷³ See also the comment of Mark Kantor, “The Limits of Arbitration” (2004) 1(2) TDM at 6.

the country in which, or under the law of which, that award was made ...

[emphasis added]

73 It is clear that the situs of the arbitration was *not* Indonesia. In addition, the generally accepted interpretation of the phrase “under the law of which ... that award was made” is that this refers to the law governing the procedure of the arbitration (law of the seat of the arbitration unless otherwise chosen by the parties, *ie*, Swedish law in the *Karaha Bodas* case) and not the substantive law of the arbitration (Indonesian law). This is clearly reflected in the following commentary.⁷⁴

The ‘competent authority’ as mentioned in Article V(1)(e) for entertaining the action of setting aside the award is virtually always the court of the country in which the award was made. The phrase ‘or under the law which’ the award was made refers to the theoretical case that on the basis of an agreement of the parties the award is governed by an arbitration law which is different from the arbitration law of the country in which the award was made.

74 Accordingly, in this case, the Indonesian courts would not have the power under the New York Convention to set aside or annul the arbitration awards. This is a clear indication of the lack of understanding by the Indonesian court of the correct application of the New York Convention and also an interventionist attitude towards the arbitral process.

E. Broad reliance on the public policy exception by the courts

75 The public policy ground as a basis for the refusal of enforcement or setting aside of international arbitral awards⁷⁵ has caused many problems

⁷⁴ See Mark Kantor, “The Limits of Arbitration” (2004) 1(2) TDM at 6.

⁷⁵ See, *eg*, Art V(2)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959) and Arts 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006).

in practice. The following note of caution on public policy sounded almost two hundred years ago still rings true:⁷⁶

[Public policy is] a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when other points fail.

76 Problems persist as various Asian courts have given the public policy ground a broad definition, deviating from the norm that the public policy ground ought to be given a narrow construction, *eg*, as being made out “only where the most basic notions of morality and justice are violated”.⁷⁷

77 The Malaysian High Court decision in *Harris Adacom Corp v Perkom Sdn Bhd* (“*Harris Adacom*”)⁷⁸ demonstrates the problem that the concept of public policy under Article V(2)(b) of the New York Convention “is not always well understood by national courts”.⁷⁹

78 In *Harris Adacom*, the defendant (“Perkom”) entered into a distribution agreement with Harris Corp (an American company), under which the defendant owed a certain sum. Harris Corp then sold its interests and assigned all its rights to the plaintiff (“Harris Adacom”), and when the defendant failed to pay the debt, the plaintiff commenced arbitration

⁷⁶ *Richardson v Mellish* (1824) 2 Bing 229 at 252; [1824–1834] All ER 258 at 266.

⁷⁷ See Michael Hwang SC & Andrew Chan, “Enforcement and Setting Aside of International Arbitral Awards – The Perspective of Common Law Countries” in *ICCA Congress Series No 10, New Delhi (2000): International Arbitration and National Courts: The Never Ending Story* (Albert Jan van den Berg ed) (The Hague: Kluwer Law International, 2000) at p 152, discussing the case of *Hebei Import & Export Corp v Polytek Engineering Co Ltd (No 2)* [1998] 1 HKC 192, which echoed the words of the US court in *Parsons & Whittemore Overseas Inc v Société Générale de l’Industrie du Papier (RAKTA)* 508 F 2d 969 (2nd Cir, 1974).

⁷⁸ [1994] 3 MLJ 504.

⁷⁹ Gabrielle Kaufmann-Kohler, “Enforcement of Awards – A Few Introductory Thoughts” in *ICCA Congress Series No 12, Beijing (2004): New Horizons in International Commercial Arbitration and Beyond* (Albert Jan van den Berg ed) (The Hague: Kluwer Law International, 2004) at p 287.

proceedings in the US. An award was made in favour of the plaintiff. The plaintiff then applied to register the award under the 1985 Act.

79 One of the grounds raised by the defendant in opposing the application was that it was contrary to public policy to enforce the award as the plaintiff was an Israeli company. Abu Mansor J allowed the application of the plaintiff to enforce the arbitral award as he found that despite the fact that the plaintiff had a 68% stake in a subsidiary company engaged in operations in Israel, the products covered by the distribution agreement had been (and would have continued to be) developed, manufactured, and supported from the plaintiff's US operation. Accordingly, he held that it was not against public policy to have the award enforced. However, the following passage may indicate a lack of clear understanding that a narrow interpretation should be given to the public policy ground for resisting enforcement under the New York Convention:⁸⁰

On the allegation that the plaintiff is an Israeli based company and, therefore, it is against public policy to have the award enforced, it is common ground that, in the foreign office declaration produced to this court, if it is so found that the plaintiff is an Israeli company, it is against public policy to enforce it as trade with Israel is prohibited.

80 The above excerpt from Mansor J's judgment in *Harris Adacom* suggests the failure to appreciate the narrow scope of the public policy ground for refusing the enforcement of arbitral awards and the "distinction between domestic and international public policy!"⁸¹ The distinction between domestic and international public policy, and the narrow scope

⁸⁰ The court was unfortunately not assisted by submissions from the Attorney-General's Chambers ("AGC") of Malaysia which would undoubtedly have not supported the reasoning in this case. However, as the result did not call for an appeal, there was no opportunity for the AGC to express its views.

⁸¹ Ahmed S El-Koshery, "Enforceability of Awards – Some Additional Problems" in *ICCA Congress Series No 12, Beijing (2004): New Horizons in International Commercial Arbitration and Beyond* (Albert Jan van den Berg ed) (The Hague: Kluwer Law International, 2004) at p 340.

of the ground of public policy in refusing to enforce an award is clearly stated in the following commentary by Albert Jan van den Berg:⁸²

The public policy defence rarely leads to a refusal of enforcement. One of the reasons is the distinction between domestic and international public policy. This distinction means that what is considered to pertain to public policy in domestic relations does not necessarily pertain to public policy in international relations. According to the distinction, the number of matters considered as falling under public policy in international cases is smaller than in domestic ones. The distinction is justified by the differing purposes of domestic and international relations. In cases falling under the Convention, the distinction is gaining increasing acceptance by the courts.

81 The approach in *Harris Adacom* is a clear contrast to the narrow interpretation of the public policy ground adopted by the US Court of Appeals for the Second Circuit in the *locus classicus* with regard to the narrow interpretation to be given to the public policy exception, *Parsons & Whittemore Overseas Inc v Société Générale de l'Industrie du Papier (RAKTA)* (“*Parsons*”),⁸³ a case with similar characteristics to *Harris Adacom*. In *Parsons*,⁸⁴ a US corporation, Parsons & Whittemore Overseas, entered into a contract with the Egyptian corporation, Société Générale de l'Industrie du Papier (RAKTA) (“RAKTA”), for the construction of a mill in Egypt. The project was to be financed by the US Agency for International Development (“AID”). The Arab-Israeli six-day war broke out when the project was near completion, and Egypt expelled all Americans except those who would apply and qualify for a special visa. The AID informed Parsons & Whittemore Overseas that it was withdrawing financial support for the project. Parsons & Whittemore

⁸² Albert Jan van den Berg, “Why are Some Awards Not Enforceable?” in *ICCA Congress Series No 12, Beijing (2004): New Horizons in International Commercial Arbitration and Beyond* (Albert Jan van den Berg gen ed) (The Hague: Kluwer Law International, 2004) at p 309.

⁸³ 508 F 2d 969 (2nd Cir, 1974).

⁸⁴ The recital of the facts of the case is largely based on the case discussion in Albert Jan van den Berg, *The New York Convention of 1958* (Deventer: Kluwer Law and Taxation Publishers, 1981) at pp 363–364.

Overseas subsequently abandoned the project on the purported ground of *force majeure*. RAKTA disagreed and, in the ensuing arbitration, obtained a favourable award.

82 In the enforcement action, Parsons & Whittemore Overseas contended that the various actions by the US officials, in particular AID's withdrawal of financial support, required Parsons & Whittemore Overseas, in the name of being a loyal US citizen, to abandon the project. Enforcement of the arbitral award premised on Parsons & Whittemore Overseas continuing to work on the project contrary to the expressions of national policy would therefore contravene US public policy.

83 In response to Parsons & Whittemore Overseas' contentions, the US Court of Appeals for the Second Circuit famously remarked as follows:⁸⁵

... the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum State's most basic notions of morality and justice.

84 The court then went on to reject Parsons & Whittemore Overseas' contentions. The following passage from the judgment is especially instructive:

In equating 'national' policy with United States 'public' policy, the appellant quite plainly misses the mark. To read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy'. Rather, a circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis.

⁸⁵ *Parsons & Whittemore Overseas Inc v Société Générale de l'Industrie du Papier (RAKTA)* 508 F 2d 969 (2nd Cir, 1974) and this passage were referred to in the Singapore Attorney-General's Chambers Review on Arbitration Laws 2001 (LRRD No 3/2001) at para 2.37.18 and the accompanying fn 101. It has been repeatedly cited as the definitive statement of the law on this topic: see the cases discussed in the main text.

To deny enforcement of this award largely because of the United States' falling out with Egypt in recent years would mean converting a defense intended to be of narrow scope into a major loophole in the Convention's mechanism for enforcement. We have little hesitation, therefore, in disallowing Overseas' proposed public policy defense.

85 The approach of the Indonesian courts towards the concept of the public policy ground also deviates from the commonly accepted norm as espoused in *Parsons*. In the Indonesian case *ED & F Man (Sugar) Ltd v Yani Haryanto* ("*EDF Man*"),⁸⁶ the subject matter of the dispute was a contract for provision of sugar between ED Man (Sugar) Ltd ("the Seller") and Yani Haryanto ("the Buyer"). The contract provided for arbitration in London. At that time, only the Government Logistics Bureau ("BULOG") was permitted to import, or authorise the import of sugar, and no such authorisation had been obtained by the Buyer. The price of sugar declined substantially between the date of the contract and the intended delivery date of the sugar. The Buyer failed to perform in accordance with the contract by failing to provide the necessary Letters of Credit and cancelled the contract.

86 The Seller commenced arbitration in London and obtained an award against the Buyer for breach of contract. The Buyer filed a suit in the High Court of England seeking a declaration that the contract was null and void on the basis that it was contrary to law and public policy, as no permit had been issued by BULOG to import the sugar.

⁸⁶ For discussion of this case, see Karen Mills, "Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration", a presentation for the Inaugural International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitrators, Kuala Lumpur (28 February–1 March 2003); Leslie Chew SC, "Public Policy – The Ride of the Unruly Steed on the Highway of International Arbitration" <<http://www.lawgazette.com.sg/2003-12/Dec03-col2.htm>> (accessed 12 July 2013), first published in the *Singapore Law Gazette* (December 2003); S Gautama, "Indonesia" in *ICCA International Handbook on Commercial Arbitration (Asian Countries)* vol 2 (Albert Jan van den Berg & Pieter Sanders gen eds) (Deventer: Kluwer Law and Taxation Publishers, 2000) at pp 29–30.

87 The parties subsequently reached a settlement agreement whereby the Buyer was to pay to the Seller a reduced compensation in instalments. It was also provided in this settlement agreement that in the case of any disputes regarding the settlement agreement, arbitration was to be held in London. The Buyer defaulted on payment instalments and the Seller again brought arbitration proceedings in London. The Seller successfully obtained another award against the Buyer.

88 The Buyer did not satisfy this second arbitral award and instead brought an action in the District Court of Central Jakarta seeking annulment of the *original* purchase contract on the basis that it was invalid *ab initio*, being in violation of law and public policy, and the arbitration clause was accordingly also invalid. The District Court of Central Jakarta declared the original purchase order null and void, on the grounds that, at that time, only BULOG could import (or authorise the import) of sugar, and that the Buyer had not obtained a permit from BULOG to import the sugar. The court held that the original purchase agreement was “contrary to Indonesia’s public policy, as contravening Indonesian State regulations”⁸⁷ and that any arbitration “arising out of a dispute touching on such an ‘illegal contract’ could not be enforced for being contrary to law and public policy”.⁸⁸ Both the Jakarta Appellate Court and the Indonesian Supreme Court upheld the District Court’s decision.

89 By holding that the violation of the *domestic* law prohibiting the import of sugar meant that the arbitral award in respect of the dispute arising from the sale of sugar was against public policy, the Indonesian courts adopted a broad view of the public policy ground. Furthermore, the Indonesian courts reached such a decision, “despite the fact that it was the Buyer that violated the provisions of law and also that at this

⁸⁷ S Gautama, “Indonesia” in *ICCA International Handbook on Commercial Arbitration (Asian Countries)* vol 2 (Albert Jan van den Berg & Pieter Sanders gen eds) (Deventer: Kluwer Law and Taxation Publishers, 2000) at p 30.

⁸⁸ Leslie Chew, “Public Policy – The Ride of the Unruly Steed on the Highway of International Arbitration” <<http://www.lawgazette.com.sg/2003-12/Dec03-col2.htm>> (accessed 12 July 2013), first published in the Singapore *Law Gazette* (December 2003).

stage the parties were in dispute not over the original sale contract but the subsequent settlement agreement”.⁸⁹ In view of this factor, there is an even stronger case for the enforcement of the arbitral award by the Indonesian courts. The settlement agreement was voluntarily entered into and not contrary to public policy:⁹⁰

[Adopting] narrower view of the scope of the public policy question would allow the Indonesian courts to give effect to the arbitral award while at the same time satisfying its own national public policy since the recognition of a foreign award giving effect to a settlement would not be a case of sanctioning the illegal import of sugar.

90 The failure of the Indonesian courts to enforce the arbitral award rendered on the settlement agreement may be an indication that the Indonesian courts will not give sufficient respect to decisions of the arbitral tribunal, and it has been observed that this attitude may possibly be a result of the “lack of understanding of the arbitral concept on the part of the court”.⁹¹ Furthermore, the broad reading of the public policy ground is contrary to the pro-enforcement bias contemplated by the New York Convention. All this could conceivably have contributed to the deviation from the generally accepted principles governing the enforcement of international arbitration awards.⁹²

⁸⁹ Karen Mills, “Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration”, a presentation for the Inaugural International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitrators, Kuala Lumpur (28 February–1 March 2003) at p 11.

⁹⁰ Leslie Chew, “Public Policy – The Ride of the Unruly Steed on the Highway of International Arbitration” <<http://www.lawgazette.com.sg/2003-12/Dec03-col2.htm>> (accessed 12 July 2013), first published in the *Singapore Law Gazette* (December 2003).

⁹¹ Leslie Chew, “Public Policy – The Ride of the Unruly Steed on the Highway of International Arbitration” <<http://www.lawgazette.com.sg/2003-12/Dec03-col2.htm>> (accessed 12 July 2013), first published in the *Singapore Law Gazette* (December 2003).

⁹² Discussed in detail in paras 7–19 above.

91 In the Bankers Trust cases,⁹³ although the South Jakarta District Court decided that it had jurisdiction over the disputes and pending the appeal of the decision of the South Jakarta District Court, the LCIA tribunal in the arbitral proceedings issued an award in favour of Bankers Trust. Bankers Trust requested the Central Jakarta District Court to enforce the LCIA awards. The Central District Court of Jakarta rejected the request, ruling that it would be against Indonesia's "public order" to decide on the granting of an enforcement order for an international arbitral award where the dispute was still pending in civil court proceedings. The court stated that "the arbitral award would cause public disorder if enforced while there was a decision to the contrary issued by the South Jakarta District Court".⁹⁴ The Central District Court of Jakarta reached this finding, despite the fact that:⁹⁵

... the judgment of the South Jakarta court was not final and binding until all appeal mechanisms have been exhausted, whereas an arbitral award is final and binding and all that is left to the court is to enforce it, but not to review it.

92 The decision of the Central District Court of Jakarta once again illustrated its expansive interpretation of the term "public order/policy" by holding that where there is a conflicting arbitration award and judgment of the Indonesian court, the Indonesian court will not enforce the award because this would be contrary to public order. The court appears to have interpreted the Arbitration Law's reference to "public order" as including *domestic* concepts of law and order. As discussed above, this is quite different from the generally accepted practice in the

⁹³ The facts are set out at paras 39–51 above.

⁹⁴ As cited in Sebastian Pompe & Marie-Christine van Waes, "Arbitration in Indonesia" in *International Commercial Arbitration in Asia* (Philip McConaughay & Thomas Ginsburg eds) (New York: JurisNet LLC, 2nd Ed, 2006) at p 125.

⁹⁵ Karen Mills, "Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration", a presentation for the Inaugural International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitrators, Kuala Lumpur (28 February–1 March 2003) at p 29.

enforcement of international arbitral awards; “most nations restrict international ‘public policy’ to rules which are elementary to retaining social order”.⁹⁶ Commentators have noted that “the District Court’s more expansive interpretation of ‘public order’ likely will be a source of concern for international commercial parties assessing the reliability of arbitration and award enforcement in Indonesia”.⁹⁷

93 In India, the courts have also failed to properly define and apply the public policy ground for refusing the enforcement of international arbitral awards, and have taken a broad view of “public policy”, leading to judicial review of awards approaching a full appeal.

94 This was evidenced in the case of *Oil and Natural Gas Corp Ltd v SAW Pipes* (“*SAW Pipes*”),⁹⁸ a decision by the Supreme Court of India. In the case, the Supreme Court of India was concerned with defining the scope of the phrase “public policy of India” as used in the context of section 34 of the Indian Arbitration and Conciliation Act 1996,⁹⁹ which provides as follows:

34. Application for setting aside arbitral award

...

(2) An arbitral award may be set aside by the court only if –

...

(b) the court finds that –

...

(ii) the arbitral tribunal is in conflict with the public policy of India.

Explanation – Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is

⁹⁶ Sebastian Pompe & Marie-Christine van Waes, “Arbitration in Indonesia” in *International Commercial Arbitration in Asia* (Philip McConaughay & Thomas Ginsburg eds) (New York: JurisNet LLC, 2nd Ed, 2006) at p 126.

⁹⁷ Sebastian Pompe & Marie-Christine van Waes, “Arbitration in Indonesia” in *International Commercial Arbitration in Asia* (Philip McConaughay & Thomas Ginsburg eds) (New York: JurisNet LLC, 2nd Ed, 2006) at p 126.

⁹⁸ (2003) 5 SCC 705.

⁹⁹ No 26 of 1996.

in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption ...

95 The dispute in *SAW Pipes* arose from a contract whereby the respondent (“SAW Pipes”) was to supply steel pipes to the appellant (“ONGC”). The contract provided for a liquidated damages clause which stated that, in the event of the failure of the respondent to supply the steel pipes within the contractually stipulated deadline, the appellant was entitled to recover from the respondent an agreed sum as liquidated damages, and not by way of a penalty, a sum equivalent to 1% of the contract price per week for such delay, up to a ceiling of 10% of the contract price. A dispute arose between the parties and the appellant proceeded to utilise this liquidated damages clause by deducting the sum from the payment due to the respondent. The deduction was disputed by the respondent and the matter referred to arbitration. The arbitral tribunal ruled that the appellant had wrongly utilised the liquidated damages clause as the appellant was only entitled to recover liquidated damages if it was shown that it had suffered some loss owing to the respondent’s breach, but the appellant had not shown this.

96 The appellant proceeded to apply to set aside the award. The Supreme Court of India held that the arbitral tribunal was not justified in concluding that the appellant would still have to establish that it had suffered loss as a result of the delay in the supply of steel pipes before the appellant could legitimately deduct the amount of the liquidated damages from the purchase price. Accordingly, as the Supreme Court of India was of the view that the phrase “public policy of India” *should not* be construed narrowly, it held that the award was patently illegal and must be set aside:¹⁰⁰

It would be clear that the phrase ‘public policy of India’ is not required to be given a narrower meaning. As stated earlier, the said term is susceptible of narrower or wider meaning depending upon the object and purpose of the legislation. ... In our view, wider

¹⁰⁰ Michael Hwang SC & Desmond Ang, “Challenging Arbitral Awards under the Model Law in Singapore and New Zealand” presented at the First New Zealand Arbitration Day, Auckland, New Zealand (9 June 2006).

meaning is required to be given so as to prevent frustration of legislation and justice. ...

...

Hence, if the award is erroneous on the basis of record with regard to the proposition of law or its application, the court will have jurisdiction to interfere ...

A previous discussion of this case also noted as follows.

By a cross-fertilisation of ideas obtained from the sphere of administrative law, the Indian Supreme Court has expanded the scope of public policy in India. Such concepts dictate that the error, at least in India, which must be present before public policy can be invoked to set aside an award, must be 'so blatant, so obvious, so manifest or so palpable that when attention is invited to it, no elaborate argument is needed to support the contention that the conclusion is erroneous'.

97 The *SAW Pipes* decision expanded on the test of "public policy" laid down earlier by the Indian Supreme Court in *GEC v Renusagar Power Co Ltd* ("*Renusagar*"),¹⁰¹ by holding that a patently illegal award may be annulled on the public policy ground. In *Renusagar*, the Indian Supreme Court held that, in order to attract the bar of public policy, the enforcement of the award must invoke something more than a mere violation of Indian law in India. The Indian Supreme Court held that the enforcement of a foreign award would be refused on the ground of public policy if such enforcement would be "contrary to (i) a fundamental policy of Indian law, or (ii) the interests of India, or (iii) justice and morality".¹⁰² Concerns had also previously been raised over this test of public policy

¹⁰¹ (1994) AIR 860.

¹⁰² Michael Hwang SC & Andrew Chan, "Enforcement and Setting Aside of International Arbitral Awards — The Perspective of Common Law Countries" in *ICCA Congress Series No 10, New Delhi (2000): International Arbitration and National Courts: The Never Ending Story* (Albert Jan van den Berg ed) (The Hague: Kluwer Law International, 2000) at p 157.

enunciated by the Indian Supreme Court, as these grounds could be construed fairly broadly:¹⁰³

The approach of the Indian Supreme Court [in *Renusagar*], however, gives rise to some question as to how xenophobically an enforcing court may construe the concept of public policy. Although the actual decision in *Renusagar* was to uphold the award, the court's remarks imply that certain national and economic interests can constitute public policy.

98 These fears have now been realised, in the light of the *SAW Pipes* decision. The expanded notion of “public policy” as a result of the *SAW Pipes* decision could mean further frustration of parties' attempts to enforce an arbitral award in India, and is clearly inconsistent with the pro-arbitration bias and narrow concept of public policy which ought to be applied in the enforcement of international arbitration awards.¹⁰⁴

99 As noted above, the broad reading of the public policy ground by these various courts is in stark contrast to the view adopted by most courts around the world that the public policy ground must be *narrowly* construed. This norm in the interpretation of the public policy ground is clearly adhered to in the following Singapore cases.

100 In the case of *Re an arbitration between Hainan Machinery Import and Export Corp and Donald & McCarthy Pte Ltd* (“*Hainan Machinery*”),¹⁰⁵ the parties entered into a contract for the sale of steel wire rods from the

¹⁰³ Michael Hwang SC & Andrew Chan, “Enforcement and Setting Aside of International Arbitral Awards – The Perspective of Common Law Countries” in *ICCA Congress Series No 10, New Delhi (2000): International Arbitration and National Courts: The Never Ending Story* (Albert Jan van den Berg gen ed) (The Hague: Kluwer Law International, 2000) at fn 62.

¹⁰⁴ The Indian Ministry of Law and Justice released the consultation paper on proposed amendments to the Arbitration and Conciliation Act 1996 in 2010 and one of the amendments proposed was to legislatively overrule the extended definition given to “public policy” in *Oil and Natural Gas Corp Ltd v SAW Pipes* (2003) 5 SCC 705 by removing the ground of “patent illegality” from the definition of “public policy” but still retaining it as a separate additional ground.

¹⁰⁵ [1995] 3 SLR(R) 354.

defendant to the plaintiff. It was a term of the contract that, failing settlement by friendly negotiation, disputes may be submitted for arbitration by a named arbitration body in China, in accordance with the rules of procedure promulgated by that body. The defendant failed to ship the goods by the agreed date in the contract, claiming that this was due to fierce storm and earthquake affecting the port of shipment. The plaintiff rescinded the contract, and claimed against the defendant for a “sum of US\$217,500 being the non-performance penalty payable by the defendants under the contract”. The defendant, relying on a *force majeure* clause, refused payment. As the parties could not reach a settlement, the plaintiff referred the matter to arbitration by the agreed Chinese arbitration body (now known as the China International Economic Trade Arbitration Commission (“CIETAC”). The CIETAC wrote to the defendant on several occasions, informing it of the arbitration proceedings and inviting its participation, but the defendant refused to participate, insisting that it had not agreed to the institution of the arbitration proceedings. The CIETAC nevertheless proceeded to hear the case and ultimately issued an award in favour of the plaintiff.

101 The plaintiff then applied for leave to enforce the award in Singapore against the defendant under the Arbitrations (Foreign Awards) Act (“the Old Act”).¹⁰⁶ The application was made and heard before the Old Act was repealed by the International Arbitration Act 1994¹⁰⁷ (“IAA 1994”). The application to enforce the award succeeded, and the order of the court granting leave to enforce served on the defendant. The defendant then applied to have the order set aside, and failed at first instance. The appeal was heard by Judith Prakash J after the IAA 1994 had come into force, and as required under section 36 of the IAA 1994,¹⁰⁸ Prakash J treated the proceedings as if it had been commenced under the IAA 1994. The defendant raised various grounds

¹⁰⁶ Formerly, Cap 10A, 1985 Rev Ed.

¹⁰⁷ Act 23 of 1994, and at the time of the judgment: Cap 143A, 1995 Rev Ed.

¹⁰⁸ Section 36 of the International Arbitration Act (Cap 143A, 1995 Rev Ed) reads as follows: “Any proceedings commenced by virtue of a provision under the repealed Arbitration (Foreign Awards) Act shall continue as if it had commenced by virtue of the corresponding provision of this Act.”

in support of the appeal, but this paper shall focus only on the public policy ground raised by the defendant. This was in reliance on section 31(4)(b) of the IAA 1994 (which is similar to section 31(4)(b) of the present IAA). The defendant alleged, ambiguously, that there was “a possibility that the award did not decide on the real matter in dispute between the parties”. By “real matter in dispute”, the defendant presumably meant the applicability of the *force majeure* clause. In dismissing the defendant’s objection, Prakash J stated as follows:¹⁰⁹

... The defendants had had ample opportunity to put up before the arbitration tribunal whatever they considered to be the real matter in dispute. In fact the Commission had been aware of the defendants’ position on *force majeure*. The defendants, however, had not given the Commission any material on which it could find that this position was substantiated and not simply a bare assertion. The defendants had agreed when they signed the contract to arbitration in China. Having done so and having themselves chosen not to participate in the arbitration proceedings, it was not open to them to complain about the possibility of an injustice having been done because their evidence had not been before the Commission.

In my view, public policy did not require that this court refuse to enforce the award obtained by the plaintiffs. There was no allegation of illegality or fraud and enforcement would not be injurious to the public good. As the plaintiffs submitted, the principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist ... I could see no exceptional circumstances in this case which would justify the court in refusing to enforce the award of the Commission.

[emphasis added]

102 Prakash J’s pro-enforcement approach has been noted as “entirely sensible”.¹¹⁰ This pro-enforcement approach is also reflected in the

¹⁰⁹ *Re an arbitration between Hainan Machinery Import and Export Corp and Donald & McCarthy Pte Ltd* [1995] 3 SLR(R) 354 at [44]–[45].

¹¹⁰ Ho Hock Lai, “Enforcement of Foreign Arbitral Award” [1996] Sing JLS 241 at 250.

recent case of *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd*¹¹¹ where, in discussing refusal to enforce an award from a Convention country on the ground of public policy, Prakash J noted that such an award “must be enforced unless it offends against our basic notions of justice and morality”.¹¹² Her Honour also reaffirmed her view in *Hainan Machinery* that the principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist.

103 Similarly, courts of various other Asian countries have also (correctly) adopted a narrow approach towards the public policy ground. A famous example is the Hong Kong case of *Hebei Import & Export Corp v Polytek Engineering Co Ltd*,¹¹³ where the Hong Kong Court of Final Appeal stated that “courts should recognize the validity of decisions of foreign arbitral tribunals as a matter of comity, and give effect to them, unless to do so would violate the most basic notions of morality and justice”.¹¹⁴

104 This international norm towards the construction of the public policy ground is also echoed in the Korean case of *Adviso NV (Netherlands Antilles) v Korea Overseas Construction Corp (“Adviso”)*.¹¹⁵ In *Adviso*, the Supreme Court of Korea upheld a Korean Court of Appeal decision to enforce an ICC award rendered in Zurich. The Supreme Court of Korea stated as follows.

The basic tenet of this provision [*ie*, Article V(2) of the New York Convention] is to protect the fundamental moral beliefs and social

¹¹¹ [2006] 3 SLR(R) 174.

¹¹² *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR(R) 174 at [75], citing from *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKC 205 at 211.

¹¹³ [1999] 2 HKC 205.

¹¹⁴ *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKC 205 at 209. The Hong Kong Court of Appeal’s recent decision in *Gao Haiyan v Keeneye Holdings Ltd* [2011] HKEC 1626 confirmed that courts in Hong Kong must enforce a foreign arbitral award unless to do so would violate the “most basic notions of morality and justice”.

¹¹⁵ (1996) XXI YBCA 612.

order of the country where recognition and enforcement is sought from being harmed ...

105 The Supreme Court of Korea accepted that the ground of public policy in Article V(2) of the New York Convention must be interpreted narrowly, and “the mere fact that the particular foreign legal rules applied in an arbitration award violated mandatory provisions of Korean law did not of itself constitute a valid reason to refuse enforcement”.¹¹⁶ The Supreme Court of Korea then went on to state that “only when the concrete outcome of recognizing such an award is contrary to the good morality and social order of Korea, will its recognition and enforcement be refused”.

106 Similarly, in China, it is noted that the Supreme People’s Court “appears to have taken a strict interpretation as to what may constitute a violation of public policy”.¹¹⁷ This is demonstrated in the recent *ED & F Man (Hong Kong) Co, Ltd v China National Sugar & Wines Group Corp (“Raw Sugar”)*,¹¹⁸ which involved an application to enforce a London arbitral award. In the award, damages were awarded for breach of a futures trading contract. While the Supreme People’s Court recognised that the futures trading contract was in breach of mandatory Chinese laws which prohibited unauthorised futures trading overseas by Chinese companies, it held that a breach of mandatory provisions of Chinese law did not completely equate with a breach of public policy so as to justify non-enforcement under Article V of the New York Convention. A commentator also noted that “the prevailing view is that any attempt to

¹¹⁶ Julian Lew, Loukas Mistelis & Stefan Kröll *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003) at p 727.

¹¹⁷ Friven Yeoh, “Enforcement of Dispute Outcomes” in *Managing Business Disputes in Today’s China* (Michael Moser ed) (The Hague: Kluwer Law International, 2007) at p 270.

¹¹⁸ [2003] Min Si Ta Zi No 3.

resist enforcement on public policy ground is unlikely to succeed, unless the relevant offence is seen to be so blatant and obvious”.¹¹⁹

107 The same view was expressed in an article by a judge of the Supreme People’s Court, where the author stated as follows:¹²⁰

To date, there have been no cases in China where the court refused to enforce a foreign arbitral award on public policy grounds; and one only, in which it refused to enforce a foreign-related (mainland) arbitral award.

108 In discussing other cases where the Supreme People’s Court rejected arguments attacking awards on the public policy ground, the author comments “that [the later cases rejecting the public policy argument], are perhaps more typical and will show China’s present judicial attitude”.¹²¹

109 In one of the cases discussed in the article,¹²² a Japanese company applied to the Haikou Intermediate Court for enforcement of an arbitral award made under the auspices of the Stockholm Chamber of Commerce. The Chinese company opposed the enforcement, claiming that the arbitral award violated a Chinese law stipulating that foreign exchange guarantees by Chinese parties must be examined and approved by the Chinese government. While the lower courts (the Intermediate Court of Haikou and the High Court of Hainan) agreed with the Chinese party’s argument and refused enforcement, the Supreme People’s Court disagreed. Using the same reasoning as that in *Raw Sugar* discussed above, the Supreme People’s Court held that a violation of a compulsory

¹¹⁹ Friven Yeoh, “Enforcement of Dispute Outcomes” in *Managing Business Disputes in Today’s China* (Michael Moser ed) (The Hague: Kluwer Law International, 2007) at p 271.

¹²⁰ Gao Xiaoli, “Public Policy and Enforcement” (2006) 1(3) *Global Arbitration Review* at 22.

¹²¹ Gao Xiaoli, “Public Policy and Enforcement” (2006) 1(3) *Global Arbitration Review* at 23.

¹²² [2001] Min Si Ta Zi No 12. The other case discussed is *ED & F Man (Hong Kong) Co, Ltd v China National Sugar & Wines Group Corp* [2003] Min Si Ta Zi No 3.

provision in a statute is different from a violation of public policy under the New York Convention.

F. Review of merits of the case by the courts

110 There have also been examples of Asian courts contravening the internationally accepted norm that the enforcing court not review the merits of the case.¹²³ As Lawrence Boo notes in *Halsbury's Laws of Singapore* vol 2, in Singapore, "the court hearing an application to set aside an award under the International Arbitration Act has no power to investigate the merits of the dispute or to review any decision of law or fact made by the tribunal".¹²⁴

111 In the Chinese case of *Hong Kong Huaxing Development Co v Xiamen Dongfeng Rubber Manufacturing Co*,¹²⁵ the parties (together with two other Chinese companies) entered into a joint venture contract in Xiamen. Disputes subsequently arose and arbitration was initiated. CIETAC eventually rendered an award in favour of the plaintiff. The award held that the joint venture contract should be terminated, and the

¹²³ See paras 7–19 above.

¹²⁴ *Halsbury's Laws of Singapore* vol 2 (Singapore: LexisNexis, 2003 Reissue) at para 20.134. Although this is in the context of the setting aside of arbitral awards, a similar principle would apply to refusal to enforcement as, in Singapore, the grounds for setting aside and refusing enforcement are similar. In *AJU v AJT* [2011] 4 SLR 739, the Court of Appeal held that the public policy exception in Art 34(2)(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) applied to permit the setting aside of awards only on the ground of error of law, and not on the ground of error of fact (except where "there is fraud, breach of natural justice or some other recognized vitiating factor").

¹²⁵ As discussed in Wang Sheng Chang, "Enforcement of Foreign Arbitral Awards in the People's Republic of China" in *ICCA Congress Series No 9, Paris (1998): Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Albert Jan van den Berg gen ed) (The Hague: Kluwer Law International, 1999) at pp 488–489.

joint venture liquidated (Order 1). In order to facilitate the liquidation of the joint venture, the award also held that the defendant should complete formalities for transfer of ownership of certain factory buildings (Order 2). The joint venture contract stated that these factory buildings were to be the defendant's capital contribution.

112 During the enforcement proceedings before the Xiamen Intermediate People's Court, the defendant objected to enforcement, alleging that it was not the owner of the factory buildings. The court found that the defendant had no right of ownership over the buildings, as the factory buildings were built on someone else's land, and were illegal buildings. The Xiamen Intermediate People's Court then concluded that the arbitral award was incorrect because of a lack of sufficient evidence and Order 2 could not be enforced.

113 The court reviewed the merits of the case, which it declared it was empowered to do under Article 217(4) of the Civil Procedure Law, which provided that the court had the power to decide whether "the main evidence for ascertaining the facts is sufficient". Article 217(4) of the Civil Procedure Law only applies to purely domestic arbitral awards. However, this case involved a foreign-related arbitration, and accordingly Article 260 of the Civil Procedure Law applied. Article 260 of the Civil Procedure Law statutorily precluded a review of the merits of the case. The application of Article 217(4) of the Civil Procedure Law to reach the conclusion that the award ought not to be enforced has been described as "a big mistake in analyzing the grounds for refusal".¹²⁶

¹²⁶ Wang Sheng Chang, "Enforcement of Foreign Arbitral Awards in the People's Republic of China" *ICCA Congress Series No 9, Paris (1998): Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Albert Jan van den Berg gen ed) (The Hague: Kluwer Law International, 1999) at p 488. However, note Wang's comments that the court could have justifiably refused to enforce the award on the ground that the arbitral tribunal dealt with a subject matter beyond the scope of the contract, and the arbitral tribunal had accordingly exceeded its arbitral authority.

114 This decision is clearly contrary to the generally accepted norms in the enforcement of international arbitral awards discussed in detail above, in particular, the non-review of the substantive merits of the case, as provided for in both the New York Convention and the Model Law.

G. *Lack of familiarity with arbitration and the enforcement of international arbitral awards by the courts*

115 Another key factor leading to difficulties in the enforcement of awards in Asia is the courts' lack of familiarity with arbitration and an understanding of the purposes and spirit behind enforcement treaties such as the New York Convention. As noted above,¹²⁷ and briefly alluded to in the discussion of the various cases of non-enforcement, some of the problems of enforcement in the cases discussed above may very well be attributed to the court's lack of familiarity with arbitration and the generally accepted principles in enforcement proceedings.

116 Respected commentators have pointed out that this lack of familiarity is a common problem in China. The former Secretary-General of CIETAC has stated as follows:¹²⁸

[A]mong the awards refused enforcement or set aside by the People's Courts, some did have mistakes, while some were rejected or set aside only because the People's Courts did not fully understand arbitration, or the Courts interpreted the laws too strictly, or even because the Courts were influenced by local protectionism.

117 A lack of judicial competence, in terms of unfamiliarity and a lack of understanding of arbitration in general and of enforcement rules (especially those relating to the New York Convention) as a cause of

¹²⁷ See n 24 above.

¹²⁸ See *Works of CIETAC; Part 7: Exchange and Co-operation with the Courts* <<http://www.cietac.org.cn>> (accessed 12 July 2013). Cited in Tao Jingzhou, *Arbitration Law and Practice in China* (The Hague: Kluwer Law International, 2004) at p 489.

difficulties in the enforcement of awards in China is noted in the following passage:¹²⁹

In China as a whole, lack of a basic knowledge regarding arbitration among some local judicial personnel – the standard practices of arbitration as well as the New York Convention – is a general phenomenon. Some local judges still have little understanding of how the Convention works and the uniform judicial interpretation of its provisions accepted by courts worldwide. It is still necessary to organize relevant judicial personnel to earnestly and systematically study the New York Convention and international practices regarding enforcement of arbitral awards, and duly and conscientiously to implement it.

118 The following Chinese cases are further manifestations of this problem in China.

119 The case of *Revpower Ltd v Shanghai Far East Aviation Technology Import and Export Corp*¹³⁰ (“*Revpower*”) has been described as “one of the most publicized, if not most infamous, examples of the problems facing foreign companies seeking to enforce a foreign rendered arbitral award in China”.¹³¹ The unfamiliarity of the Chinese court with norms in enforcement proceedings led to an overly technical reading of the New York Convention, thereby impeding enforcement of the arbitral award.

120 The claimant in *Revpower* (“*Revpower Ltd*”) was a firm registered in Hong Kong owned by a US company, while the respondent (“*Shanghai Far East Aviation Technology Import and Export Corp*”) was a Chinese company registered in Shanghai, China. The parties entered into a compensation trade agreement, under which the claimant provided the equipment and technology for the manufacture of industrial batteries (which were in accordance with the claimant’s specifications) by the respondent. The claimant would be compensated for the price of its

¹²⁹ Li Hu, “Enforcement of Foreign Arbitral Awards and Court Intervention in the People’s Republic of China” (2004) 20(2) *Arb Int’l* 167 at 178.

¹³⁰ This case has not been officially reported.

¹³¹ Tao Jingzhou, *Arbitration Law and Practice in China* (The Hague: Kluwer Law International, 2004) at p 168.

equipment and technology by manufactured batteries. The compensation trade agreement contained an arbitration clause, as follows:¹³²

- (a) All disputes or claims arising out of this Agreement shall be settled by friendly consultation between the parties if possible.
- (b) Except for excusable delays and conditions specified under the Force Majeure clauses in Articles 12 and 13 of the Agreement, if one party breaches the agreement and causes the other party to suffer loss or to be deprived of rights and benefits accorded to it under the terms of the Agreement, the injured party has the right to claim compensation from the infringing party for the losses incurred and should set up a claim within 30 days after the predetermined performance date as specified in the Agreement and provide documentary evidence necessary for the claim. Documentary evidence of Revpower shall be issued by the American Arbitration Association. Documentary evidence of Shanghai Far East shall be issued by the China Council for the Promotion of International Trade (CCPJT). If the party against whom the claim is filed does not accept the claim (after all evidence is issued) the parties shall submit the dispute to arbitration as provided below.
- (c) Should either party, 60 days after the dispute arises, believe that no solution to a dispute can be reached through friendly consultation, such party has the right to initiate and require arbitration in Stockholm, Sweden, in accordance with the Statute (R & P) of the Arbitration Institute of the Stockholm Chamber of Commerce.

121 Disputes arose between the parties and the claimant terminated the agreement in December 1989. After unsuccessful negotiations lasting 18 months, the claimant submitted the matter for arbitration before the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”), without having presented the respondent with the required American Arbitration Association (“AAA”) documentary evidence. SCC accepted the case, and a three-man arbitral tribunal was formed. While the respondent raised a jurisdiction plea, it nominated an arbitrator to the tribunal. The

¹³² Tao Jingzhou, *Arbitration Law and Practice in China* (The Hague: Kluwer Law International, 2004) at p 168.

arbitral tribunal then made a partial award in July 1992, rejecting the respondent's jurisdictional objection.

122 In March 1993, the respondent filed a complaint in relation to the same dispute in the Shanghai Intermediate People's Court, a move which caused "furore in both the diplomatic and business fraternities".¹³³ In April 1993, the Shanghai Intermediate People's Court accepted jurisdiction, on the ground that the arbitration clause contained in the agreement was ambiguous and incapable of performance, as it did not refer to the relevant arbitral body. The claimant then challenged this acceptance of jurisdiction by the Shanghai Intermediate People's Court. A considerable period of time passed before the Chinese courts made a ruling on the claimant's challenge.

123 Meanwhile, after the decision of the Shanghai Intermediate People's Court in April 1993, the respondent notified SCC that it was withdrawing from the arbitral proceedings. In July 1993, the arbitral tribunal issued a final award in favour of the claimant. The claimant then started enforcement proceedings before the Shanghai Intermediate People's Court pursuant to the New York Convention. The Shanghai Intermediate People's Court refused to accept the case, as the jurisdiction issue was pending. As a result, China was openly accused of "failing to honour its commitments under the New York Convention".¹³⁴

124 Finally in 1995, after a lapse of around two years, the Shanghai Intermediate Court ruled to reject the respondent's application and the Shanghai High Court ruled to uphold the lower court's decision in July 1995. The claimant then resumed its application to enforce the arbitral award to the Shanghai No 2 Intermediate People's Court¹³⁵ in February

¹³³ Tao Jingzhou, *Arbitration Law and Practice in China* (The Hague: Kluwer Law International, 2004) at p 169.

¹³⁴ Tao Jingzhou, *Arbitration Law and Practice in China* (The Hague: Kluwer Law International, 2004) at p 170.

¹³⁵ In late 1995, the Shanghai Intermediate People's Court was divided into two courts: the Shanghai No 1 Intermediate People's Court and the Shanghai No 2 Intermediate People's Court. This was in response to the ever-increasing caseload of the courts.

1996. In March 1996, the Shanghai No 2 Intermediate People's Court finally ruled to recognise and enforce the arbitral award. However, following registration of the award, the claimant was unable to obtain satisfaction, as the respondent had successfully filed for bankruptcy.

125 There are various criticisms of the way the Chinese courts handled *Repower*.

(a) It has been remarked that:¹³⁶

... obviously the arbitration clause contained in the contract at issue was a valid arbitration agreement and [the respondent's] commencement of judicial proceedings before the court was nothing but a dilatory tactic to interrupt the arbitration proceeding.

As the arbitration agreement was valid, the Shanghai Intermediate People's Court erred in (initially) accepting the respondent's application for commencing court proceedings in relation to the dispute which was already pending before SCC. It has been remarked that the court made a mistake by applying the wrong law in determining the validity of the arbitration agreement:¹³⁷

[T]he Court made its second mistake by erroneously applying Chinese law to interpret the validity of the arbitration agreement contained in the contract. While the parties agreed that the place of arbitration should be Stockholm, Sweden, and failed to specify the law governing the arbitration agreement, normally the *lex arbitri* comes into play. According to Swedish

¹³⁶ Wang Sheng Chang, "Enforcement of Foreign Arbitral Awards in the People's Republic of China" in *ICCA Congress Series No 9, Paris (1998): Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Albert Jan van den Berg gen ed) (The Hague: Kluwer Law International, 1999) at p 499.

¹³⁷ Wang Sheng Chang, "Enforcement of Foreign Arbitral Awards in the People's Republic of China" in *ICCA Congress Series No 9, Paris (1998): Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Albert Jan van den Berg gen ed) (The Hague: Kluwer Law International, 1999) at p 499.

law, an arbitration agreement without mentioning an arbitration institution is absolutely valid and capable of operation.

This was a breach of China's obligations under the New York Convention. Pursuant to Article II(3) of the New York Convention, the court of a contracting State, when seized of an action in a matter in respect of which the parties have made an agreement to arbitrate, *shall*, at the request of one of the parties, refer the matter for arbitration.

- (b) The Shanghai Intermediate People's Court unduly delayed the enforcement proceedings by refusing to *accept* the enforcement case. This must surely be an anomalous situation even if the court were justified in refusing to enforce the award. It is also not clear which ground of Article V of the New York Convention could justify the court's refusal to enforce the arbitral award. Presumably, the court might have refused to enforce the award under Article V(1)(a) of the New York Convention on the (erroneous) basis that the arbitration agreement was not valid.

127 The second Chinese case, known simply as the 1995 Case,¹³⁸ also concerned the validity of an arbitration agreement. The parties (one Chinese and the other Swiss) entered into a contract which contained the following arbitration clause: "[A]ny disputes arising, from or in connection with the present contract shall be finally settled in accordance with the ICC Rules of Conciliation and Arbitration. The place of arbitration shall be London." The Haikou Intermediate People's Court held that the arbitration clause was invalid, as the ICC Rules were not necessarily solely utilised by the ICC International Court of Arbitration and therefore, the parties failed to nominate an arbitration body to administer the arbitration. The Haikou Intermediate People's Court then held that the

¹³⁸ Unreported. This case was discussed in Wang Sheng Chang, "Enforcement of Foreign Arbitral Awards in the People's Republic of China" in *ICCA Congress Series No 9, Paris (1998): Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Albert Jan van den Berg gen ed) (The Hague: Kluwer Law International, 1999) at pp 484–485. The name of this case was not mentioned.

arbitration clause was ambiguous, and under Chinese law (as discussed above), such an arbitration clause shall be invalid.¹³⁹

128 The Haikou Intermediate People's Court was unjustified in concluding that the arbitration clause did not provide (with a certain degree of certainty) that the ICC International Court of Arbitration was the arbitration body chosen by the parties to administer the arbitration. By referring to the ICC Rules:¹⁴⁰

[I]t is self evident that the ICC International Court of Arbitration will definitely set an arbitration case under the ICC Rules in motion unless the parties have indicated another arbitration body to handle the case.

129 This again reflects a possible lack of judicial knowledge and expertise with regard to the pro-arbitration principle in international arbitration, and/or a lingering suspicion of the arbitral process on the part of the Chinese courts. As discussed, these factors will contribute to deviation from the generally accepted norms of the enforcement of international arbitral awards, leading to unjustified non-enforcement of international arbitral awards. Indeed, the discussion above demonstrates that these factors *have* led to such a problem.

H. Attitude of local protectionism in the courts

130 Local protectionism is a major problem in the enforcement of international arbitral awards in Asia, especially China. It has been described as being "among the most serious stumbling blocks to China's

¹³⁹ See n 42 above for a discussion of cases finding that no arbitration commission was specified where parties merely referred to the International Chamber of Commerce Rules of Arbitration.

¹⁴⁰ Wang Sheng Chang, "Enforcement of Foreign Arbitral Awards in the People's Republic of China" in *ICCA Congress Series No 9, Paris (1998): Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Albert Jan van den Berg gen ed) (The Hague: Kluwer Law International, 1999) at p 485, and reference contained therein.

proper implementation of the New York Convention".¹⁴¹ This problem has also been noted by another leading Chinese commentator:¹⁴²

Local protectionism is a common problem the courts of most countries must face in the enforcement proceedings of foreign arbitral awards. It also exists. At one time, local protectionism constituted a serious impediment to the enforcement of arbitral awards and caused some enforcement proceedings of foreign awards to be unduly delayed. So-called nationalist or regionalist sentiment still lurks in some regional courts which sympathize with the national or local entities that most often appear before them, denying enforcement.

131 In a survey of the enforcement of arbitration awards in China, Randall Peerenboom (who is a professor of Chinese law at UCLA Law School), provided statistical evidence based on direct interviews with lawyers involved in some 72 enforcement cases between 1995 and 1998 ("the Peerenboom Report"). Overall, 49% of foreign and CIETAC awards are enforced, with the enforcement rate for foreign awards slightly higher at 52%, compared to 47% for CIETAC cases. Enforcement applicants were able to recover 100% of the award in 34% of the cases, 75–99% in 34% of the cases, 50–74% in 14% of the cases, and below 50% in 17% of the cases. However, it must be pointed out that in almost half of the 37 cases where there was no enforcement, the court was unable to enforce the award simply because the respondent had no assets, and "very few jurisdictions can do much in the way of enforcement on a party without assets to seize".¹⁴³ Peerenboom also provided statistical evidence that suggests that the likelihood of enforcement is

¹⁴¹ Tao Jingzhou, "Arbitration in China" in *International Commercial Arbitration in Asia* (Philip McConaughay & Thomas Ginsburg eds) (New York: JurisNet LLC, 2nd Ed, 2006) at p 47.

¹⁴² Li Hu, "Enforcement of Foreign Arbitral Awards and Court Intervention in the People's Republic of China" (2004) 20(2) *Arb Int'l* 167 at 178.

¹⁴³ Tao Jingzhou, "Arbitration in China" in *International Commercial Arbitration in Asia* (Philip McConaughay & Thomas Ginsburg eds) (New York: JurisNet LLC, 2nd Ed, 2006) at p 50.

higher in the larger commercial cities such as Shanghai, Beijing and Guangzhou, whilst less likely in smaller cities.¹⁴⁴

132 The Peerenboom Report notes that local protectionism is cited as a significant impediment to enforcement, with local courts often being pressured from government officials to deny enforcement or to prolong the proceedings.¹⁴⁵ It has also been noted that “most commentators consider that the main root of the problem [*i.e.*, refusal of enforcement in China] lies with local protectionism”.¹⁴⁶

133 Signs of local protectionism were evidenced by the Intermediate People’s Court in *Anhui Cereal*.¹⁴⁷ After resumption of the case in April 2000 following the coming into force of the Arrangement, and a Supreme People’s Court’s issuance of a judicial interpretation which gave the force of law to the Arrangement and provided the legal structure for its implementation, the party seeking enforcement submitted to the Court a Supplemental Application for Enforcement, while the party resisting enforcement responded by claiming that the application should be refused. Hefei Intermediate People’s Court decided to refuse enforcement of the award, one of the reasons being that enforcement of the award would cause damage to the legal interests of Anhui Cereal & Oil Food Import & Export Co, disrupt the social economic order and be contrary to the social public interest of the Mainland. Being contrary to “social public interest” was one of the grounds by which enforcement could be refused under the Arrangement.

134 Commentary on *Anhui Cereal* had noted that the Hefei Intermediate People’s Court did not “explain the standard and extent of the social

¹⁴⁴ Tao Jingzhou, *Arbitration Law and Practice in China* (The Hague: Kluwer Law International, 2004) at p 171.

¹⁴⁵ Tao Jingzhou, *Arbitration Law and Practice in China* (The Hague: Kluwer Law International, 2004) at p 171. Peerenboom found an enforcement rate of 61% where local protectionism is absent, compared to 54% where local protectionism is present.

¹⁴⁶ *Resolving Disputes in China through Arbitration* (Freshfields Bruckhaus Deringer, April 2006) at p 40.

¹⁴⁷ This case was briefly discussed in paras 21–38 above.

public interest concept and did not even analyse how the arbitral award was in breach of social public interest”.¹⁴⁸ Accordingly, *Anhui Cereal* is “open to serious criticism on the ground of local protectionism”.¹⁴⁹ Furthermore, while the term “social public interest” is used in the Arrangement as a possible ground to refuse enforcement instead of the term “public policy” under the New York Convention, it has been noted that the term “social and public interests” is regarded as equivalent to “public policy” in the New York Convention.¹⁵⁰ Given the narrow scope given to the “public policy” ground by the Supreme People’s Court,¹⁵¹ there is even less justification for the Hefei Intermediate People’s Court to refuse enforcement on the “social public interest” ground.

135 It must be noted that the Supreme People’s Court rectified the situation by rightly holding that fraud had led to the conclusion of the arbitration agreement, and the agreement was thereby void, and refusal accordingly ordered. However, it must also be recognised that, if the Supreme People’s Court was minded to *enforce* the award in this case, undue delay to enforcement would have been caused by the attitude of the lower court.

IV. Conclusion

136 While the discussion above focuses on the problems faced by parties seeking enforcement of international arbitral awards in Asia and the

¹⁴⁸ James Lee, “A Review of the Enforcement of Hong Kong Awards in Mainland China” [2006] Asian DR 52 at 53.

¹⁴⁹ James Lee, “A Review of the Enforcement of Hong Kong Awards in Mainland China” [2006] Asian DR 52 at 53.

¹⁵⁰ Gao Xiaoli, “Public Policy and Enforcement” (2006) 1(3) *Global Arbitration Review* at 22. However, it must be noted that this comment on the ground “social and public interests [of China]” was in the context of a discussion of Art 260 of the Civil Procedure Law regarding the enforcement of foreign-related awards rendered within China, and not the Arrangement itself, although the terms used in Art 260 of the Civil Procedure Law and the Arrangement are very similar.

¹⁵¹ Discussed in paras 75–109 above.

causes of such problems, one must not lose sight of the fact that arbitral awards in Asia are successfully enforced more often than not. Asian countries are also actively seeking to eliminate the problems discussed above, so that the courts will apply internationally accepted principles in enforcement proceedings. As an example, it had been commented that, while Indonesia still experiences problems despite the promulgation of the 1999 Indonesian Arbitration Law, this new Arbitration Law:¹⁵²

... is an attempt ... to improve the situation with respect to arbitration and to encourage disputes to be settled in that way, in order to reduce the ability of the courts to interfere in due legal process [and] for the most part, with notable exceptions ... the courts are trying to do this.

137 Furthermore, the great majority of awards are accepted and complied with by the parties without the need to start an enforcement procedure. This can partially be attributed to the New York Convention, as noted in the following passage:¹⁵³

[T]his voluntary compliance with arbitral awards without the need of enforcement is partly due to the preventive effect of the New York Convention itself; knowing that enforcement can be obtained under the New York Convention, a losing party may often choose voluntary fulfillment of the award instead of the work, time and money that would be required to challenge an enforcement procedure before the courts.

138 However, there still exist cases of non-enforcement, arising mainly as a result of the deviations from the generally accepted norms in a sound

¹⁵² Karen Mills, "Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration", a presentation for the Inaugural International Conference on Arbitration of the Malaysia Branch of the Chartered Institute of Arbitrators, Kuala Lumpur (28 February–1 March 2003) at p 35.

¹⁵³ Karl-Heinz Bockstiegel, "Summary of Discussion in the Third Working Group" in *ICCA Congress Series No 9, Paris (1998): Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Albert Jan van den Berg gen ed) (The Hague: Kluwer Law International, 1999) at p 437.

legal framework governing enforcement proceedings discussed above.¹⁵⁴ It is hoped that the discussion of the generally accepted principles in enforcement proceedings and the identification of the factors hindering the application of such principles in this paper will contribute to the ongoing dialogue on the improvement of enforcement efficacy in Asia.

¹⁵⁴ As discussed in paras 7–19 above.

Background to Essay 7

This paper was written in response to a call for contributions to a *Liber Amicorum* for a distinguished international arbitrator on his 80th birthday. As the volume has not yet been published, the name of the arbitrator cannot be revealed (as the volume is meant to be a birthday surprise).

This paper has grown out of a presentation on this subject made by me at an International Chamber of Commerce Masterclass for Arbitrators held in Hong Kong in March 2013.

It has been co-written by Joshua Lim, whose experience as a Justices' Law Clerk in the Supreme Court of Singapore has been invaluable in explaining judicial thinking.

HOW TO DRAFT ENFORCEABLE AWARDS UNDER THE MODEL LAW

Michael HWANG SC* and Joshua LIM†

Contents

I.	Introduction.....	305
II.	The method.....	306
III.	The pathologies.....	307
A.	Pathology 1: A lack of reasoning or insufficient reasoning	307
(1)	No reasons	307
(2)	Problematic reasoning	308
(a)	Example 1: The inability to tell if the arbitrator decided matters outside of his jurisdiction	311
(b)	Example 2: The inability to tell if the arbitrator disregarded due process.....	312
(3)	Impact on bifurcated proceedings	318
(4)	Conclusion on the issue of problematic reasoning	319
B.	Prescription for Pathology 1	319

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C.	Pathology 2: The lack of due process or arbitrators deciding without hearing parties' arguments.....	320
(1)	Different conclusions on the same facts: the case of <i>Pacific China Holdings Ltd (in liquidation) v Grand Pacific Holdings Ltd</i>	324
(2)	Costs issues.....	329
(a)	US: <i>Compagnie des Bauxites de Guinee v Hammermills, Inc</i>	329
	The alleged denial of due process.....	330
	The alleged violation of ICC procedure.....	331
(3)	Interest issues.....	332
(a)	<i>L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd</i>	333
(b)	<i>Cadogan Maritime Inc v Turner Shipping Inc</i>	334
D.	Prescription for Pathology 2.....	339
IV.	Conclusion.....	339

I. Introduction

1 Many if not all arbitration practitioners have heard of pathological arbitration clauses, but what about pathological awards, that is, awards which have such failings that they are liable to be set aside by national courts?

2 This paper will seek to set out elements of such pathological awards and how parties can seek to challenge such awards under the United Nations Commission of International Trade Law Model Law on Commercial Arbitration (“Model Law”).¹ We have chosen to address challenges under the Model Law as it forms the basis of most (if not all) new arbitration laws passed since its birth in 1985. As of 2012, 90 jurisdictions across a variety of legal traditions have enacted legislation based on the Model Law.² In addition, recent commentaries have predicted that countries

¹ UN Doc A/40/17, annex I; UN Doc A/61/17, annex I (21 June 1985; amended 7 July 2006).

² United Nations Commission on International Trade Law, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (2012) at p 1, para 5.

that have adopted the Model Law will be “in the vanguard” of the development of international arbitration law and practice.³

II. The method

3 Unlike a trip to ancient Rome, there are only certain routes available for an unhappy party to set aside awards in Model Law countries. International arbitration regimes which base themselves on the Model Law and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁴ (“New York Convention”) provide an exhaustive list of grounds for setting aside or refusing to enforce an arbitral award. In Singapore, section 24 of the International Arbitration Act⁵ references in Article 34 of the Model Law. The commission of errors of law or fact in the award is not ground for setting aside under the Model Law.⁶

4 There are two main pathologies in awards which applicants might rely on to set aside awards:

- (a) the lack of reasoning in an award; and
- (b) breaches of natural justice in the rendering of an award.

³ Paul Tan, “Arbitration Jurisprudence in Singapore: Is There a Disturbance in the Force?” *Singapore Law Watch Commentary* (October 2012), citing Julian Lew QC speaking at the Hong Kong Arbitration Week.

⁴ 330 UNTS 3 (10 June 1958; entry into force 7 June 1959).

⁵ Cap 143A, 2002 Rev Ed.

⁶ Although the first author has previously argued that awards can be set aside where an arbitrator commits an egregious error as it would contravene the public policy of a pro-arbitration jurisdiction: see Michael Hwang SC & Su Zihua, “Egregious Errors and Public Policy: Are the Singaporean Courts too Arbitration Friendly?” *SAL Conference 2011: Developments in Singapore Law between 2006 and 2010* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu gen eds) (Academy Publishing, 2011) at pp 19–56.

III. The pathologies

A. **Pathology 1: A lack of reasoning or insufficient reasoning**

5 There are two main problems that present themselves when we speak of the reasoning contained in pathological awards:

- (a) a complete lack of reasons; or
- (b) insufficient reasons.

6 The importance of a reasoned decision is set out in Article 31(2) of the International Chamber of Commerce Rules of Arbitration (“ICC Rules”) 2012⁷ and also in Article 31(2) of the Model Law.

(1) *No reasons*

7 The first scenario to be discussed is that of the unreasoned award. Awards that fall under this category include cases where there are completely no reasons provided, or where the reasons contained in the award are so fundamentally contradictory that the award amounts to one which has no reasoning at all.⁸

8 If the award is unreasoned, the award can be set aside under Article 34(2)(a)(iv) of the Model Law, which provides:

Article 34. Application for setting aside as exclusive recourse against arbitral award

- (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
- (2) An arbitral award may be set aside by the court specified in article 6 only if:
 - (a) the party making the application furnishes proof that:

⁷ Entry into force 1 January 2012.

⁸ Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at p 2655. See also Stavros Brekoulakis & Laurence Shore, “UNCITRAL Model Law, Chapter VI, Article 31 [Form and contents of award]” in *Concise International Arbitration* (Loukas Mistelis ed) (Kluwer Law International, 2010) at pp 640–641.

...

- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law;

9 The applicant will essentially argue that “the arbitral procedure was not in accordance with the agreement of the parties”. If, for instance, the arbitration is governed by the ICC Rules, then Article 31(2) requires awards to be reasoned. It is not enough for the arbitral tribunal to decide the dispute; it must also give the reasons that have led to its decision. In other words, it must set out the grounds justifying and explaining the operative part of the award.⁹ This approach may be termed the “Formalist Approach”.

(2) *Problematic reasoning*

All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is. This is all that is meant by a ‘reasoned award’.¹⁰

10 Beyond the bright line of a total failure to provide reasons, the analysis becomes murkier. The words of Donaldson LJ, while fully correct in principle, provide a difficult test to apply in practice. The deceptively simple formulation set out above belies the uphill struggle both arbitrators and courts have felt in pinpointing the basic needs of reasoning in an award. Providing legal reasons has been said to be often

⁹ Erik Schäfer, Herman Verbist & Christophe Imhoos, *ICC Arbitration in Practice* (Kluwer Law International, 2005) at p 120.

¹⁰ *Bremer Handelgesellschaft mbH v Westzucker GmbH (No 2)* [1981] 2 Lloyd’s Rep 130 at 132–133, *per* Donaldson LJ (as he then was).

the most difficult part of drafting the award; hence, the legal analysis is frequently the weakest part of the award.¹¹

11 The issue as to the “adequacy of reasons” has been an abundant source of debate.¹² As Pierre Lalive has written:¹³

...a theoretical or abstract discussion of the question ‘How extensive must the reasoning be?’ in an award, if at all possible, appears bound to be fruitless or to lead to the obvious answer: ‘it depends on the particular case!’¹⁴

12 Indeed there has been an article in the journal, *Arbitration*, with that exact title.¹⁵ However, the question should be visited in a climate where there might be tensions between national courts and the arbitration world

¹¹ Michael Buhler & Thomas Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* (Sweet & Maxwell, 1st Ed, 2005) at para 25-24.

¹² Toby Landau, “Reasons for Reasons: The Tribunal’s Duty in Investor-State Arbitration” in ICCA Congress Series No 14, Dublin (2009): *50 Years of the New York Convention: ICCA International Arbitration Conference* (Albert Jan van den Berg ed) (Kluwer Law International, 2009) at p 191.

¹³ Pierre Lalive, “On the Reasoning of International Arbitral Awards” (2010) 1(1) *J Int Disp Settlement* 55. The same views were expressed by the Singapore Court of Appeal in *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 in the context of judicial reasoning (at [41]):

It is impossible (as well as unprofitable) to attempt to formulate a fixed rule of universal application. The particularity with which the judge is required to set out the reasons must depend on the circumstances of the case before him and the nature of the decision he is giving. The standard may vary in two cases involving the same type of issues. [emphasis in original omitted]

¹⁴ The same answer was given by Lord Phillips MR in *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 at 2417: “As to the adequacy of reasons, as has been said many times, this depends on the nature of the case: see for example *Flannery’s case* [2000] 1 WLR 377, 382.”

¹⁵ See Peter Gillies & Niloufer Selvadurai, “Reasoned Awards: How Extensive Must the Reasoning Be?” (2008) 74 *Arbitration* 2.

and where a growing hostility between the two might be emerging.¹⁶ It might be, as Lalive alludes to,¹⁷ an exercise in futility to positively and exhaustively set out a checklist of what makes an adequate award (in terms of reasoning) but we believe that it is useful (and indeed helpful and instructive) for us to look at what standards the courts have used in setting aside awards for deficiencies in reasoning.¹⁸ This would be an appropriate exercise in the light of recent suggestions of a return to greater judicial oversight of arbitration.¹⁹

13 A party seeking to utilise the Formalist Approach in the scenario where the arbitrator has provided some (as opposed to no) reasons will probably face a court which is unsympathetic to that line of argument. It is easier for a supervising court to say that:

- (a) no reasons were provided; and
- (b) therefore that the parties' agreement to arbitrate was not met

than for a court to analyse the reasons provided by the tribunal and say that the reasons were so insufficient that they were not what the parties agreed to. In essence, most courts would be of the view that the latter exercise would be an incursion into merits review and accordingly seek to keep their distance from the endeavour.

14 Accordingly, while it might be possible to run the Formalist Approach in a scenario where reasons were provided but they were simply insufficient, another approach might have to be deployed. We call this the "Substantive Approach" and we elaborate on it now.

¹⁶ The then Attorney-General of Singapore (and now Chief Justice of Singapore) has spoken about potential hotspots in the golden age of international arbitration and this was one of the hotspots he mentioned: see Sundaresh Menon SC, "International Arbitration: The Coming of a New Age for Asia, (and Elsewhere)" ICCA Congress 2012 at p 11.

¹⁷ See para 11 above.

¹⁸ Chan Leng Sun SC, *Singapore Law on Arbitral Awards* (Academy Publishing, 2011) at para 3.17.

¹⁹ Sundaresh Menon SC, "International Arbitration: The Coming of a New Age for Asia, (and Elsewhere)" ICCA Congress 2012 at p 20.

15 The main planks on which the Substantive Approach rests are Articles 34(2)(a)(ii) and 34(2)(a)(iii) of the Model Law, which provide:

Article 34. Application for setting aside as exclusive recourse against arbitral award

- (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
- (2) An arbitral award may be set aside by the court specified in article 6 only if:
 - (a) the party making the application furnishes proof that:
...
 - (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside ...

16 In the context of this paper, the critical question is: How is a supervisory court to know when the decision by the arbitrator is made on legal arguments not advanced by the parties or on facts not made out if the arbitrator's reasoning is scanty?

- (a) Example 1: The inability to tell if the arbitrator decided matters outside of his jurisdiction

17 Take, for instance, an allegation that a tribunal has decided to award damages to a party. The dispositive portion of the award states that Party X is to pay Party Y \$30m in damages. There is little reasoning as to how the tribunal got to the number. Arguments canvassed at the hearing by the parties were on the remoteness principle in damages and

whether the losses were direct or indirect losses. This was important to the parties as indirect losses were excluded from the tribunal's mandate.

18 In such a case, how would one argue, if indeed it were true, that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration (*per* Article 34(2)(a)(iii))?

19 If reasons were provided to an adequate extent, the flaws in the tribunal's decision might be plain to see and be subject to a setting aside under Article 34(2)(a)(iii). It cannot be that a tribunal can, in essence, escape from this consequence simply by being less diligent in setting out its reasons.

20 Accordingly, this would be one example where an award which has insufficient reasons should be set aside.

(b) Example 2: The inability to tell if the arbitrator disregarded due process

21 Two scenarios can be considered under this example, both of which might allow for setting aside under Article 34(2)(a)(ii).²⁰

²⁰ In August 2013, a judge of the Singapore High Court delivered a speech which allowed an insight into how the Singapore courts deal with the issues discussed: Justice Judith Prakash, "Challenging Arbitration Awards for Breach of the Rules of Natural Justice" delivered at the Chartered Institute of Arbitrators 2013 International Arbitration Conference (24 August 2013). The judge stated:

As a judge who hears applications to set aside awards, I have found parties frequently take a creative approach to natural justice. They are increasingly fitting all sorts of arguments which do not fall under the other grounds for setting aside under the umbrella of natural justice. Some of these complaints are legitimate; most, however, are errors of law or fact in disguise. Under Singapore law, errors of law and fact *per se* are not grounds for curial intervention. Frequently, as long as the arbitrator has relied on a point that was not explicitly made by either party; or characterised an issue in a way which neither party had

(continued on next page)

22 The first example would be where the arbitrator decides the case on a point that neither party has canvassed.²¹

23 With little reasoning, there is little material with which to ascertain whether the decision is based on materials, legal or factual, that originated only out of the recesses of the arbitrator's mind and which would ordinarily be a possible avenue to set aside an award.

24 Without adequate reasons and a simple summary decision, it is conceivable that the party deciding whether to apply for setting aside due to a breach of natural justice would be none the wiser as to whether the judge decided the case based on considerations that neither party raised.

25 The second example would be cases where the tribunal does not deal with all the issues raised by the parties.²² An award might be annulled under most national laws if a tribunal fails to consider all of the issues that have been submitted to it (*infra petita*),²³ whether this is due

thought of, or used an authority which was not referred to by either party to support his conclusion, the arbitrator is attacked for having been in breach of the rules of natural justice. I think that that cannot be right.

Arbitration is intended to be a real alternative to the court system. Masking such challenges under the guise of natural justice not only protracts the final resolution of the dispute, but it calls into question the efficacy of the final product, *viz*, the award, and accordingly undermines confidence in the arbitral system. The law should develop in a way which enables such cases to be filtered out quickly. Courts can afford to take a more robust stance so that parties who are dissatisfied with the merits of the outcome will be discouraged from going to the courts for a second bite at the cherry.

[emphasis in original omitted]

²¹ For an example in the judicial realm, see *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491.

²² See the Singapore High Court observations in *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 at [31] and [53].

²³ Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at p 2610. See also the recent decision by the Singapore High Court in *BLB v BLC* [2013] SGHC 196 at [98]–[99] where the concept of

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to omission or deliberate refusal to do so.²⁴ There will be instances where reasons are so scarce as to essentially become a failure to deal with an issue. Pathology 1 crosses to the realm of Pathology 2 (a breach of natural justice). Here is a hypothetical case:

- (a) Party X and Y enter into a supply contract. Party X buys \$200 worth of cotton from Y.
- (b) There is a breach of the contract by Party Y after delivering \$100 worth of cotton to Party X. The breach extends to several clauses.
- (c) Party X claims damages. However, Party X also acknowledges that it has been supplied \$100 worth of cotton, which can be set off from any damages awarded.
- (d) The award made by the arbitrator allows the claim in damages in full and awards \$200 to Party X. In the award, the arbitrator says he has considered all defences (which includes set-off although he does not list it specifically), but finds them inapplicable.

26 Would such an award be said to have dealt with all the issues? Technically it would, seeing that the arbitrator specifically said that he considered all the defences, which implicitly means that he considered set-off in particular. In substance, it would appear that the arbitrator might have overlooked the issue of set-off, or not focused his mind on the issue. However, he might not have actually overlooked it and might have actually considered the issue of set-off but, for one reason or another, did not think it was applicable. However, *owing to the lack of reasoning, there was no opportunity for a reader actually to tell whether he did or did not address his mind to it.*

infra petita was discussed and, importantly, applied. The High Court found that the arbitral tribunal in the arbitration failed to exercise the authority granted it by the parties, and set aside a part of the award. A detailed examination of the decision is not undertaken here as the decision was released after this article had been submitted for publication.

²⁴ Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at p 2610, citing *Fouchard Gaillard Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer Law International, 1999).

27 In the Singapore High Court's decision in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd*²⁵ (“SEF”) (which concerned an adjudicator who, it was argued, failed to consider submissions on two out of four jurisdictional issues), the court framed the issue in question in the following terms:²⁶

The question that faces me is whether ... the Adjudicator still flouted the [*audi alteram partem*] rule because he did not expressly deal with the third and fourth arguments and explain why he was rejecting them (as he obviously did since if he thought they were valid arguments he would not have made the determination that the Adjudicated Amount was due to Skoy).

28 The court gave this question “somewhat anxious consideration since affording natural justice is a fundamental requirement of the adjudication procedure”²⁷ and decided that the adjudicator's failure to discuss the submissions in his adjudication determination was not a breach of natural justice.²⁸

I am satisfied that the Adjudicator did have regard to the submissions of the parties and their responses and the other material placed before him. The fact that he did not feel it necessary to discuss his reasoning and explicitly state his conclusions in relation to the third and fourth jurisdictional issues, though unfortunate in that it gave rise to fears on the part of SEF that its points were not thought about, cannot mean that he did not have regard to those submissions at all. It may have been an accidental omission on his part to indicate expressly why he was rejecting the submissions since the Adjudicator took care to explain the reasons for his other determinations and even indicated matters on which he was not making a determination. Alternatively, he may have found the points so unconvincing that he thought it was not necessary to explicitly state his findings. Whatever

²⁵ [2010] 1 SLR 733 at [59]–[60].

²⁶ *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [57].

²⁷ *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [58].

²⁸ *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [60].

may be the reason for the Adjudicator's omission in this respect, I do not consider that SEF was not afforded natural justice. Natural justice requires that the parties should be heard; it does not require that they be given responses on all submissions made.

29 However, the court found the following passage from the judgment of Palmer J in *Brookhollow Pty Ltd v R&R Consultants Pty Ltd*²⁹ particularly useful (the court in *SEF* stated that the references to good faith could be applied to the requirements of natural justice as well³⁰):³¹

Where both claimant and respondent participate in an adjudication and issues are joined in the parties' submissions, the failure by an adjudicator to mention in the reasons for determination a critical issue (as distinct from a subsidiary or non-determinative issue) may give rise to the inference that the adjudicator has overlooked it and that he or she has therefore failed to give consideration to the parties' submissions as required by s 22(2)(c) and (d). Even so, the adjudicator's oversight might not be fatal to the validity of the determination: what must appear is that the adjudicator's oversight results from a failure overall to address in good faith the issues raised by the parties.

In some cases, it may be possible to say that the issue overlooked was of such major consequence and so much to the forefront of the parties' submissions that no adjudicator attempting to address the issues in good faith could conceivably have regarded it as requiring no specific examination in the reasons for determination. In other cases, the issue overlooked, although major, may be one of a large number of issues debated by the parties. If the adjudicator has dealt carefully in the reasons with most of those issues, it might well be a possibility that he or she has erroneously, but in good faith, omitted to deal with another major issue because he or she did not believe it to be determinative of the result. Error in identifying or addressing issues, as distinct from lack of good faith in attempting to do so, is

²⁹ [2006] NSWSC 1.

³⁰ *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [58].

³¹ *Brookhollow Pty Ltd v R&R Consultants Pty Ltd* [2006] NSWSC 1 at [57]–[58].

not a ground of invalidity of the adjudication determination. The Court must have regard to the way in which the adjudication was conducted and to the extent and content overall of the adjudicator's reasons: the Court should not be too ready to infer lack of good faith from the adjudicator's omission to deal with an issue when error alone is a possible explanation.

30 The dismissal of the setting aside application in *SEF* must be read in context; the proceedings involved were adjudication proceedings and the court stated that it was fortified in its view by cases which held that the adjudication process is a quicker but less thorough means of achieving justice, with litigation through a court emphasising thoroughness over timeliness. The statutory regime on adjudications requires that an adjudicator work quickly and this may "militate against the standards of thoroughness and detail that are to be expected where no externally imposed time pressure applies" and that it "cannot be intended that an adjudicator working to the tight statutory timetable will be as painstaking as a judge who has reserved judgment in a case involving the same claims under the same construction contract".³² In the context of arbitration proceedings, where the timelines are, relative to adjudicator proceedings, more generous, the courts might not give such a wide berth to a tribunal which delivered an award which did not, beyond setting out the four central issues, discuss two of them. Can the argument always be made that in reading the award one can infer that certain arguments were accepted and certain others rejected by virtue of the fact that one party won and the other lost? We suggest not. The Singapore Court of Appeal in *Thong Ah Fat v Public Prosecutor*³³ dealt with this issue in the context of a non-reasoned judgment and, using the example of an English case, stated as follows:³⁴

Regina v Harrow Crown Court, Ex parte Dave [1994] 1 WLR 98 (Ex parte Dave) exemplifies the importance of having reasons adequately stated. The applicant brought an appeal to the Crown

³² *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [53].

³³ [2012] 1 SLR 676.

³⁴ *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 at [25].

Court against her conviction by justices for an offence of assault. The appeal was dismissed. *The Crown Court simply stated: '[o]ver the course of three days we have had ample opportunity to hear and to assess the witnesses. It is our unanimous conclusion that this appeal must be dismissed'* (Ex parte Dave at 102H). The applicant sought judicial review to quash the decision of the Crown Court. *The application was granted by the Queen's Bench Division, which held that, in principle, enough must be said 'to demonstrate that the court has identified the main contentious issues in the case and how it has resolved each of them'* (Ex parte Dave at 107A). Although '[e]laborate reasoning was not required' (Ex parte Dave at 107B), *the statement made by the Crown Court was clearly inadequate because effectively no reason was given.* Against the holding of the Crown Court, one may argue that it was implicit in the dismissal of the applicant's appeal that there was a finding by the Crown Court that it accepted the evidence of the Prosecution's witnesses. *But this argument is clearly flawed, because if it is taken to its logical conclusion, no reason needs ever be stated, since it would be implicit in every decision that the judge has accepted the evidence adduced by the party he has ruled in favour of.* [emphasis added in italics and bold italics]

(3) *Impact on bifurcated proceedings*

31 There are also knock-on effects from a lack of reasoning that arise in the context of bifurcated proceedings. Bifurcated proceedings are commonly split into the liability and quantum phases. A partial award might be delivered after the liability phase and before the quantum phase begins. This allows, *inter alia*, for the parties to focus their arguments on quantum or consider settlement.

32 However, problems arise when the partial award on liability has a lack of reasons. Instead of gaining clarity and focus, the quantum phase might be mired in liability arguments dressed up as arguments on quantum. For instance, a tribunal might, in dealing with arguments on ten breaches, only give reasons which discuss the findings on nine breaches, thinking, but not stating, that this would dispose of the tenth breach. The parties would seek to resurrect the tenth breach at the liability phase. The

quantum hearings might then be derailed by long arguments on liability, which the partial award was supposed to have dealt with.

(4) *Conclusion on the issue of problematic reasoning*

33 The inability for a supervisory court to deal with issues set out in the examples should provide cause for concern. In order for the statement of reasons to be useful, it has to be sufficient to the extent that the supervisory court can see whether there have been problems in the award for the purposes of setting aside.

B. Prescription for Pathology 1

34 A prescription for this problem is to address *all* central issues argued by the parties.³⁵

35 Even if the case is disposed of on a single point which all other arguments are predicated on, short reasons on why other arguments failed are useful (“having decided that Party X breached clause A, and with a single breach being sufficient to terminate the contract, the question as to whether there were breaches of clauses B, C and D do not fall to be considered in determining whether the contract was terminated”).

36 The prescription issued here would be to address every single *essential* issue as set out in the parties’ pleadings to avoid prejudicing any party to the arbitration.³⁶ In *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK*,³⁷ the Singapore Court of Appeal noted that a failure by an arbitral tribunal to deal with every issue referred to it would

³⁵ See *Ascot Commodities NV v Olam International Ltd* [2002] CLC 277, *Meridian Gold Holdings II Cayman Ltd v Southwestern Gold (Bermuda) Ltd* (2013) CarswellOnt 226 at [26].

³⁶ See also the Singapore High Court decision in *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] SGHC 186 at [72]–[73]. A detailed examination of the decision is not undertaken here as the decision was released after this article had been submitted for publication.

³⁷ [2011] 4 SLR 305.

not *ordinarily* render its arbitral award liable to be set aside.³⁸ Instead, the court pointed out that the crucial question in every case was whether there had been real or actual prejudice to either (or both) of the parties to the dispute. In making the point, the Court of Appeal referred to *Redfern and Hunter*, which stated that the significance of the issues that were not dealt with had to be considered in relation to the award as a whole.³⁹ The learned authors pointed out that it was not difficult to envisage a situation in which the issues that were overlooked were of such importance that, if they had been dealt with, the whole balance of the award would have been altered and its effect would have been different. The Court of Appeal emphasised the contextual nature of the exercise.

37 We are of the view that a patent lack of reasons is a compelling reason for setting aside an award; it upsets or frustrates the process of arbitration and an award with inadequate reasons is surely not what the parties intended be rendered when they agreed to arbitrate.

38 In sum, a case can (and should) be made that, in the event that courts are not sure as to how the tribunal came to its decision because of the lack of sufficient reasoning, the award should be set aside. We are not advocating that awards be attacked for poor reasons or bad reasons; there is a clear distinction between bad or poor reasons for a decision and a lack of reasons for a decision. The expectation is not for tribunals to arrive at the correct decision, but to arrive at their decision, whether right or wrong, through *proper reasoning*, and set out their thought process.

C. Pathology 2: The lack of due process or arbitrators deciding without hearing parties' arguments

39 Having dealt with the question of setting aside due to insufficient reasons, we turn to another common refuge of dissatisfied parties in arbitration: the argument that arises from a lack of due process or a

³⁸ *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [32].

³⁹ Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at para 10.40.

breach of natural justice. Others have written about the situation in some European countries where the substantive merits of the case have been decided by the arbitrator without arguments from the parties,⁴⁰ so we will speak very briefly about two cases from Singapore and one case from Hong Kong to reiterate the warning that arbitrators should guard themselves against these charges assiduously.

40 In the Singapore Court of Appeal case of *Soh Beng Tee v Fairmount Development Pte Ltd*,⁴¹ the appellant sought to convince the court that there had *not* been a breach of the rules of natural justice necessitating a setting aside of the award. Counsel for the appellant acknowledged that the parties *had not* strenuously debated whether the disputed issue was at large during the oral-hearing phase of the arbitration.⁴² Despite this, the Court of Appeal held that the disputed issue was “eventually animated after a long period of hibernation”.⁴³ The main question in the appeal was whether Fairmount had indeed been taken by surprise as claimed; the Court of Appeal held that Fairmount had not shown why it was caught unawares.

41 The Court of Appeal elaborated on the *degree* of surprise a party had to face before it could be said that the parties were truly deprived of an opportunity to argue it:⁴⁴

As helpfully summarised in Sir Michael J Mustill & Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1989) (*‘Commercial Arbitration’*) at p 312:

⁴⁰ For a review of recent cases from Finland, Paris and Switzerland, see Gisela Knuts, “*Jura Novit Curia* and the Right to Be Heard: An Analysis of Recent Case Law” (2012) 28(4) *Arb Int'l* 669. See also Elliott Geisinger & Vivian Frossard, “Challenge and Revision of the Award” in *International Arbitration in Switzerland: A Handbook for Practitioners* (Gabrielle Kaufmann-Kohler & Blaise Stucki gen eds) (Kluwer Law International, 2004) ch 8, at p 147.

⁴¹ [2007] 3 SLR(R) 86.

⁴² *Soh Beng Tee v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [40].

⁴³ *Soh Beng Tee v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [40].

⁴⁴ *Soh Beng Tee v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [41].

If the arbitrator decides the case on a point which he has invented for himself, he creates surprise and deprives the parties of their right to address full arguments on the base which they have to answer. Similarly, if he receives evidence outside the course of the oral hearing, he breaks the rule that a party is entitled to know about and test the evidence led against him.

[emphasis added]

42 We would only add here that one can see where Pathology 1 might creep into issues concerning Pathology 2. Accepting that there is a question of *degree* of “surprise” involved in the assessment of the magnitude of the breach of natural justice, one is still left with the question, in the context of unreasoned awards, of *how one can tell whether such a magnitude was reached*. If an arbitration award simply dealt with the disposition of the case in summary terms, it would be difficult to see whether the arbitrator took irrelevant considerations into account and (more importantly for the present discussion) to what extent such considerations affected the final decision. Returning to Pathology 2, how is one supposed to decide what the scope of the submission to arbitration for the purposes of the decision is? The Singapore Court of Appeal case of *PT Prima International Development v Kempinski Hotels SA*⁴⁵ (“*Kempinski*”)⁴⁶ provides some instruction.

43 First, the court made the distinction between the scope of the arbitration agreement and the scope of the submission to arbitration. The scope of submission to arbitration is a subset of the scope of the arbitration agreement and particular matters submitted for arbitration may not be all the matters covered by the arbitration agreement.⁴⁷

44 Second, the court stated that the role of pleadings in arbitral proceedings was to provide a convenient way for the parties to define the jurisdiction of the arbitrator by setting out the precise nature and scope of the disputes in respect of which they sought the arbitrator’s

⁴⁵ [2012] 4 SLR 98.

⁴⁶ The first author was counsel for the successful party in this case.

⁴⁷ *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [32].

adjudication. The court referred to Article 23 of the Model Law,⁴⁸ which it said provided for the compulsory filing of pleadings.

45 Third, arbitrators should pay close attention to the exact wording in the pleadings. In *Kempinski*, the court found that the scope of the parties' submission to arbitration was delineated by the notice of arbitration filed by Kempinski Hotels SA ("Kempinski"). In the case, certain remedies were pleaded and the court held that, under those pleadings, "any new fact or change in the law arising in the course of the Arbitration which would affect Kempinski's right to these remedies had to fall within the scope of the parties' submission to arbitration".⁴⁹

46 Put another way, the tribunal should, as a starting point, look to the pleadings to define the issues in the arbitration. The ICC Rules provide for terms of reference ("Terms of Reference") to be circulated and a list of issues ("List of Issues") drawn up within these terms.⁵⁰ Arbitrators should, when writing the award, look to address all issues set out in the List of Issues. If, during the life of the arbitration, the List of Issues is modified (as is frequently done just before the hearing in the form of a "Final List of Issues"), the tribunal should be careful to ensure that it decides the issues as set out in the list with the assistance of the parties' arguments. While this might sound overly defensive, we submit that it should be viewed in another light; parties agree to appoint the arbitrators to deal with the issues that they want to have resolved. As an Australian court put it, the prudent arbitrator will prefer to err on the side of comprehensiveness in order that the award should be of benefit to the parties.⁵¹

⁴⁸ Article 23 of the Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) addresses issues relating to the Statement of Claim and Defence.

⁴⁹ *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [48].

⁵⁰ The first author has previously discussed the utility of the list of issues: see Michael Hwang SC, "Trial by Issues" (2010) 7(1) TDM.

⁵¹ *Peter Schwartz (Overseas) Pty Ltd v Morton* [2003] VSC 144.

(1) *Different conclusions on the same facts: the case of Pacific China Holdings Ltd (in liquidation) v Grand Pacific Holdings Ltd*

47 Having discussed the two Singapore cases for the general proposition that arbitrators should decide the case on the arguments before them, we turn to discuss the Hong Kong case of *Pacific China Holdings Ltd v Grand Pacific Holdings Ltd* (“*Pacific China Holdings*”), a case which involved proceedings at the Court of First Instance,⁵² the Court of Appeal,⁵³ and the Court of Final Appeal (“CFA”) (where the CFA dismissed the application for leave to appeal).⁵⁴ The facts as stated in the CFA’s decision are as follows.⁵⁵

48 The respondent (“GPH”) commenced an arbitration in Hong Kong against the applicant (“PCH”) to recover a debt of US\$40m plus interest under a loan agreement. The arbitral tribunal made its final award in favour of GPH on 24 August 2009, ordering PCH to pay US\$55,176,170.48 with interest at 5% pa from 1 June 2009.

49 On 8 March 2010, PCH applied to the Court of First Instance to set aside that award. The application succeeded before Saunders J but the Court of Appeal allowed GPH’s appeal and restored the award. PCH sought leave to appeal from the Court of Appeal’s judgment and the CFA dismissed the application for leave to appeal.⁵⁶

⁵² *Pacific China Holdings Ltd v Grand Pacific Holdings Ltd* [2011] HKCFI 424.

⁵³ [2012] HKCA 200.

⁵⁴ *Pacific China Holdings Ltd v Grand Pacific Holdings Ltd* [2013] HKCFA 13.

⁵⁵ *Pacific China Holdings Ltd v Grand Pacific Holdings Ltd* [2013] HKCFA 13 at [2]–[3].

⁵⁶ *Pacific China Holdings Ltd v Grand Pacific Holdings Ltd* [2013] HKCFA at [5]:

In our view, the Court of Appeal was entirely correct to hold that the complaints advanced by PCH do not constitute viable grounds for setting aside the award under the aforesaid provisions. The rulings complained of were made by the tribunal in the proper exercise of its procedural and case management discretions, reflecting its assessment of the requirements of procedural fairness as appropriate to the circumstances. There is no basis for interference by the Court.

50 PCH argued that it was unable to present its case and the arbitral procedure was not in accordance with the agreement of the parties. We only discuss the argument relating to PCH's inability to present its case and focus on one of the issues in illustrating how supervisory courts can come to different conclusions on the law relating to setting aside. PCH had referred to Hong Kong law in its post-hearing submissions.⁵⁷ GPH objected to this reference to Hong Kong law and any evidence seeking to prove Hong Kong law in its post-hearing submissions.⁵⁸ Notwithstanding the objection, it made objections as to Hong Kong law.⁵⁹ The tribunal wrote to the parties, stating that the expectation was that post-hearing written submissions would refer to the cases already pleaded and presented, and that the tribunal considered that, at this late stage of the arbitration, it may be inappropriate and unfair to admit any new submissions or evidence based on Hong Kong law; it may also cause unnecessary delay to do so. The tribunal indicated that its provisional view was that there may be a problem in receiving the Hong Kong law submissions. However, the tribunal also stated that, before taking any final decision on the matter, it wanted an explanation from PCH, within seven days, as to its actions in this respect and also what it would say, if anything, in answer to GPH's protests on this matter as set out in its post-hearing reply submissions. In the meantime GPH was asked to advise whether, if the PCH's challenged Hong Kong law submissions were received, GPH would wish:

- (a) to make any further submissions; or
- (b) to adduce any further evidence, expert or otherwise, on the Hong Kong law matter.

51 PCH accepted that the Hong Kong law submissions on the issue of authority had not been raised previously, but claimed that because GPH

⁵⁷ *Pacific China Holdings Ltd v Grand Pacific Holdings Ltd* [2011] HKCFI 424 at [42].

⁵⁸ *Pacific China Holdings Ltd v Grand Pacific Holdings Ltd* [2011] HKCFI 424 at [42].

⁵⁹ *Pacific China Holdings Ltd v Grand Pacific Holdings Ltd* [2011] HKCFI 424 at [42].

had failed to meet its challenge on a point on authority, it was incumbent on PCH to make submissions of Hong Kong law on the issue in order to make the point good.

52 GPH was given time to reply to PCH's submission on the Hong Kong law issue, which GPH duly supplied. Two new cases were cited by GPH in this set of submissions.

53 PCH subsequently made further comments on the Hong Kong law issue, in the light of GPH's reply (although there were no provisions for such a reply).

54 The tribunal then informed the parties that it considered that it now had sufficient materials and arguments to decide on the Hong Kong law issue.

55 Subsequently, PCH sought leave to make further submissions on the Hong Kong law issue. The tribunal refused PCH's application.

56 These facts provide sufficient background to illustrate the division between the Court of First Instance and the Court of Appeal. The Court of First Instance held:⁶⁰

136 Instead of allowing PCH the opportunity to respond, the Tribunal informed the parties that it had sufficient material to decide the Hong Kong law issue. This it proceeded to do. In so doing it relied upon the new authorities that had been referred to by GPH, and referred to other New York authorities, to which neither party had been referred, and about which neither had made submissions.

137 The Tribunal was right when it said that no provision was made in the directions of 13 October 2008, for PCH to respond. *But by not giving PCH the right to respond to the new material from GPH in its 24 October 2008 response, PCH was effectively denied the opportunity to present its case. Once the Tribunal had invited GPH to respond to PCH's Hong Kong law submissions the Tribunal was bound to give PCH the opportunity to reply on those matters of law.* PCH were entitled, in my view, to take the position that Hong Kong law need not be proved in the light of the fact that Hong Kong

⁶⁰ *Pacific China Holdings Ltd v Grand Pacific Holdings Ltd* [2011] HKCFI 424 at [136]–[137] and [140]–[141].

was the seat of the arbitration. *They were unable to present argument in response to the opposite position taken by GPH in its substantive submissions of 24 October 2008.*

...

140 In the whole of the circumstances, I am satisfied that the failure of the Tribunal to give PCH the opportunity to respond to GPH's submissions on Hong Kong law rendered PCH unable to present its case. A violation of Article 34(2)(a)(ii) is established by PCH.

141 I am unable to say that, had PCH been given the opportunity to respond to the new material raised by GPH, the result could not have been different. Having so found, PCH are entitled to the exercise of discretion in favour of setting aside the award.

[emphasis added]

57 In addition, the Court of First Instance also stated:⁶¹

In its award, when dealing with the Hong Kong law issue, the Tribunal cited other New York authorities, to which neither party had been referred, and about which neither party had made any submissions. *I have always understood that the practice was that, when a judge, in the course of preparing his judgment, came upon authorities not cited by the parties which the judge considered that might be relevant, he should refer them to the parties and seek either written or oral submissions on those authorities. That said, I can find no direct authority to support the proposition. That may be because it is self evident.* [emphasis added]

⁶¹ *Pacific China Holdings Ltd v Grand Pacific Holdings Ltd* [2011] HKCFI 424 at [142], although it later found that:

[w]hile the more prudent course might have been for the arbitrators to refer the new New York authorities to the parties for a brief round of written submissions on the point, having regard to the background of the arbitrators, I am satisfied that they were perfectly capable of dealing with the New York law issue, without further submissions.

Pacific China Holdings Ltd v Grand Pacific Holdings Ltd [2011] HKCFI 424 at [144].

58 Contrast the Court of First Instance's approach to that of the Court of Appeal, which held:⁶²

With respect, I cannot agree with the learned judge that the Tribunal was not entitled to refuse leave to PCH to reply to GPH's submission of 24 October 2008. Essentially, PCH's complaint was that they had been denied the right to the last word on the Hong Kong law issue. *The Tribunal took the view, as they were entitled to, that the Hong Kong law issue was raised at a late stage of the proceedings and that PCH had had two opportunities to make submissions on the Hong Kong law issue and that submissions should end with GPH's submission of 24 October 2008. Given the circumstances under which the Hong Kong law issue was raised the Tribunal could not be faulted for not allowing PCH another opportunity to deal with the issue. Moreover, I cannot agree with the learned judge that the result might have been different if PCH had been given leave to respond.* [emphasis added]

59 This case serves to illustrate that the different courts can take vastly different interpretations of the facts before them; awards might be sought to be enforced or set aside in jurisdictions where the courts are less supportive of the arbitral process and where, given the facts in *Pacific China Holdings*, the court would set the award aside. It is incumbent for tribunals to render an enforceable award and every measure taken to ensure that an award is enforceable and not liable to be set aside is a measure that should be exhausted by the tribunal.

60 We also want to address a more insidious situation where arbitrators decide the merits of the case in accordance with due process and get everything correct, only to fail at the last hurdle to deliver a "safe" award by not dealing correctly with issues of interest and costs. The issues of costs and interest in particular have given rise to setting aside applications in the courts and it is to these issues that we now turn.

⁶² *Pacific China Holdings Ltd v Grand Pacific Holdings Ltd* [2012] HKCA 200 at [77].

(2) *Costs issues*

61 With regard to costs, the relevant article under the ICC Rules 2012 is Article 37.

62 First, it should be clear that the only costs that are fixed by the tribunal are the fees and expenses of tribunal-appointed experts and the legal costs incurred by the parties. The fees and expenses of the tribunal and the administrative costs of the ICC are determined by the court.

63 While the issue of costs is discretionary, the tribunal must still provide reasons for the exercise of this discretion.⁶³ It has been pointed out that, in practice, arbitrators in international cases usually award costs of legal representation without discussing questions of applicable law or detailed substantive analysis. This has led to criticism that awards of costs in international commercial arbitration are often arbitrary and inconsistent. It is also pointed out that the reasons given should be relevant to the level of the costs and the tribunal's overall decision on the merits. In the exercise of discretion, tribunals have often awarded costs to the prevailing party.

64 Tribunals should allow the parties an opportunity to submit on issues of costs. Even if neither party has formally made a claim for costs during the arbitration (perhaps, as has been suggested, due to the different approaches to the matter of costs in different jurisdictions⁶⁴), the tribunal should invite both to do so given the need for the tribunal to deal with the issue in the award.

(a) *US: Compagnie des Bauxites de Guinee v Hammermills, Inc*

65 An interesting case in this regard was a case heard in the District Court of the District of Columbia: *Compagnie des Bauxites de Guinee v*

⁶³ Michael Buhler & Thomas Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* (Sweet & Maxwell, 1st Ed, 2005) at para 25-29.

⁶⁴ Yves Derains & Eric Schwartz, *A Guide to the ICC Rules of Arbitration* (Kluwer Law International, 2nd Ed, 2005) at p 370.

*Hammermills, Inc.*⁶⁵ The petitioner sought to vacate the award in so far as it related to legal costs.

66 The arbitrator had added to the award an assessment against the petitioner of the other party's "normal legal costs" amounting to US\$993,220.60 *after* the ICC Court had approved the draft award. In addition, the award had been approved a few days before (one day after the arbitrator had received *both* parties' calculations on legal costs) and was final.

67 In its application for vacation of the award, the petitioner asserted that the award of legal fees against it could not stand for two principal reasons.

68 First, the petitioner claimed that it was denied due process because it was deprived of adequate notice of the arbitrator's intention to assess legal fees against it and had no opportunity to be heard on the issue.

69 Second, it claimed that the arbitrator's addition of the fee assessment subsequent to the ICC Court's approval of the award violated ICC procedures.

70 Neither argument cut any ice with the court.

THE ALLEGED DENIAL OF DUE PROCESS

71 To the argument on due process, the court was convinced that the petitioner was afforded sufficient notice that the assessment of legal fees was an issue in the arbitration to comport with due process. The court stated as follows:

- (a) The ICC Rules⁶⁶ themselves expressly placed the petitioner on notice that the assessment of legal costs would necessarily be incidental to the final disposition of the proceeding. The court referred to what we now know as Articles 37(1) and 37(4) of the 2012 ICC Rules.

⁶⁵ 1992 WL 122712 (DCC, 29 May 1992).

⁶⁶ International Chamber of Commerce Rules of Arbitration 1988 (entry into force 1 January 1988).

- (b) The Terms of Reference stated that one issue in the arbitration was the costs of the arbitration.
- (c) At the conclusion of its post hearing brief (which was filed and served on the petitioner one year before the award was issued) the other party had urged the arbitrator to enter an award in favour of it which included its legal fees.
- (d) The court found that the petitioner was put on notice that the assessment of legal costs was an issue when it received the arbitrator's request for parties to submit their legal costs.

72 The court found that the petitioner did not once raise an argument that the other party was not entitled to its legal costs, despite having been put on notice that the arbitrator was empowered to assess legal costs in the final award, and having been put on notice that the other party had sought legal costs. Under these circumstances, the court was not convinced that the award should be vacated.

THE ALLEGED VIOLATION OF ICC PROCEDURE

73 In the second of its contentions, the petitioner argued that the arbitrator violated ICC procedure by inserting into the award the amount of legal costs to be assessed against it *after* the draft award had been approved by the ICC Court.

74 The argument for the breach of the ICC procedure went along these lines. Article 33 (then Article 21) of the ICC Rules, read with Article 37(4) (then Article 20(1)) meant that the draft award submitted to the court for approval had to include the assessment on costs. The petitioner argued that this procedural violation gave rise to a defence to the award under section 1(d) of Article V of the New York Convention. The petitioner reasoned that the arbitration clause in its contract provided for arbitration "according to the Rules of Conciliation and Arbitration of the [ICC]"⁶⁷; therefore, any procedural violation of ICC Rules necessarily violated "the agreement of the parties" under the Convention.

75 The court did not look favourably on this argument. First, the court stated that it did not believe that section 1(d) of Article V of the New

⁶⁷ 1992 WL 122712 (DCC, 29 May 1992) at 5.

York Convention was intended to permit reviewing courts to police every procedural ruling made by the arbitrator and to set aside the award if any violation of ICC procedures was found, as such an interpretation would directly conflict with the “pro-enforcement” bias of the Convention and its intention to remove obstacles to confirmation of arbitral awards. The court stated that a more appropriate standard of review would be to set aside an award based on a procedural violation only if such violation worked substantial prejudice to the complaining party. The court then went on to state that section 1(d) was not applicable in the case because the petitioner had not shown that a violation of ICC procedure had occurred.

76 The District Court held that the petitioner did not meet the burden of showing that the procedures used by the arbitrator to assess costs in this case were in contravention of ICC Rules.

77 Another question that might arise relating to costs might be whether a tribunal that has declined jurisdiction has the ability to award costs. This is controversial but tribunals have been ready to do so.⁶⁸ Parties can be made to agree to confer such authority on the tribunal in the Terms of Reference to the arbitration.⁶⁹ Having discussed how inadequacies in dealing with the issue of costs might cause problems for awards, we now turn to the issue of interest and how this might also create issues for arbitrators to deal with in awards.

(3) *Interest issues*

78 The importance of issues relating to interest cannot be understated. The increased focus on issues of interest might be because “awards of interest may in some cases exceed the principal owed because of extensive delays between the occurrence of the underlying injury and the resulting

⁶⁸ Yves Derains & Eric Schwartz, *A Guide to the ICC Rules of Arbitration* (Kluwer Law International, 2nd Ed, 2005) at p 369.

⁶⁹ Yves Derains & Eric Schwartz, *A Guide to the ICC Rules of Arbitration* (Kluwer Law International, 2nd Ed, 2005) at p 369.

award”⁷⁰ and in these cases, the question of interest can be as important as the valuation of the loss itself.⁷¹

79 With respect to the award, it must provide reasons for the period of interest and the rate. The tribunal cannot award interest for a period prior to that requested by a party. The utility of this principle will become clear as we now discuss the recently decided Singapore Court of Appeal case of *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd*.⁷²

(a) *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd*

80 In this case, the Court of Appeal set aside the additional award (regarding interest) that the arbitrator made because it was made in breach of the rules of natural justice.

81 The Court of Appeal went on to hold that the additional award was made without affording the plaintiff the opportunity to be heard on two points.

82 The first was whether the arbitrator had jurisdiction to render an additional award (which the court termed “the Jurisdictional Question”). The second was whether the arbitrator had given the plaintiff the opportunity to be heard on the substantive question of interest (which the court termed the “Substantive Question”); he did not hear parties on the rate of interest to be levied, the date from which interest would accrue and what was the amount on which the interest was to be levied. The Court of Appeal noted that it was important to distinguish the two different questions on which the applicant for the additional award could have expected to be afforded a reasonable opportunity to be heard. First,

⁷⁰ Thierry Senechal, “Present-day Valuation in International Arbitration: A Conceptual Framework for Awarding Interest” in *Interest, Auxiliary and Alternative Remedies in International Arbitration* (Filip De Ly & Laurent Levy gen eds) (International Chamber of Commerce, 2008).

⁷¹ Thierry J Senechal, “Present-day Valuation in International Arbitration: A Conceptual Framework for Awarding Interest” in *Interest, Auxiliary and Alternative Remedies in International Arbitration* (Filip De Ly & Laurent Levy gen eds) (International Chamber of Commerce, 2008).

⁷² [2013] 1 SLR 125.

whether pre-award interest in this case was a presented claim that had been omitted from the supplementary award. Second, if the claim for pre-award interest was present and omitted, whether pre-award interest should be awarded and, if so, to what extent.

83 The Court of Appeal found that the requisite real or actual prejudice was suffered in both breaches and affirmed the decision of the judge in setting aside the additional award. Importantly, the Court of Appeal affirmed the judge's holding that natural justice should apply to the entire arbitration proceedings and, in so doing, grounded it on section 22 of the Singapore Arbitration Act.⁷³ This is worded in a similar to Article 18 of the Model Law.

84 Arbitrators should be careful to hear all parties out before coming to a decision. If one party makes a submission, adequate allowance should be granted to the other party or parties to respond. This case stands for a fundamental proposition which appears trite, but which arbitrators tend to overlook. Violation of that rule will often (although not always) result in the successful setting aside of applications like the one described above. To illustrate that challenges like these do not occur infrequently, we turn to a recent case in the English courts which concerned a similar point.

(b) *Cadogan Maritime Inc v Turner Shipping Inc*

85 Just this year (2013), the English Commercial Court delivered a judgment on 25 January which also involved an arbitrator (or more precisely an umpire) who issued an additional award that sought to deal with a category of interest ("accrued interest"). The additional award was made pursuant to an application to the umpire under section 57 of the English Arbitration Act 1996.⁷⁴ The umpire said that he had failed to deal

⁷³ Cap 10, 2002 Rev Ed.

⁷⁴ Arbitration Act 1996 (c 23) (UK) s 57:

57 Correction of award or additional award.

- (1) The parties are free to agree on the powers of the tribunal to correct an award or make an additional award.
- (2) If or to the extent there is no such agreement, the following provisions apply.

(continued on next page)

with the accrued interest in his first award (“the First Award”) and so considered it a case where he should make an additional award.

86 An application was made that:

- (a) he acted in excess of his powers and this amounted to a serious irregularity, contrary to section 68 of the English Arbitration Act 1996;⁷⁵ and

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- (3) The tribunal may on its own initiative or on the application of a party—
 - (a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or
 - (b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award. These powers shall not be exercised without first affording the other parties a reasonable opportunity to make representations to the tribunal.
 - (4) Any application for the exercise of those powers must be made within 28 days of the date of the award or such longer period as the parties may agree.
 - (5) Any correction of an award shall be made within 28 days of the date the application was received by the tribunal or, where the correction is made by the tribunal on its own initiative, within 28 days of the date of the award or, in either case, such longer period as the parties may agree.
 - (6) Any additional award shall be made within 56 days of the date of the original award or such longer period as the parties may agree.
 - (7) Any correction of an award shall form part of the award.

⁷⁵ **68 Challenging the award: serious irregularity.**

- (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).
- (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—

(continued on next page)

- (b) that he misinterpreted those powers, causing him to commit an error of law.

87 The applicant mounted two arguments in support of these contentions. First, the other party had not made a claim in the

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- (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
 - (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
 - (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
 - (d) failure by the tribunal to deal with all the issues that were put to it;
 - (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
 - (f) uncertainty or ambiguity as to the effect of the award;
 - (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
 - (h) failure to comply with the requirements as to the form of the award; or
 - (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.
- (3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—
- (a) remit the award to the tribunal, in whole or in part, for reconsideration,
 - (b) set the award aside in whole or in part, or
 - (c) declare the award to be of no effect, in whole or in part. The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.
- (4) The leave of the court is required for any appeal from a decision of the court under this section.

arbitration for accrued interest.⁷⁶ Second, even if such a claim had been made for accrued interest, the claim was dealt with in the First Award.⁷⁷ Accordingly, the umpire had no power to make the additional award under section 57(3)(b) of the English Arbitration Act 1996.

88 Justice Hamblen found that the claim for accrued interest was not “dealt with” in the First Award and that the tribunal was correct to so conclude; accordingly, the tribunal did have power to make the additional award under section 57(3)(b).⁷⁸

89 In so finding, the learned judge made several important points relating to pleadings as well as the way the court would deal with applications relating to excess of powers.

90 The judge addressed the argument that the claim for accrued interest was not presented to the tribunal. In relation to the issue of how claims were presented to the tribunal, the learned judge said that:

- (a) no particular formality was required; and
- (b) if the claim was before the tribunal and would reasonably be expected to be determined, it did not matter how the claim had been placed before the tribunal.

91 It did not, for example, have to be a claim set out in written pleadings or submissions.⁷⁹ The judge pointed out that arbitration was a less formal process and concentrated on substance rather than form, and that an unduly narrow and technical construction of the claims was being made by the applicant. The judge also found “that the claim for

⁷⁶ *Cadogan Maritime Inc v Turner Shipping Inc* [2013] EWHC 138 (Comm) at [20].

⁷⁷ *Cadogan Maritime Inc v Turner Shipping Inc* [2013] EWHC 138 (Comm) at [21].

⁷⁸ *Cadogan Maritime Inc v Turner Shipping Inc* [2013] EWHC 138 (Comm) at [49]–[50].

⁷⁹ *Cadogan Maritime Inc v Turner Shipping Inc* [2013] EWHC 138 (Comm) at [22]. See also the discussion relating to *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at para 43 above.

Accrued Interest was one which was 'presented to the tribunal' within section 57(3)(b) and that the Tribunal was correct so to conclude".⁸⁰

92 Next the judge dealt with the question of whether the claim was dealt with in the First Award and found that the claim was indeed overlooked, and accordingly found that the tribunal had the power to make the additional award and had not exceeded its powers.

93 In this case, the additional award was not set aside. However, what we should take away from this case is how the judge went through the particulars of claim and the submissions in the arbitration⁸¹ and stated in the following terms:

In the present case, Turner's claims included a claim for 'all sums' in the Escrow Account. That is literally sufficient to embrace a claim for the Accrued Interest. Further, Turner had always had a claim for a declaration and further and other relief in respect of the consequences of the wrongful demand on the Refund Guarantee, which demand covered both the principal sum and the Accrued Interest. Yet further, if Turner was entitled to the US\$7.7 million then, as Cadogan would have well understood and did not challenge, it was necessarily entitled to the Accrued Interest. There can have been no sensible reason for Turner not pursuing that claim, or, to put it another way, excluding it from its claim for 'all sums' in the Escrow Account. *Both a literal and a purposive construction leads to the same conclusion: the claim for Accrued Interest was included, as the Tribunal concluded.* [emphasis added]

94 It is also useful as a reference to how courts might objectively ascertain that a claim was omitted in the initial award, thereby justifying the tribunal's rendering of an additional award.⁸² The court will not just take at face value a statement in the additional award that a head of claim had been omitted in the first award. In this case, the judge looked at the

⁸⁰ *Cadogan Maritime Inc v Turner Shipping Inc* [2013] EWHC 138 (Comm) at [42].

⁸¹ *Cadogan Maritime Inc v Turner Shipping Inc* [2013] EWHC 138 (Comm) at [22]–[42].

⁸² *Cadogan Maritime Inc v Turner Shipping Inc* [2013] EWHC 138 (Comm) at [43]–[49].

reasons the tribunal gave and compared them to the dispositive part of the award to come to the conclusion that the claim had indeed been omitted from the First Award; hence, the additional award was justified and unimpeachable.

D. Prescription for Pathology 2

95 The odds of overlooking interest and costs issues, especially since these issues present themselves at the tail end of an arbitration proceeding, are significant and result in dire consequences if they are not identified. The prescription for Pathology 2 is to simply keep these two issues in mind as an award is drafted. A constant reminder to deal with these two issues should keep the award on the straight and narrow.

IV. Conclusion

96 There are many pitfalls that an arbitrator can fall into in rendering an award. Some traps might appear to be more obvious (*ie*, not granting parties a right to be heard) than others (*ie*, not dealing with issues of costs or interest; or providing insufficient reasons and thereby flouting the parties' agreed procedure). However, as the cases show, arbitrators can easily succumb to those pitfalls all the same.

Background to Essay 8

This is possibly the only paper I have written which required the assistance of two co-authors. When I was invited to speak at the annual Fordham University Arbitration Conference in New York in 2007 on this topic, I knew that the research involved would be more extensive than usual because I had to write a global survey and my paper was destined for publication as all papers presented at the annual Fordham Conference would eventually be collated and published in a single volume as *The Fordham Papers* for that year. Fong Lee Cheng (also known as Jennifer) and Katie Chung did a great job in researching the materials for this challenging paper. Over the years, this paper has proved a valuable asset in my toolkit as many people have asked me for copies (which I am always happy to supply), and I recently re-presented this paper in an International Chamber of Commerce Masterclass for Arbitrators at Hong Kong.

I wish to extend my thanks to Martinus Nijhoff for kindly granting me permission to republish this paper in this book.

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CLAIMS AGAINST ARBITRATORS FOR BREACH OF ETHICAL DUTIES

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Contents

I.	Introduction.....	341
II.	Immunity of arbitrators: Common law judge immunity analogy	342
III.	Civil law contractual analysis.....	347
IV.	Examples of statutes granting immunity or imposing liability.....	347

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V.	Examples of arbitral rules granting immunity or imposing liability	349
VI.	Institutional powers of supervision	351
VII.	Claims against arbitral institutions	352
VIII.	Claims against arbitrators for breach of ethical duties.....	355
	A. Claims for delay by arbitrators.....	355
	B. Claims for failure to disclose conflicts of interest	359
	C. Claims for being corrupt	363
	D. Claims for negligence.....	365
IX.	Should arbitrators appear as defendants in an action?	367
X.	Should arbitral institutions intervene when its arbitrators are sued?	370
XI.	Conclusion.....	371

I. Introduction

1 Arbitral immunity is a well-established principle in international arbitration. Excluding arbitrators from certain liabilities aims to prevent frivolous lawsuits brought by parties who are dissatisfied with the merits of the arbitral award and uphold the administration of justice. The immunity of arbitrators limits the opportunity for aggrieved parties to hold the arbitrators personally liable and claim damages against them. However, arbitral immunity is not absolute. Arbitrators have a duty to act fairly and impartially in arbitration proceedings.¹ Arbitral institutions and State courts recognise that arbitrators owe ethical duties to the parties. National arbitration laws and institutional rules contain provisions that either extend immunity to arbitrators or set out the liabilities of arbitrators.² The ethical duties of arbitrators generally include (a) a duty

¹ See the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) (“Model Law”). Article 18 of the Model Law provides that: “The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.”

² American Arbitration Association/American Bar Association *Code of Ethics for Arbitrators in Commercial Disputes* (1 March 2004). See also the codes of ethics prescribed by the Chartered Institute of Arbitrators (October 2009); Singapore International Arbitration Centre (“SIAC”), <<http://www.siac.org.sg>> (accessed 10 May 2013); Chamber of National

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to act fairly and uphold the integrity of the arbitration process; (b) a duty to act impartially and disclose any conflicts of interest;³ (c) a duty to act independently and avoid impropriety or the appearance of impropriety in communicating with parties; and (d) a duty to conduct the proceedings diligently. The arbitration rules or legislation of certain jurisdictions may have more specific duties, like conducting the proceedings or rendering an award expeditiously⁴ and not withdrawing from the arbitration except in stipulated circumstances.⁵

II. Immunity of arbitrators: Common law judge immunity analogy

2 The common law jurisdictions adopt a functional analysis of the role of arbitrators. Under this view, arbitrators exercise judicial or quasi-judicial functions that render them comparable to judges. The

and International Arbitration of Milan <http://www.camera-arbitrale.it/risolvi.php?sez_id=104&lng_id=14> (accessed 10 May 2013); the International Bar Association Guidelines for Conflicts of Interest (approved 2 May 2004); the Cairo Regional Centre for International Commercial Arbitration <http://www.crcica.org.eg/code_ethics.html> (accessed 10 May 2013).

³ Article 12(1) of the UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) provides that:

When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

⁴ Austrian Civil Procedure Code (1983) §594(4).

⁵ Under s 25 of the English Arbitration Act 1996 (c 23), the parties are free to agree with the arbitrator as to the consequences of resignation with regards to his entitlement to fees or expenses, and any liability thereby incurred by the arbitrator. If there is no such agreement, the arbitrator may apply to the court to grant him relief from any liability thereby incurred. The arbitrator will not be held liable if he had reasonable cause for his resignation.

English courts have consistently recognised that arbitrators are in a quasi-judicial position and enjoy immunity from negligence and mistakes in law or fact.⁶ The immunity of arbitrators in the exercise of their judicial functions is an exception to the general principle that a person with professional expertise may be liable in damages for negligence if he fails to exercise due care and skill. Such immunity is also “vital to the efficient and speedy administration of justice and therefore necessary on grounds of public policy”.⁷

3 The Irish courts have also recognised the quasi-judicial role of arbitrators. In *Patrick Redahan v Minister for Education and Science*,⁸ the High Court of Ireland held that the defendant arbitrator was acting in a quasi-judicial capacity sufficient to attract immunity from suit at common law, save for any acts in bad faith, which was conceded not to have been the case. The court drew support for its decision from other common law jurisdictions (*eg*, England, Australia and the US) and stated that an arbitrator performs duties of a judicial character and, as a result, enjoys quasi-judicial status. The Irish Supreme Court has also recognised that arbitrators and judges enjoy the same immunity on the basis that they both perform an adjudicative function.⁹

⁶ *Lendon v Keen* [1916] 1 KB 994 at 999 *per* Sankey J; *Arenson v Casson Beckman Rutley & Co* [1977] AC 405.

⁷ *Lendon v Keen* [1916] 1 KB 994 at 999, *per* Sankey J; *Arenson v Casson Beckman Rutley & Co* [1977] AC 405.

⁸ [2005] IEHC 271. As of February 2013, this decision remains good law and it has not been overturned.

⁹ In *Beatty v The Rent Tribunal* [2005] IESC 66, a statutory rent tribunal had determined the rent of a “controlled dwelling”, which was even less than the valuation of the tenant. After the landlords successfully quashed the tribunal’s decision, the landlords sued tribunal for damages for loss caused by an invalid decision of the tribunal. The Irish High Court allowed the claim and awarded damages. The Irish Supreme Court allowed the tribunal’s appeal on the basis that the immunity of a statutory tribunal arises at common law. The Supreme Court also applied and approved *Arenson v Casson Beckman Rutley & Co* [1977] AC 405. As of February 2013, this decision remains good law and it has not been overturned.

4 In Australia, section 39(1) of the Commercial Arbitration Acts¹⁰ and section 28(1) of the International Arbitration Act (Cth) 1974¹¹, which are modelled after section 29(1) of the English Arbitration Act 1996,¹² exclude liability for acts or omissions done in good faith. This exclusion is broader than the immunity previously given under section 51 of the Commercial Arbitration Act 1984¹³ (NSW and Victorian versions), the latter being extended only to negligence. However, there have been some strong statements from the Australian courts supporting the liability of arbitrators. In *Najjar v Haines*,¹⁴ Kirby P listed four reasons why arbitrators should not ordinarily be immune at common law: (a) such immunity would be exceptional (compared to the standards to which other professionals are held); (b) parties help select the arbitrator; hence, his position is distinguishable from a judicial one; (c) the ordinary rule in society is that a person wronged should have redress; and (d) arbitrators have a financial and vested interest in conducting cases and thus should not be immune.

5 In *Sinclair v Bayly*,¹⁵ the court held that arbitral immunity applies where an arbitrator takes into account material not in evidence, and renders the award invalid. The arbitrator is also immune from liability to pay costs. However, the court opined that upholding the liability of arbitrators would provide parties redress and ensure a proper system of

¹⁰ Commercial Arbitration Act 2010 (NSW) (Act 61 of 2010); Commercial Arbitration Act 2011 (SA); Commercial Arbitration Act 2011 (Vic) (No 50 of 2011), Commercial Arbitration (National Uniform Legislation) Act 2011 (NT) (No 23 of 2011); Commercial Arbitration Act 2011 (Tas) (No 13 of 2011); Commercial Arbitration Act 2012 (WA) (No 23 of 2012).

¹¹ Act No 136 of 1974.

¹² Section 29(1) of the English Arbitration Act 1996 (c 23) reads:

An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.

¹³ Commercial Arbitration Act 1984 (Vic) (No 10167 of 1984); Commercial Arbitration Act 1984 (NSW) (Act 160 of 1984).

¹⁴ *Najjar v Haines* (1991) 25 NSWLR 224.

¹⁵ *Sinclair v Bayly* (19 October 1994) (SC, Vic) (unreported).

loss distribution. It also observed that, where the lapse is so gross that a lack of good faith can be inferred and where the lapse is not negligent but results in an award being aborted, an arbitrator may become personally liable for costs (given that the statute only excludes liability for negligence), as bad faith was not necessarily negligence.

6 Arbitrators and arbitral institutions in the US enjoy the broadest degree of immunity from suit for actions taken within their duties.¹⁶ Judgments made by arbitrators are “functionally comparable to those of a judge”,¹⁷ and arbitrators are granted the same immunity as courts because of the nature of their decision-making power, even though they do not hold a federal office.¹⁸ The immunity of arbitration institutions in the US is parasitic on the immunity of arbitrators; without the latter, an arbitral institution can be held liable in place of the arbitrator.¹⁹ All

¹⁶ Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at para 5-52.

¹⁷ *Butz v Economou* 438 US 478 at 511–512 (1978), establishing the principle that the extension of judicial-like immunity to non-judicial officials is properly based on the “functional comparability” of the individual’s acts and judgments to the acts and judgments of judges.

¹⁸ *Corey v New York Stock Exchange* 691 F 2d 1205 at 1209 (6th Cir, 1982). See also *Stasz v Schwab* 121 Cal App 4th 420; 17 Cal Rptr 3d 116; 04 Cal Daily Op Serv 7169; *Austern v Chicago Board of Options Exchange* 898 F 2d 882 at 885–886 (2nd Cir, 1990); *Butz v Economou* 438 US 478 (1978); *Wasyf, Inc v First Boston Corp* 813 F 2d 1579 at 1582 (9th Cir, 1987).

¹⁹ W C Moffitt, “Choice of Governing Rules of Arbitration under the Doctrine of Arbitral Immunity in *Strategic Resources, Inc v BCS Life Insurance, Inc*” (2006) 5 J Am Arb 179. In *Cort v American Arbitration Association* 795 F Supp 970 (ND Cal, 1992), a disgruntled party sued the American Arbitration Association (“AAA”), alleging that the selection of arbitrators was an administrative function and not quasi-judicial in nature. The court held that the AAA was immune from suits arising from the selection of arbitrators. The US District Court for the Northern District of California also held in *Alexander v American Arbitration Association* WL 868823 (ND Cal,

circuits recognise the doctrine of arbitral immunity²⁰ and most US courts take the view that recourse to the Federal Arbitration Act (“FAA”)²¹ for any breach of the duties of an arbitrator (*ie, vacatur* or rehearing) should be the exclusive remedy.²² If an arbitrator defaults on his contractual duty by failing to render a timely decision, he loses his claim to immunity because he loses his resemblance to a judge. In *EC Ernst v Manhattan Construction Co of Texas*,²³ the court recognised the contractual duty to render a timely decision and held the arbitrator liable for damages for the loss caused by his failure to render an award. However, arbitral immunity in the US does not appear to be broad enough to cover a withdrawal from an arbitration without reasons. The rationale appears to be that an arbitrary withdrawal would be inconsistent with ethical strictures and an arbitrator’s quasi-judicial role, and amounts to a breach (or non-performance) of the arbitrator’s contractual duty to conduct a binding arbitration.²⁴

27 July 2001) that the AAA was immune when it uses its discretion to choose the applicable rules governing an arbitration proceeding.

²⁰ In a recent decision delivered on 20 February 2007, the Tenth Circuit Court of Appeals, in *Pfannenstiel v Merrill Lynch, Pierce, Fenner & Smith* 477 F 3d 1155 (10th Cir, 2007), observed (citing cases from nine other circuits), that “[e]very other circuit that has considered the issue of arbitral immunity recognizes the doctrine”.

²¹ 9 USC (US) §§1–14 (1925).

²² *Higdon v Construction Arbitration Associates, Ltd* 71 SW 3d 131 (Ky App, 2002) (proper remedy for any violation of terms and conditions of arbitration agreement stemming from the arbitrator’s alleged entertaining of untimely counterclaim and gross underestimation of complainant’s damages was an action for review of the award, not damages. Such decisions were the sort of procedural and factual determinations an arbitrator is commonly called upon to make.)

²³ *EC Ernst, Inc v Manhattan Construction Co of Texas* 551 F 2d 1026 (5th Cir, 1977).

²⁴ In *Morgan Phillips, Inc v JAMS/Endispute* (2006) 44 Cal Rptr 3d 782 at 786 (2006), the California Court of Appeals (Second Appellate District, Division 4) stated that arbitral immunity cannot be used to “immunize the unprincipled abandonment and refusal to make a decision”. This decision

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III. Civil law contractual analysis

7 The civil law jurisdictions adopt a contractual analysis of the role of arbitrators.²⁵ Under the contractual approach, the arbitrator performs the service of resolving a dispute for a fee. The terms of the arbitrator's contract may be set out in the submission to arbitration, the relevant rules of arbitration and the terms of reference or terms of appointment. Other terms may be imposed by operation of law, for example, the duty to act with due diligence and the duty to act judicially.²⁶ The immunity of an arbitrator is therefore a contractual term negotiated between the parties and the arbitrator. The extent of arbitral liability is subject to modifications but within the limits of mandatory provisions of the national law.²⁷ It may be worthwhile to note that the judge immunity analogy does not apply in civil law jurisdictions. Unlike common law judges who enjoy judicial immunity, civilian judges can be held liable for all culpable and wrongful acts, including adjudicatory acts. To a variable extent and under specific circumstances, parties to a judicial proceeding can recover damages caused by judicial wrongdoing.²⁸

IV. Examples of statutes granting immunity or imposing liability

8 The United Nations Commission of International Trade Law Model Law on International Commercial Arbitration²⁹ contains no provision on

was affirmed in *Morgan Phillips v JAMS Inc* 2010 Cal App Unpub LEXIS 689 (Cal App 2d Dist, 28 Jan 2010) at 29–32. See also nn 19, 20, 22 and 23.

²⁵ Nigel Blackaby & Constatine Partasides with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at para 5-49.

²⁶ Section 594(4) of the Austrian Civil Procedure Code (1983) imposes liability on an arbitrator for damages for failure to act in a timely manner.

²⁷ Christian Hausmaninger, "Civil Liability of Arbitrators – Comparative Analysis and Proposals for Reform" (1990) 7(4) J Int Arb 7 at 11–19.

²⁸ Christian Hausmaninger, "Civil Liability of Arbitrators – Comparative Analysis and Proposals for Reform" (1990) 7(4) J Int Arb 7 at 15–16.

²⁹ UN Doc A/40/17, annex I; UN Doc A/61/17, annex I (21 June 1985; amended 7 July 2006).

the liability of an arbitrator for misconduct or error, and so there is no uniform approach to immunity. It is notable that, in the drafting of the Model Law, there was general agreement among members of the Working Group on International Contract Practices that the question of the liability of an arbitrator could not appropriately be addressed in a model law on international commercial arbitration.³⁰ That was because the liability issue was not widely regulated and remained highly controversial. National arbitration laws therefore have different formulations either granting immunity or imposing liability on arbitrators.³¹

9 Statutes that grant immunity to arbitrators include section 20 of the Singapore International Arbitration Act (“IAA”)³² and section 29 of the English Arbitration Act 1996.³³ Under section 59 of the IAA, the appointing authority and arbitral institutions are only liable for acts or omissions in bad faith. In the US, section 14(a) of the Revised Uniform

³⁰ UNCITRAL, *Report of the Working Group on International Contract Practices on the Work of Its Third Session* (UN Doc A/CN.9/216) (16–26 February 1982, New York) at 51). See also UNCITRAL, *Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration* (UN Doc A/CN.9/207) at para 70.

³¹ See Hans van Houtte & Bridie McAsey, “The Liability of Arbitrators and Arbitral Institutions” in *ASA Special Series No 40: Arbitral Institutions under Scrutiny* (Philipp Habegger *et al* eds) (JurisNet LLC, 2013) at pp 146–149 for a discussion of an arbitrator’s liability in legal systems where there are no or limited legislative provisions governing it and the liability has a contractual basis.

³² Section 20 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) excludes the liability of arbitrators for negligence or mistakes in law, fact or procedure.

³³ Under s 29 of the English Arbitration Act 1996 (c 23), an arbitrator is only liable for acts or omissions in bad faith. Under s 25 of the same act, an arbitrator can be liable for resignation without reasonable cause (see n 3). See Hans van Houtte & Bridie McAsey, “The Liability of Arbitrators and Arbitral Institutions” in *ASA Special Series No 40: Arbitral Institutions under Scrutiny* (Philipp Habegger *et al* eds) (JurisNet LLC, 2013) by at pp 143–146 for a discussion of other common law legislative provisions concerning arbitral liability.

Arbitration Act (2000) is a broad provision that grants immunity to an arbitrator or arbitration organisation to the same extent as a judge of a state court acting in a judicial capacity. In Hong Kong, although section 104 of the Hong Kong Arbitration Ordinance³⁴ imposes liability on arbitrators, it is in effect a blanket immunity, save for dishonesty.

10 Statutes that impose liability on arbitrators include section 21 of the Spanish Arbitration Act,³⁵ which expressly imposes liability for bad faith, recklessness or fraud. In England, upon the removal of an arbitrator under section 24(4) of the English Arbitration Act 1996,³⁶ a court may order the arbitrator to repay any fees or expenses already paid.

V. Examples of arbitral rules granting immunity or imposing liability

11 The American Arbitration Association (“AAA”) Commercial Arbitration Rules and Mediation Procedures³⁷ (“AAA Commercial Arbitration Rules”) and the International Centre for Settlement of Investment Disputes (“ICSID”) Rules of Procedure for Arbitration Proceedings³⁸ grant blanket immunity, but under the provisions of the latter, the ICSID itself may

³⁴ Cap 609.

³⁵ 60/2003 of 23 December 2003. English Translated version available in David Cairns, B Cremades y Asociados & Alejandro Lòpez Ortiz, “Spain’s Consolidated Arbitration Law” (2012) 13 *Spain Arbitration Review* 49 at 57. The amendments by Acts 5/2011 and 11/2011 of 20 May 2011 do not affect s 21 of the Act.

³⁶ See n 5.

³⁷ Effective 1 June 2009. Rule 48(b) of the American Arbitration Association (“AAA”) Commercial Arbitration Rules and Mediation Procedures (effective 1 June 2009) (“AAA Rules”) states: “Neither the AAA nor any arbitrator in a proceeding under these Rules is a necessary or proper party to judicial proceedings relating to the arbitration.” Rule 48(d) of the AAA Rules states:

Parties to an arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.

³⁸ Amended 10 April 2006.

waive the immunity.³⁹ The International Chamber of Commerce (“ICC”) Rules of Arbitration 2012 grant blanket immunity except to the extent that such limitation of liability is prohibited by the applicable laws.⁴⁰ The London Court of International Arbitration (“LCIA”) Arbitration Rules⁴¹ and the World Intellectual Property Organization (“WIPO”) Arbitration Rules⁴² grant immunity save for conscious and deliberate wrongdoing. The 2010 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce grant immunity save for “wilful misconduct or gross negligence”.⁴³ Article 584(2) of the Austria Code of Civil Procedure also imposes general liability for damages caused by an arbitrator’s

³⁹ Article 20 of the International Centre for Settlement of Investment Disputes (“ICSID”) Rules of Procedure for Arbitration Proceedings (amended 10 April 2006) (“ICSID Rules”) states: “The Centre, its property and assets shall enjoy immunity from all legal process, except when the Centre waives this immunity.” See also Art 21(a) of the ICSID Rules. To date, there have been two applications to ICSID to waive immunity, but both were refused because the party in the respective cases sought annulment of the award as well.

⁴⁰ Article 40 of the International Chamber of Commerce Rules of Arbitration (entry into force 1 January 2012) states:

The arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the Court and its members, the ICC and its employees, and the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law.

Article 34 of the SIAC Rules (4th Ed, 1 July 2010) similarly excludes their arbitrators’ liability.

⁴¹ London Court of International Arbitration Arbitration Rules (effective 1 January 1998) Art 31.1.

⁴² World Intellectual Property Organization Arbitration Rules (effective 1 October 2002) Art 77.

⁴³ Article 48 of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (entry into force 1 January 2010) states: “Neither the SCC Institute nor the arbitrator(s) are liable to any party for any act or omission in connection with the arbitration unless such act or omission constitutes wilful misconduct or gross negligence.”

wrongful refusal or delay, and allows the parties to claim rescission of the arbitration agreement.⁴⁴

VI. Institutional powers of supervision

12 Arbitral institutions may impose penalties for breach of the institutions' code of ethics. This shows that arbitrators do not, in practice, enjoy absolute immunity. The ICSID, for example, may waive arbitral immunity if an arbitrator is found liable for wilful misconduct (*eg*, actual bias or corruption). The Hong Kong International Arbitration Centre ("HKIAC") Court of Arbitration, a supervisory body that investigates complaints against arbitrators on its Panel of Arbitrators, has Terms of Reference that deal with complaints against members of the HKIAC Panel. The HKIAC Court reviews any decision of the HKIAC Panel Selection Committee that a complaint does not warrant an investigation by the court, and has the discretion to override the decision of the panel selection committee.

13 The Chamber of National and International Arbitration of Milan ("Chamber of Arbitration") also has a Code of Ethics that empowers the Chamber of Arbitration to replace an arbitrator who fails to comply with the Code of Ethics. The additional sanction is that the Chamber of Arbitration may refuse to confirm subsequent appointments of the errant arbitrator because of that violation.⁴⁵ Members of the Chartered Institute of Arbitrators ("CI Arb") are subject to the Royal Charter

⁴⁴ Section 584(2) of the Austria Code of Civil Procedure (1983) states:

An arbitrator who does not fulfil in time or at all the obligations assumed by his acceptance of office is liable to the parties for all the loss caused by his wrongful refusal or delay, without prejudice to the parties rights to claim rescission of the arbitration agreement.

⁴⁵ Article 13 of the Chamber of National and International Arbitration of Milan's Code of Ethics (entry into force 1 January 2010) states:

The arbitrator who does not comply with this Code of Ethics shall be replaced by the Chamber of Arbitration, which may also refuse to confirm him in subsequent proceedings because of this violation.

Bye-laws and Schedule to the Bye-laws⁴⁶. A disciplinary tribunal may be set up by the CI Arb to decide upon any violations of the code of ethics in the conduct of an arbitration. Sanctions may vary from reprimands and censure, on the one hand, to expulsion from the Institute, on the other.⁴⁷ In contrast, the Singapore International Arbitration Centre (“SIAC”) Code of Ethics for an Arbitrator (“the SIAC Code”) provides that breach of the SIAC Code is not intended to provide grounds for the setting aside of an award and does not appear to impose any penalty for violations of the SIAC Code.⁴⁸ The SIAC Code therefore makes it clear that an appropriate remedy for a party dissatisfied with the merits of an award is to attempt to set it aside or resist enforcement under the Model Law. To impose personal liability on an arbitrator on the pretext of a breach of the institutional code of ethics is not a substitute remedy for challenging the merits of the award.

VII. Claims against arbitral institutions

14 Although this paper seeks to focus on the claims against arbitrators for breach of ethical duties, it is useful to note that arbitral institutions have also become targets for aggrieved parties who have lost an arbitration. The general view is that there is a contractual relationship between parties to the arbitration and the arbitral institution administering the arbitration.⁴⁹ Arbitral institutions in common law jurisdictions have immunity, at least against negligence or errors of procedure, on the basis

⁴⁶ Effective 20 July 2012.

⁴⁷ Bye-Law 15.2 of the Royal Charter Bye-laws and Schedule to the Bye-laws of the Chartered Institute of Arbitrators (effective 20 July 2012) sets out what constitutes “misconduct”, for example, “(3) falling significantly below the standards expected of a competent Practitioner or a competent professional person acting in the field of private dispute resolution”.

⁴⁸ Article 7.2 of the Singapore International Arbitration Centre Code of Ethics for an Arbitrator, available at <<http://www.siac.org.sg>> (accessed 10 May 2013).

⁴⁹ Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at para 5-21.

that they operate as quasi-judicial organisations to protect those functions that are closely related to the arbitral process and sufficiently related to the adjudicative phase of the arbitration. For example, section 74 of the English Arbitration Act 1996 grants immunity to an appointing authority and imposes liability for acts or omissions in bad faith.⁵⁰

15 In the US, arbitral immunity is absolute and covers acts by an arbitral institution that are associated with the judicial phase of the proceedings. In *Austern v Chicago Board of Options Exchange*,⁵¹ the investor (“Austern”) was party to an arbitration. The investor had successfully set aside the arbitral award but went on to sue the Chicago Board of Options Exchange (as the sponsoring organisation) for mental anguish and expenses of defending against the confirmation of the award. The court held that the administrator of an arbitration was immune from suit for the alleged failure to notify the investor of pending arbitration proceedings. The investor had already obtained the exclusive remedy of defeating the confirmation of the award.

16 The French courts have affirmed the contractual relationship between the parties and the institution and find it unnecessary to treat

⁵⁰ Section 74 of the English Arbitration Act 1996 (c 23) states:

- (1) An arbitral or other institution or person designated or requested by the parties to appoint or nominate an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of that function unless the act or omission is shown to have been in bad faith.
- (2) An arbitral or other institution or person by whom an arbitrator is appointed or nominated is not liable, by reason of having appointed or nominated him, for anything done or omitted to be done by the arbitrator (or his employees or agents) in the discharge or purported discharge of his functions as arbitrator.

See also s 25A(1) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) and s 48 of the Arbitration Act 2005 (Act 646 of 2005) (M’sia).

⁵¹ 898 F 2d 882 at 885–886 (2nd Cir, 1990).

institutions as judicial bodies.⁵² In *Société Cubic Defense System v Chambre de Commerce Internationale*,⁵³ the French *Cour de Cassation* recognised a contract between the parties to the arbitration and the ICC. Under that contract, it was held, the ICC is contractually obligated to fulfill its essential function as an arbitral institution, that is, to follow the rules applicable to the arbitration, and is potentially liable for any breach of the arbitration agreement. In the more recent case of *Société Filature Française de Mohair v Fédération Françaises des Industries Lainières et Cotonnières*,⁵⁴ the court at first instance held that an arbitral institution was contractually liable to the parties to the arbitration it administered. The arbitral institution had failed to pass on to the parties an exhibit that it had obtained from a third party and communicated to the tribunal. As a result, the award was annulled due to the arbitral institution's failure to adhere to the adversarial principle. The court found that such a violation of the adversarial principle constituted a breach of contract that resulted in damage suffered by the parties since it had been the cause of the annulment of the award.⁵⁵

⁵² Matthew Rasmussen, "Overextending Immunity: Arbitral Institutional Liability in the United States, England and France" (2003) 26 *Fordham Int'l LJ* 1824 at 1863.

⁵³ (2001) Rev Arb 510, followed by *SNF v ICC* (2007) Rev Arb 847 (*Tribunal de Grande Instance de Paris* (1er Ch)) and (2010) Rev Arb 314 (*Cour d'appel de Paris*). The Paris *Cour d'appel* held that the International Chamber of Commerce's ("ICC") standard exclusion of liability clause was invalid because it allowed the ICC to avoid its fundamental obligation to conduct an effective and efficient arbitration. Following this decision, Art 40 of the new ICC Arbitration Rules (entry into force 1 January 2012) expressly added that the restriction of liability only applies "to the extent such limitation of liability is prohibited by applicable law".

⁵⁴ TGI Nanterre, 1er juillet 2010, RG: 07/13274.

⁵⁵ Philippe Stoffel-Munck, "Responsabilité d'un Centre d'Arbitrage pour Nullité de la Sentence" (2011) 2 *Paris Journal of International Arbitration* 401. The court held that the damage suffered by the parties did not amount to the loss of chance to benefit from a compensation allocated by an award because the procedural defect in the arbitration proceedings could still be rectified by allowing the parties an opportunity to respond to the exhibit.

17 The Austrian courts adopt a different view. In an Austrian case,⁵⁶ an arbitrator in the Vienna International Arbitral Centre (“VIAL”) was successfully challenged on the grounds of failure to disclose a material conflict of interest. The arbitrator then asked for his fees, but the Secretary-General of the VIAL decided not to pay out any fees to the arbitrator because he breached his duty of disclosure. The arbitrator sued the VIAL. The VIAL defended the case and won, so no fees were payable to the arbitrator, who was removed for conflict of interest. A recent decision of the Austrian Supreme Court held that under the arbitration rules of the VIAL, the arbitration agreement is entered into by the parties to the arbitration and the arbitrator. Therefore the arbitrators’ fees are to be paid only by the parties to the arbitration, not by the institution. The Supreme Court left open the question of whether and under what conditions the VIAL would be liable for the negligence of its General Secretary in calculating the arbitrator’s fees.⁵⁷

VIII. Claims against arbitrators for breach of ethical duties

A. *Claims for delay by arbitrators*

18 National arbitration laws or institutional rules may stipulate a requirement to render a timely award or act without unnecessary delay,⁵⁸ which forms part of a tribunal’s duty to act with due diligence. The ICC Rules fixes a time limit of six months for an arbitral tribunal to make

⁵⁶ OGH, 30 November 2006.

⁵⁷ 18 September 2012 (4 Ob 30/12h).

⁵⁸ Article 14(1) of the UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) states:

If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in Article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

an award,⁵⁹ though it may be extended by consent of the parties or at the initiative of the institution.⁶⁰ The English Arbitration Act 1996 provides that an arbitrator who fails to proceed with reasonable speed in conducting the arbitration and making his award may be removed by a competent court.⁶¹ However, some caution must be taken against imposing liability for delay that is not excessive,⁶² as what is “reasonable despatch” depends on the circumstances of the case.⁶³ Even if an arbitrator is found liable for being dilatory, it seems that his obligation to proceed with reasonable speed will not be enforced by specific performance.⁶⁴

19 Under certain arbitration laws, the time limit is a “drop-dead” provision that terminates the authority of the arbitral tribunal and makes it *functus officio*, and the award will be null and void. Article 1463 of the French Code of Civil Procedure (“the French Code”)⁶⁵ stipulates a period of six months for an arbitral tribunal to render an award in the absence of other provisions in the arbitration agreement. If the parties had not agreed to an extension of time or sought an extension from the court, the tribunal would have to request an extension of time to render the award. If the tribunal fails to do so, the award rendered out of time may be set aside under Article 1463. In *Louis Juliet, Benoît Juliet v Paul Castagnet*

⁵⁹ International Chamber of Commerce Arbitration Rules (entry into force 1 January 2012) Art 30.1.

⁶⁰ International Chamber of Commerce Arbitration Rules (entry into force 1 January 2012) Art 24.2.

⁶¹ Arbitration Act 1996 (c 23) (UK) s 33(1)(b).

⁶² Susan Franck, “The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity” (2000) 20 NY L Sch J Int’l & Comp L 1 at 57.

⁶³ David Sutton & Judith Gill, *Russell on Arbitration* (Sweet & Maxwell, 22nd Ed, 2003) at para 7-083.

⁶⁴ Sir Michael Mustill & Steward Boyd, *Commercial Arbitration* (LexisNexis, 2nd Ed, 1989) at p 231.

⁶⁵ Code of Civil Procedure (1975) as amended by Decree No 2011-48 of 13 January 2011, available at <http://www.iaiparis.com/pdf/FRENCH_LAW_ON_ARBITRATION.pdf> (accessed 10 May 2013).

(arbitrator), *Pierre Couilleaux* (arbitrator) and *Adolphe Biotteau* (arbitrator) in the First Civil Chamber of the *Cour de Cassation*,⁶⁶ the three-member tribunal published its award out of time in breach of Article 1456 of the then French Code, which sets out the same time limit of six months for the rendering of an award. The *Cour d'appel* annulled the award, as the tribunal failed to request an extension of time. A party to the arbitration brought a claim for breach of contract against the arbitrators. The *Cour de Cassation* found that the arbitrators were liable for damages for breach of contract. The tribunal had an obligation under Article 1456 of the then French Code⁶⁷ to obtain an extension of time from the court for delivering the award out of time, where the parties had not agreed to such an extension.

20 The AAA Commercial Arbitration Rules have a more restrictive time limit: the arbitral tribunal has to render the award no later than 30 days from the date of closing the hearing.⁶⁸ In *Baar v Tigerman*,⁶⁹ the arbitrator (“Tigerman”) failed to render an award within 30 days from the date of closing the hearing and in fact had yet to make an award seven months after the submission. The authority of the arbitrator vested in him by the AAA contract and statutory law to make an award was terminated. One party to the arbitration brought an action against the arbitrator and the AAA. That party alleged breach of contract, negligence, and breach of the implied covenant of good faith. That party also argued that the AAA failed to exercise reasonable care in the selection of Tigerman as an arbitrator; therefore, the AAA failed to administer the arbitration properly. The California Court of Appeals (Second District,

⁶⁶ Case 1660 FS-P+B (6 December 2005).

⁶⁷ Code of Civil Procedure (1975).

⁶⁸ Rule 41 of the American Arbitration Association Commercial Arbitration Rules and Mediation Procedures (effective 1 June 2009) states:

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 days from the date of closing of the hearing, or, if oral hearings have been waived, from the date of the AAA’s transmittal of the final statements and proofs to the arbitrator.

⁶⁹ *Baar v Tigerman* 140 Cal App 3d 979; 211 Cal Rptr 426 (1983).

Division 3) held that an arbitrator who breaches his contract to render a timely award is not entitled to judicial immunity. Further, it held that arbitration immunity does not extend to a private arbitration association for its administrative action. Following *Baar v Tigerman*, the California legislature adopted section 1297.111 of the Code of Civil Procedure⁷⁰ to expand arbitral immunity to conform to judicial immunity and supersede the holding in that case. In *Thiele v RML Realty Partners*,⁷¹ the Court of Appeals (Second District, Division 7) extended arbitral immunity to the AAA on the basis that arbitral immunity should be liberally construed. The court stated that the act of sending out the arbitral award was sufficiently associated with the adjudicative phase of the arbitration to justify immunity. In *Morgan Phillips, Inc v JAMS/Endispute*, the California Court of Appeals held that an arbitrator's failure to render an arbitral award is "not integral to the arbitration process; [but] a breakdown of that process". A refusal to render an award is in effect a "complete non-performance" of the ultimate object of the arbitration agreement.⁷²

21 The Austrian Civil Procedure Code imposes an obligation on arbitrators to act without undue delay. In an Austrian case before the Austrian Supreme Court⁷³ concerning two arbitrators who had been sued by the losing party, the court set out two pre-conditions for the arbitrators to be held liable for breach of the duty to act without undue delay: (a) the award must have been successfully challenged; and (b) there had been some kind of grossly negligent behaviour on the part of the arbitrators.

22 The cases show that, where there is a strict time limit that must be adhered to, it would seem that there is no defence in a contractual claim for the failure to conduct the arbitration without undue delay in

⁷⁰ Section 1297.111 of the California Code of Civil Procedure (1872) provides that "[a]n arbitrator has the immunity of a judicial officer from civil liability when acting in the capacity of arbitrator under any statute or contract".

⁷¹ 14 Cal App 4th 1526 (1993).

⁷² *Morgan Phillips v JAMS/Endispute* 44 Cal Rptr 3d 782 at 785 (2006).

⁷³ OGH (6 June 2005) (9 Ob 126/04a); affirmed by the Austrian Supreme Court in OGH (28 February 2008) (8 Ob 4/08h).

jurisdictions that recognise such a contractual claim against the tribunal. The award may be rendered null and void in such circumstances, but any damages inflicted through the conduct of the arbitrators would be difficult to quantify.⁷⁴ However, the arbitral rules of the main institutions do not impose liability to compensate the parties for delay. In jurisdictions that do not recognise such a contractual claim, there is no compensation in damages for a party who has suffered loss as a result of delay in proceeding with the arbitration.

B. Claims for failure to disclose conflicts of interest

23 The obligation to disclose conflicts of interest is essential to the independence and impartiality of the arbitrator. Article 12(1) of the Model Law imposes on an arbitrator a continuing obligation of disclosure of any conflicts of interest that may arise from the time of his appointment and throughout the arbitral proceedings.⁷⁵ The International Bar Association Guidelines on Conflicts of Interest in International Arbitration (“IBA Guidelines”) set out an objective test for the disclosure of any conflicts of interest: an arbitrator should disclose circumstances that, “from a reasonable third person’s point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator’s impartiality or independence”.⁷⁶ The IBA Guidelines also enumerate various categories of specific situations in respect of which disclosure is made, and specific consent by the parties or a presumption of consent, if no timely objection is made, is required.⁷⁷

⁷⁴ Julian Lew, Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at para 12-59.

⁷⁵ See also Canon II of the American Arbitration Association/American Bar Association Code of Ethics for Commercial Arbitrators (2004).

⁷⁶ International Bar Association Guidelines on Conflicts of Interest in International Arbitration (2 May 2004) General Standard 2(b).

⁷⁷ See Pt II and the Non-Waivable Red List, Waivable Red List, Orange List and Green List of the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (2 May 2004).

24 Claims against arbitrators for failure to declare conflicts of interest can lead to the award being vacated or at least the termination of the arbitration.⁷⁸ The French courts have found arbitrators liable to compensate parties for losses incurred through a breach of the duty of disclosure that leads to a successful challenge of the award. In *Raoul Duval v V*^{79,80} the chairman of the arbitral tribunal started working for one of the parties the day after the award was rendered. The chairman failed to disclose this fact to the parties. The arbitral award was set aside on the ground of unlawful constitution of the tribunal. Duval then sued the arbitrator for loss caused by his conduct. The court held that the arbitrator was liable on a contractual basis to pay damages for the fees paid to the arbitrators and the arbitral institution, as well as costs incurred for the defence.

25 The Finnish courts have also found arbitrators liable to compensate parties for losses incurred through a failure to disclose conflicts of interest. In *Urho, Sirkka and Jukka Ruola v X*,⁸¹ the plaintiff had successfully annulled the arbitral award in a prior action in which he challenged the award on the ground of bias. In this subsequent action before the Finnish Supreme Court, the plaintiff sued the arbitrator

⁷⁸ See the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (approved 2 May 2004) (“IBA Guidelines”) Pt II at para 5: The Working Group on the IBA Guidelines is of the view that a later challenge based on the fact that an arbitrator did not disclose facts or circumstances giving rise to justifiable doubts as to his impartiality or independence should not result automatically in either non-appointment, later disqualification, or a successful challenge to any award. In the view of the Working Group, non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so.

⁷⁹ (1996) Rev Arb 411 (*Tribunal de Grand Instance*, Paris), affirmed in *V v Raoul Duval* (1999) Rev Arb 324.

⁸⁰ Confirmed by the Paris *Cour d’appel* in (1999) Rev Arb 324 and the *Cour de Cassation*.

⁸¹ KKO 2005:14. This is the only case addressing an arbitrator’s liability for damages. There are no subsequent decisions overturning this decision (as of February 2013).

directly for the costs and expenses of the arbitration. The arbitrator had failed to disclose the fact that he had given several legal opinions to the defendant company and financial institutions who were intervening parties in the arbitration. The Finnish Supreme Court held that the relationship between an arbitrator and the parties to the arbitration was comparable to a contractual relationship. Consequently, the court awarded the plaintiff the costs and expenses of the arbitration on a contractual basis for the arbitrator's non-disclosure.

26 In the US, claims against arbitrators for failure to disclose conflicts of interest do not result in any loss of arbitral immunity. Under section 14(c) of the Revised Uniform Arbitration Act (2000), an arbitrator's failure to make a disclosure required by section 12 does not cause any loss of immunity under this section. The typical remedy for a failure to disclose conflicts of interest is *vacatur* under section 23 of the Act.

27 There is a positive duty on arbitrators to investigate possible conflicts of interest.⁸² In *HSMV Corp v ADI Ltd*,⁸³ the arbitrator's law firm had an indirect professional relationship with the defendant. The plaintiff discovered this conflict of interest only after two awards were rendered and brought an action to vacate the second award. The arbitrator claimed that he was unaware of this relationship. The District Court for the Central District of California vacated the second award and held that arbitrators have an affirmative duty to investigate possible conflicts.

28 Although an award may be vacated on the basis of apparent partiality, the doctrine of arbitral immunity in the US ensures that arbitrators are not held personally liable for failure to disclose conflicts of interest. In *Blue Cross Blue Shield of Texas v Juneau*,⁸⁴ Juneau was an arbitrator on the arbitration panel in a dispute between HealthCor

⁸² *Commonwealth Coatings Corp v Continental Casualty Co* 393 US 145 at 151–152 (1968); the US Supreme Court held that arbitrators “should err on the side of disclosure” as “it is better that the relationship be disclosed at the outset when the parties are free to reject the arbitrator or accept him with knowledge of the relationship”.

⁸³ 72 F Supp 2d 1122 (CD Cal, 1999).

⁸⁴ 114 SW 3d 126 (Ct App Tex, 2003).

Liquidation Trust (“HealthCor”) and Blue Cross Blue Shield of Texas (“Blue Cross”). The panel rendered a unanimous decision in favor of HealthCor. Blue Cross filed suit against HealthCor and two arbitrators, alleging “gross mistake”, and sought modification or vacation of the award. Blue Cross subsequently sued Juneau for evident partiality. Juneau had previously worked in the same law firm as the attorney who worked for HealthCor. However, Juneau did not have much contact with this attorney, and so he thought the relationship was trivial and not worth disclosing. The Court of Appeals of Texas held that arbitral immunity covers an arbitrator’s failure to disclose conflicts of interest, even though the award might be vacated on the grounds of failure to disclose, because the disclosure requirement was directly related to the functions of an arbitrator.

29 In *Positive Software Solutions Inc v New Century Mortgage Corp*,⁸⁵ the sole arbitrator had been co-counsel with the defendant’s counsel in the arbitrator’s prior law firm more than ten years prior to the arbitration. The arbitrator and the defendant’s counsel failed to disclose this relationship in the course of the arbitration. The arbitrator ruled in favour of the defendant. The plaintiff discovered this relationship and sought to vacate the arbitral award. The District Court (affirmed by the Court of Appeals) vacated the award on the ground that the prior professional relationship might create a reasonable impression of possible bias and that the arbitrator’s failure to disclose that prior relationship deprived the plaintiff of the opportunity to make an informed choice of arbitrator. On the defendant’s petition, the Fifth Circuit Court of Appeals reversed its own decision in a rehearing of the case *en banc*. The US Supreme Court affirmed the Court of Appeals’ decision and held that a failure to disclose trivial or insubstantial relationships is not a sufficient

⁸⁵ 337 F Supp 2d 862 at 865 (ND Tex, 2004), affirmed, 436 F 3d 495 (5th Cir, 2006); reversed in rehearing, 476 F 3d 278 (5th Cir, 2007) (*en banc*), *certiorari* denied, 127 S Ct 2943 (2007).

basis to vacate an award. The relationship must involve a “significant compromising connection to a party”.⁸⁶

30 Parties to an arbitration have a duty to exercise due diligence in investigating possible conflicts of interest. A disgruntled party that wants to set aside the award on the basis of apparent bias may end up being time barred if it fails to discover information revealing bias (if any) within the statutory time limit for vacating an award. In *Pullara v American Arbitration Association, Inc.*,⁸⁷ the plaintiff (“Pullara”) sued the arbitrator and the AAA for damages for the arbitrator’s failure to disclose his professional relationship (as general counsel) with a trade association. The plaintiff alleged that the arbitrator’s professional relationship with the trade association was a material fact that he was entitled to know when he chose the arbitrator from the AAA’s list of arbitrators. The plaintiff could not apply to vacate the award as it was time barred under the Texas Civil Practice and Remedies Code;⁸⁸ he had discovered the arbitrator’s undisclosed professional relationship only one year after the award was rendered. The Court of Appeals of Texas held that the arbitrator and the AAA were both immune against claims for evident partiality.

C. Claims for being corrupt

31 The national arbitration laws of common law jurisdictions and arbitral rules of the main arbitral institutions exclude immunity for fraud, dishonesty or actual bias. If there are circumstances that give rise to justifiable doubts as to the impartiality of an arbitrator, the national court has the power to remove the arbitrator and institutional rules set out a

⁸⁶ *Positive Software Solutions Inc v New Century Mortgage Corp* 476 F 3d 278 at 283 (5th Cir, 2007).

⁸⁷ 191 SW 3d 903 (Tex App, Texarkana, 2006).

⁸⁸ Section 171.088 of the Texas Civil Practice and Remedies Code, General Arbitration (Cap 171) provides that any application to vacate an award must be made within 90 days from the date of delivery of a copy of the award to the applicant. An award may be vacated on the basis of, for example, corruption, fraud, evident partiality, and misconduct or wilful misbehaviour.

procedure to challenge the arbitrator.⁸⁹ Some national arbitration laws may impose an additional sanction by giving the court the power to order the arbitrator to repay any fees or expenses already paid.⁹⁰ Allegations of actual bias go to the jurisdiction of the tribunal and should be remedied by challenging the arbitrators and seeking their removal or withdrawal,⁹¹ or challenging the arbitral award.

32 Arbitral immunity in the US extends to challenges of the arbitrators' authority to resolve a dispute and allegations of misfeasance by arbitral institutions. Immunity may not extend to allegations of fraud, corruption and conspiracy, and it is likely that, in such cases, the arbitral award would be vacated.⁹² An arbitrator is also immune from allegations of libel and slander if the statements are made in the course of arbitral proceedings.⁹³ In *Tamari v Conrad*,⁹⁴ the US Court of Appeals for the

⁸⁹ Julian Lew, Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at para 12-33. See Art 11 of the International Chamber of Commerce Rules of Arbitration (entry into force 1 January 2012); Art 10 of the London Chamber of International Arbitration Arbitration Rules (effective 1 January 1998); Arts 12 and 13 of the UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006).

⁹⁰ See, *eg*, s 24(4) of the English Arbitration Act 1996 (c 23).

⁹¹ Julian Lew, Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at para 12-34. The US courts take this approach; see, *eg*, *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v Greyhound Lines, Inc* 701 F 2d 1181 at 1185–1187 (6th Cir, 1983); *Montero v Travis* 171 F 3d 757 at 761 (2nd Cir, 1999); *Saavedra v City of Albuquerque* 859 F Supp 526 at 532 (D N Mex, 1994), affirmed, 73 F 3d 1525 (10th Cir, 1996), *Stasz v Schwab* 121 Cal App 4th 420; 17 Cal Rptr 3d 116; 04 Cal Daily Op Serv 7169 (2004); *Garland v US Airways, Inc* 153 Lab Cas at [10,762] (WD Pa, 2006).

⁹² *Jones v Brown* 54 Iowa 140 at 142–143 (Iowa, 1880). In a subsequent case, the arbitrators were not allowed to recover their arbitral fees.

⁹³ *Kabia v Koch* 186 Misc 2d 363, 713 NYS 2d 250 (NY Civ Ct, 2000).

⁹⁴ 552 F 2d 778 (7th Cir, 1977).

Seventh Circuit held that arbitral immunity applies where the arbitrator's authority is challenged because arbitrators will be dissuaded from serving if they can be embroiled in a dispute and be saddled with the burdens of defending a lawsuit. In *International Medical Group, Inc v American Arbitration Association, Inc*⁹⁵ ("IMG"), the US Court of Appeals for the Seventh Circuit upheld *Tamari v Conrad*. In *IMG*, the respondents in the arbitration were clearly not interested in the arbitration proceedings. They sued the claimant, his lawyers and their law firm, the AAA and its employees, alleging malicious prosecution, abuse of process and "bad faith arbitration" (the last being a cause of action that the court did not recognise), and sought a stay of the arbitration proceedings. The court dismissed the claim on the basis of arbitral immunity and found that the causes of action were unsubstantiated.

D. Claims for negligence

33 Allegations of negligence against arbitrators are premised on the arbitrators' incompetent handling of the arbitration and do not amount to the arbitrators' wilful misconduct. An arbitrator may be liable for breach of contract or the tort of negligence if he is extravagant or dilatory, but the remedy is limited to his removal as an arbitrator and a forfeiture of his fees. Such sanctions are similar to those that are imposed on professionals who have a duty of care and skill.⁹⁶

34 Arbitrators are immune against claims for negligence under national arbitration laws of common law jurisdictions and the rules of the main arbitral institutions.⁹⁷ Arbitration institutions in the US are also immune against tortious claims based on wrongful exercise of jurisdiction over parties who are not parties to the arbitration agreement. The appropriate remedy for parties who raise jurisdictional objections is to seek an injunction in an appropriate court against the party initiating the

⁹⁵ 312 F 3d 833 (7th Cir, 2002).

⁹⁶ David Sutton & Judith Gill, *Russell on Arbitration* (Sweet & Maxwell, 22nd Ed, 2003) at para 4-203.

⁹⁷ See also *Stasz v Schwab* 121 Cal App 4th 420; 17 Cal Rptr 3d 116; 04 Cal Daily Op Serv 7169 (2004).

arbitration.⁹⁸ In a controversial English case, the arbitrator was removed by the court and held liable for the costs of the court hearing, and was awarded only £10,000 in arbitral fees. The court held that the arbitrator had no power under the English Arbitration Act 1996⁹⁹ to obtain double security for his anticipated fees and expenses and had exercised the wrong principles in ordering the parties to give security for each other's costs.¹⁰⁰

35 Jurisdictions that adopt a contractual approach to arbitral immunity are more likely to find arbitrators liable for claims for negligence. Arbitrators are contractually liable for loss and damages for the failure to perform their duties. For example, Argentinean arbitration law takes the view that the arbitral contract renders arbitrators liable for losses caused by any failure to perform duties.¹⁰¹ In France, arbitrators have duties and obligations to both parties once they accept an appointment. If an arbitrator breaches any term in the agreement, he may be liable for damages.¹⁰² However, the French courts have held that arbitrators can only incur liability in the event of gross fault, fraud, or connivance with one of the parties. In *Floragne v Brissart et Corgie*,¹⁰³ a party brought an

⁹⁸ *International Medical Group, Inc v American Arbitration Association* 312 F 3d 833 (7th Cir, 2002); *Stasz v Schwab* 121 Cal App 4th 420; 17 Cal Rptr 3d 116; 04 Cal Daily Op Serv 7169 (2004).

⁹⁹ See n 5.

¹⁰⁰ *Wicketts v Brine Builders* [2002] CILL 1805; [2001] App LR 06/08.

¹⁰¹ Nigel Blackaby & Constatine Partasides with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at para 5-50. Article 745 of the National Code of Civil and Commercial Procedure (Book VI, Law No 17.454 of 1967) in Argentina states that "acceptance by arbitrators of their appointment shall entitle the parties to compel them to carry out their duties and to hold them liable for costs and damages derived from the non-performance of arbitral duties". Article 18 of the Peruvian General Arbitration Law (Law No 26572 of 1996) is virtually identical to Article 745 of the National Code of Civil and Commercial Procedure in Argentina.

¹⁰² *Ceckolovenska Obcendi Banka v International Chamber of Commerce* (1987) Rev Arb 367; Peter B Rutledge, "Towards a Contractual Approach for Arbitral Immunity" (2004) 39 Ga L Rev 151.

¹⁰³ TGI Reims, No 482/77 (27 September 1978), unpublished.

action against the arbitrators seeking to recover the loss suffered as a result of the arbitral award. The court held that the party's arguments implied that the arbitrators reached the wrong decision. The court dismissed the action as no misfeasance was alleged or justified, and considered the action to be abusive and offensive. The court awarded the arbitrators the nominal damages that the arbitrators sought in their counterclaim.

IX. Should arbitrators appear as defendants in an action?

36 Claims against arbitrators for breach of ethical duties are fetters to their independence and ability to administer justice without fear of reprisals from disgruntled parties and "arbitration guerillas" who simply refuse to play the game by the rules.¹⁰⁴ Unmeritorious actions against arbitrators have a retrogressive effect on international arbitration as a dispute resolution mechanism¹⁰⁵ and increase costs for the parties and the arbitrators involved. Even if an arbitrator is found to be immune from suit, he is certainly not immune from the additional legal fees that

¹⁰⁴ Michael Hwang SC, "Why is there Still Resistance to Arbitration in Asia?" in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum for Robert Briner* (Gerald Aksen *et al* eds) (ICC, 2005) at p 401 (revised version in *Table Talk* (Autumn 2007) at p 4).

¹⁰⁵ Michael Hwang SC, "Why is there Still Resistance to Arbitration in Asia?" in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum for Robert Briner* (Gerald Aksen *et al* eds) (ICC, 2005) at p 401 (revised version in *Table Talk* (Autumn 2007) at p 4). The principal author of this paper was a member of a tribunal in an arbitration in which the respondent not only challenged the jurisdiction of the tribunal in its local court, but also filed an action against the claimant for the tort of "wrongful arbitration", claiming huge damages and a conservatory order seizing the claimant's assets. As a co-arbitrator, he had some difficulty persuading the other members (who were both from the jurisdiction of the local court) to issue orders while these court proceedings were pending as they were fearful that any action taken by the tribunal to advance the hearing would result in similar court proceedings being taken against the members of the tribunal.

he has to pay to counsel defending him.¹⁰⁶ The costs of professional indemnity insurance will consequently increase and is likely to be passed down to the parties.

37 Another concern that arises from litigation against arbitrators is whether arbitrators should appear in actions in which they are joined as defendants. Arbitrators may choose not to take full part in the proceedings as an active party. In the alternative, arbitrators may take a limited part in the proceedings by filing an affidavit setting out any facts that he considers may be of assistance to the court.¹⁰⁷ Appearing in such actions would mean that the arbitrators may be cross-examined on matters that pertain to the merits of the award, and lead to a re-litigation of the merits of the arbitral award that undermine its *res judicata* effect. Not taking an active part in proceedings to set aside an award, for example, may be advantageous to the arbitrator, as an award of costs in such proceedings will ordinarily be inappropriate unless the arbitrator becomes a participant in the litigation or is guilty of collusion and dishonesty.¹⁰⁸

38 Arbitrators may choose to expressly contract out of participating in any judicial proceedings in their terms of appointment. In the US, the Revised Uniform Arbitration Act (2000) states that an arbitrator is neither competent to testify or required to produce any documents pertaining to an arbitration, except where it is necessary to determine the

¹⁰⁶ The civil procedure rules of most common law jurisdictions require parties to pay their own solicitor and client costs. See also John Townsend, "Recourse against the Arbitrator after the Arbitral Award: An American Perspective, in *The Status of the Arbitrator – Special Supplement*" (1995) ICC ICArb Bull 115; Murray Smith, "Costs in International Commercial Arbitration" in *AAA Handbook on International Arbitration & ADR* (Thomas Carbonneau & Jeanette Jaeggi eds) (Juris Publishing, 2006).

¹⁰⁷ *Port Sudan Cotton Co v Govindaswamy Chettiar & Sons* [1977] 1 Lloyd's Rep 166.

¹⁰⁸ *Lendon v Keen* [1916] 1 KB 994. See also *Najjar v Haines* (1991) 25 NSWLR 224. The court held that arbitrators should be immune because of the overriding importance of the need for a judge to act independently and without fear of harassment by action.

claim of an arbitrator or in a hearing to vacate an award.¹⁰⁹ The Act also aims to curb frivolous lawsuits against arbitrators by imposing liability for legal fees and other expenses of litigation on parties that commence civil action against an arbitrator, arbitral organisation, or representative of an organisation, and it is subsequently found that arbitral immunity applies.¹¹⁰ Recent case law also demonstrates that judicial policy is moving towards imposing sanctions on parties who bring spurious lawsuits.¹¹¹

39 Conflict-of-laws issues arise where an unhappy litigant who is unable to set aside an award in the local courts of the seat of arbitration attempts to vacate the award by bringing an action in the jurisdiction of the arbitrators on the basis of corruption or other grounds of public policy. In a famous case in the US District Court in Beaumont, Texas, the unhappy litigant failed twice in Switzerland, the seat of the arbitration, to set aside the award given by the three-member tribunal. He then sued everyone he could think of, including the arbitrators, to vacate the award on the grounds that the tribunal had taken US\$25m in bribes. The arbitrators did not take any active part in the proceedings, so no issue of arbitral immunity arose. The Texas judge made a finding that the court must have the jurisdiction to set aside the award before it could decide on the issue of corruption. Because the seat of the arbitration was Geneva and not Texas, he declined to do so.¹¹² On appeal, the Fifth Circuit Court of Appeal affirmed the District Court's finding on jurisdiction and dismissed the appeal.¹¹³

¹⁰⁹ Revised Uniform Arbitration Act (2000) §14(d). See also commentary on the provision.

¹¹⁰ Revised Uniform Arbitration Act (2000) §14(e). See also commentary on the provision.

¹¹¹ *B L Harbert International, LLC v Hercules Steel Co* 441 F 3d 905 (11th Cir, 2006).

¹¹² *Gulf Petro Trading Co, Inc v Nigerian National Petroleum Corp* 2006 US Dist LEXIS 86493 (E D Tex, 2006).

¹¹³ On 7 January 2008, the US Fifth Circuit Court of Appeals affirmed the dismissal of *Gulf Petro Trading Co, Inc v Nigerian National Petroleum Corp* on the basis that it was a collateral attack on the foreign (Swiss) arbitral award in the underlying arbitration. *Gulf Petro Trading Co v Nigerian*
(continued on next page)

40 Claims against arbitrators give rise to the question of the kinds of relief that can be obtained against them. In the Beaumont case mentioned above, the party claimed for the costs of arbitrating, lost revenue, profits that allegedly should have been awarded at the arbitration proceedings, damage to reputation from losing in the arbitration, and loss of business opportunities from losing the award. As the court decided it did not have jurisdiction, the court did not have to decide on the relief sought. In the Finnish case of *Urho v X* (mentioned above), the claimant sought to recover the costs and expenses of arbitration. The court held that the arbitrator-party relationship was comparable to a contractual relationship and the arbitrator was therefore liable to pay such damages on a contractual basis for the arbitrator's failure to disclose conflicts of interest (which may have influenced his award).

X. Should arbitral institutions intervene when its arbitrators are sued?

41 Most arbitral institutions do not provide any protection for arbitrators who come under their purview, and arbitrators who are sued are generally left to fend for themselves. The ICC, which gets sued quite regularly around the world, together with their arbitrators, and the Swiss Arbitration Association¹¹⁴ take this approach. Interestingly, the Netherlands Arbitration Institute purchases professional indemnity insurance for arbitrators on its general panel, but only if the arbitration is

National Petroleum Corp 512 F 3d 742 (5th Cir Tex, 2008) was followed in *Global Building Products Ltd v Chemco, Inc* 2012 US Dist LEXIS 150317. For a commentary on the case, see also "Etat-Unis: United States Court of Appeals, Decision No 06-40713 (7 January 2008). Appeal from the US District Court for the Eastern District of Texas. *Gulf Petrov Nigerian National Petroleum Corp*" (2008) 26 ASA Bulletin 167.

¹¹⁴ *Gulf Petro Trading Co, Inc v Nigerian National Petroleum Corp* 512 F 3d 742 (5th Cir Tex, 2008). The Swiss Arbitration Association was willing to act as *amicus curiae* before the US Court of Appeal, arguing that a US court had no jurisdiction to interfere in a Swiss arbitration.

conducted under its rules and auspices.¹¹⁵ By contrast, the AAA actively assists its arbitrators in resisting claims but stops short of indemnifying them out of its own pocket.¹¹⁶

XI. Conclusion

42 Most jurisdictions recognise that immunity is necessary to ensure that the arbitrator acts independently and impartially. The degree of immunity available under the national laws of different jurisdictions and arbitral rules varies according to whether they accept the judge immunity analogy or the contractual analysis of the role of arbitrators. The formulation of arbitral immunity can be seen clearly in the grounds relied on in successful claims against arbitrators that are brought, more often than not, by an aggrieved party. While the personal liability of

¹¹⁵ The Chartered Institute of Arbitrators offers a Professional indemnity Insurance scheme to its members at a competitive rate. See Chartered Institute of Arbitrators, Professional indemnity Insurance Scheme <<http://www.ciarb.org/joining-us/benefits/professional-indemnity-insurance/>> (accessed 10 May 2013).

¹¹⁶ In *Gulf Petro Trading Co v Nigerian National Petroleum Corp* 512 F 3d 742 (5th Cir Tex, 2008), the American Arbitration Association and the Swiss Arbitration Association were willing to act as *amici curiae* before the US courts in support of the arbitrators involved. The London Court of International Arbitration (“LCIA”) has a similar policy and the International Chamber of Commerce (“ICC”) has professional indemnity insurance for some expenses incurred by its arbitrators in resisting claims. The results of the University of Geneva’s Master of Advanced Studies in International Dispute Settlement Survey indicated that approximately 60% of all participants, which included the ICC and LCIA, hold some form of insurance. “The type of insurance held varies: some institutions hold only ‘directors and officers’ cover for their board or senior officials, some appear to have full coverage and some are covered by the insurance policies of their parent body (eg, the Chamber of commerce under which they are established)”. See Hans van Houtte & Bridie McAsey, “The Liability of Arbitrators and Arbitral Institutions” in *ASA Special Series No 40: Arbitral Institutions under Scrutiny* (Philipp Habegger *et al* eds) (JurisNet LLC, 2013) at pp 166–168.

arbitrators for acts of bad faith in the exercise of their judicial functions provides some redress to the losing party, this cannot be used as an additional weapon or a substitute remedy for the setting aside of the award. Arbitrators ought to be protected from frivolous claims so that they can render awards judiciously and unaffected by potential lawsuits.

Background to Article 9

This has become a hobby of mine, identifying questions which do not work forensically in international arbitration. It was written for a chapter in a book called *The Art of Advocacy in International Arbitration*. I had already written a chapter on cross-examination for the first edition of this book, but for the second edition, I decided on something more radical. I have often given lectures on this theme after the publication of this paper and my list of questions not to ask has increased from ten to nearly 20. I was greatly assisted in the preparation of the footnotes to the paper (which set out the legal principles underpinning my approach to cross examination) by Charis Tan and Su Zihua.

I wish to extend my thanks to JurisNet for kindly granting me permission to republish this paper in this book.

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TEN QUESTIONS NOT TO ASK IN CROSS-EXAMINATION IN INTERNATIONAL ARBITRATION

Michael HWANG SC*

Contents

I.	Introduction	374
II.	The ten questions to avoid	375
III.	Why avoid the ten questions?.....	376
	A. The principles of contractual interpretation render such questions pointless (Questions 1, 2 and 3)	376
	(1) The approach to contractual interpretation is objective (Question 1)	376

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(2)	The court only looks at a limited factual matrix (Question 2)	381
(3)	Questions of construction are a matter for the tribunal or dictionaries. Further, pre-contractual negotiations and post-contract conduct may generally not be taken into account for contractual interpretation (Question 3).....	384
B.	As a matter of practice, “forensic” questions (Questions 4, 5, 6 and 7) are not helpful and merely waste time unnecessarily	390
C.	Legal issues are matters for submission (Question 8).....	393
D.	Questions which take a witness through facts and documents with a view to making the witness agree with the other party’s interpretation of a document or characterisation of events (rather than the actual facts themselves) are generally not worth the time (Question 9)	393
E.	“Yes” or “no” questions may be unfair (Question 10).....	393
IV.	Conclusion.....	394

I. Introduction

1 This chapter identifies ten questions that an international arbitration practitioner should take pains to avoid in cases concerning contractual interpretation and breach. The recommended abstinence applies mainly to cross-examination where the governing law is common law, but the majority of the questions from which counsel should abstain in common law should in most cases be likewise avoided during cross-examination where the arbitration is governed by civil law. The lesson to bear in mind is that, in his preparation for cross-examination, counsel must have a firm grasp of his case theory, before trying to establish the facts that are the foundation stones of that theory. He must first understand the rules of contractual interpretation and contractual breach (these being the two most common issues in practice), and focus his mind on the significance of questioning witnesses in contract cases and whether certain questions should be asked. Even where questions are permissible, they may not be (a) relevant to the legal issues at hand; or (b) helpful to the tribunal in deciding the key issues.

II. The ten questions to avoid

- 2 First: Questions about the unarticulated intention of witnesses, *eg*, “What did you mean when you wrote this letter/ these minutes?”
- Second: Questions about the motives of witnesses relating to actions or omissions, *eg*, “Why did you insert this clause in the agreement? Why did you do/not do something?”
- Third: Questions about a witness’s interpretation of letters or contractual documents unless it impacted on his subsequent actions, *eg*, “What does this clause of the contract mean to you? What do you think the writer of this letter meant by paragraph X?”
- Fourth: Questions to demonstrate what is or is not in a document, *eg*, “Where in this document does it say [whatever]? Do you agree that this clause does not say anything about [something]? Look at this document – does it contain any reference to [x]?”
- Fifth: Questions for dramatic effect which do not add to the knowledge of the tribunal, *eg*, “I put it to you that you are not telling the truth (unless counsel has built up a foundation for this suggestion by previous questioning). Could you please read out the third paragraph of your letter?”
- Sixth: Questions designed to make the witness concede facts in favour of the opposing party which are apparent from the record and are not denied, *eg*, “Do you agree that you never replied to my client’s letter?”
- Seventh: Questions solely aimed at attacking credibility or creating prejudice, *ie*, having no direct relevance to the issues, but designed to question the witness’s credibility or character by asking him questions on other matters outside the events covered by the existing arbitration.
- Eighth: Questions that seek to argue a legal issue with a lay witness, *eg*, “Do you agree that clause X means ...? Do

you agree that my client acted lawfully in terminating your employment?”

Ninth: Questions which take a witness through facts and documents with a view to making the witness agree with the other party's interpretation of a document or characterisation of events (rather than the actual facts themselves), *eg*, “Do you agree that my client behaved reasonably under the circumstances?”

Tenth: Questions which end in “answer ‘yes’ or ‘no’” when the question is not a “yes” or “no” question.

III. Why avoid the ten questions?

A. *The principles of contractual interpretation render such questions pointless (Questions 1, 2 and 3)*

(1) *The approach to contractual interpretation is objective (Question 1)*

3 Under English law, interpretation of a contract is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.¹ In short, the English approach to interpretation is an objective one and is so without controversy.² The objective approach is

¹ *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (“*Investors*” at 912, reaffirmed by the House of Lords in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1131, which was in turn followed by the Supreme Court in *Oceanbulk Shipping & Trading SA v TMT Asia Ltd* [2011] 1 AC 662 at 680.

² Kim Lewison, *The Interpretation of Contracts* (London: Sweet & Maxwell, 5th Ed, 2011) at para 2.03.

also applied in Australia,³ New Zealand,⁴ Singapore,⁵ the US⁶ and Canada.⁷ Thus, common law embraces an objective approach to interpretation.

³ In Australia, courts have adhered to an explicitly objective approach to the construction of contracts, particularly of written contracts signed by the parties. Both in determining what terms have been incorporated in a contract, and in interpreting those terms, the task of construction is not to ascertain the subjective intention of the parties, but rather to determine what a reasonable person in their situation would have intended or assumed: see N C Seddon, R Bigwood & M P Ellinghaus, *Cheshire and Fifoot Law of Contract* (Australia: LexisNexis, 10th Ed, 2012) (“*Cheshire Australia*”) at pp 408 and 428–432. Accordingly, it is unequivocal that the court cannot receive evidence from one party as to its uncommunicated intention, understanding or expectation of the contract. Such extrinsic evidence of subjective intention is in principle not admissible: see *Cheshire Australia* at pp 428–432.

⁴ Kim Lewison, *The Interpretation of Contracts* (London: Sweet & Maxwell, 5th Ed, 2011) at p 30.

⁵ *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029.

⁶ Contractual interpretation in the US similarly takes such an objective approach. The object in construing a contract is to ascertain the meaning and intent of the parties as expressed in the language used in the contract. Primary importance is placed upon the words of the contract; therefore, the actual intent of the parties is ineffective unless it is expressed in some way in the writing. Thus, the court should not inquire into the actual mental processes of the parties in entering into the particular contract; rather, the law presumes that the parties understood the import of their contract and that they had the intention which its terms manifest: see Richard Lord, *A Treatise on the Law of Contracts* vol 11 (US: West Group, 4th Ed, 1999) (“*US Contract Law*”) at pp 271–277; Glen Banks, *New York Contract Law* (West’s New York Practice Series vol 28) (Thomson West, 2006) (“*New York Contract Law*”) at pp 8–12 and 368–370. It is clear, therefore, that it is not the real intent but the intent expressed or apparent in the writing which is sought; it is the objective, not the subjective, intent that controls: *US Contract Law* at pp 281–283; *New York Contract Law* at pp 8–12 and 368–370.

⁷ In Canada, it is similarly accepted that an objective approach is necessary to make sense of the words used in a contract. When asked to give meaning to
(continued on next page)

4 In the common law context, the aim of interpretation is not to probe the real intentions of the parties but to ascertain the *contextual meaning* of the relevant contractual language. The question to be asked is what a reasonable person, given the factual matrix in which the contract was made, would have understood the parties to have meant by the use of specific language. The answer to this question is to be gathered from the text under consideration and its relevant contextual scene.⁸ However, where the contract is complete on its face, the language of the contract constitutes *prima facie* proof of the parties' intentions⁹ and it is only in limited circumstances that the courts can seek to interpret the document using information from beyond the four corners of the contract.

5 Where the courts indicate that they will give effect to the intention of the parties when interpreting a contract, the intention referred to is the articulated rather than the actual intention of the parties. In other words, what is important is not one party's subjective intention, or even what he might have conveyed, or attempted to convey to a third party (*ie*, a non-contracting party) about his understanding of what he was doing.¹⁰ What is important is what was *expressed* and what a reasonable person would have understood from what was expressed.

6 Consequently, the subjective intentions of the parties have no role to play in contractual interpretation. This is why questions aimed at demonstrating the parties' subjective intentions at the time of the contract (*ie*, Question 1-type questions) are unhelpful and irrelevant to the legal issue at hand. It makes no difference to the outcome of the case, even if it can be established what the witness meant when he penned a

the words the parties have used, courts have to start from the position that the interpretation of those words has to be established objectively, *ie*, as they would be understood by the reasonable person as familiar as necessary with the business and the likely shared understandings of the parties. John Swan, *Canadian Contract Law* (Canada: LexisNexis, 1st Ed, 2006) at p 492.

⁸ *Per* Lord Steyn in *Sirius International Insurance Co v FAI General Insurance Ltd* [2004] 1 WLR 3251.

⁹ *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [40].

¹⁰ *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451.

letter or typed a document. It makes no difference *why* the witness inserted a particular clause into the agreement, or phrased the clause the way he did at the time of the agreement, since both these questions go to the question of what was in the parties' own minds and their uncommunicated intentions.

7 There is one exception where the subjective intention of the parties of the parties can override the clear meaning of the written words: when one party applies for rectification¹¹ of the contract so that the written words will reflect the actual intention of the parties. However, unless such an application is made, the remarks made above will apply.

8 While a civil law court or tribunal is theoretically required to interpret a contract by way of discerning the parties' common intention¹²

¹¹ In *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1131, the House of Lords also clarified the scope of application and test for allowing rectification. According to the House, rectification is not confined to cases where there was a concluded antecedent contract with which the final contract did not conform, but is also available when there was no binding antecedent agreement but the parties had a common continuing intention in respect of a particular matter in the instrument in respect of which rectification is sought. In both cases, the question is what an objective observer would have thought the intentions of the parties to be. In order to get rectification, it has to be shown that the parties were in complete agreement on the terms of their contract but by an error wrote them down wrongly. If, by looking at what the parties said or wrote to each other in coming to their agreement and then comparing it with the contract they signed, it can be predicated with certainty what their contract was, and that it is by common mistake wrongly expressed in the document, the document can be rectified, but no less will suffice. Rectification is rarely sought as a remedy, but such a claim would justify a more liberal approach to cross-examination of the actual intentions of the parties as manifested by what they said or wrote.

¹² This is the French position under Art 1156 of the Code Civil 1804 (French Civil Code) which says that the primary role of interpretation is to discover the *commune intention des parties* (common intention of parties): see Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law* (Oxford: Clarendon Press, 3rd Ed, 1998) at p 402.

or real intention,¹³ which suggests that a subjective approach needs to be taken in the interpretation of a contract, courts and tribunals adopt an objective approach¹⁴ to interpretation in practice.

¹³ The German position under §133 of the German Civil Code 1900 is that the aim of construction is to “discern the real intention” and the crucial thing is the actual historical will of the parties: see Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law* (Oxford: Clarendon Press, 3rd Ed, 1998) at p 403.

¹⁴ The French courts incline towards the subjective approach to interpretation. Nonetheless, where no common intention can be found, the judge is supposed to ascertain the “hypothetical” intention of the parties or to adopt the interpretation which in all circumstances, objective and subjective, must be regarded as the one the parties would reasonably have intended. Further, since a judge will very rarely be able to discern any actual intention common to the parties, he generally has no option but to focus on “objective” considerations and ask how the term in question should and would normally have been understood in that particular context by a reasonable man and remains free to come to his conclusion on the basis of objective considerations and call it the *commune intention ties parties contractantes* when he comes to write his judgment: see Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law* (Oxford: Clarendon Press, 3rd Ed, 1998) at p 402.

While §133 of the German Civil Code 1900 explains that the aim of construction is to “discern the real intention”, thus suggesting a subjective approach must be taken, other parts of the same Code presuppose that an objective approach to interpretation be taken and there is a certain tension between the objective and subjective tests. German case law has suggested that contracts will generally be interpreted objectively although this is subject to certain important qualifications, for instance, where the true intention of both parties coincides but deviates from the objective meaning of their declaration, the literal meaning need not prevail. The classic example is the famous *Haakjöringsköd* case (Deu RG, 8 June 1920, *RGZ* 99 at 147), in which parties intended to buy and sell whale meat, but described it as shark meat. The court took the view that the contract was for the sale of whale meat and that the delivery of shark meat was a breach of contract: see Basil Markesinis, Haimon Unberath & Angus Johnston, *The German Law of Contract* (Cornwall: Hart Publishing, 2nd Ed, 2006) at pp 133–135.

9 In short, they interpret a contractual term by reference to what a reasonable person would have understood it to mean in that particular context. Consequently, questioning exercises seeking to expose the unarticulated intention of witnesses are limited in value and Question 1-type questions should also be eschewed even where civil law governs the contract.

(2) *The court only looks at a limited factual matrix (Question 2)*

10 Questions on motives should be avoided. The common law position (taken in England,¹⁵ Singapore,¹⁶ Australia,¹⁷ Canada¹⁸ and the US¹⁹) is

¹⁵ See, for instance, *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896.

¹⁶ See, for instance, *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029.

¹⁷ See, for instance, *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337.

¹⁸ Similarly, in Canada, it is accepted that words cannot be understood apart from their context. Contractual language cannot be understood without some knowledge of their context and the purpose of the contract. Words, taken individually, have an inherent vagueness that will often require courts to determine their meaning by looking at their context and the expectations that the parties may have had: see John Swan, *Canadian Contract Law* (Canada: LexisNexis, 1st Ed, 2006) at p 493.

¹⁹ In the US, extrinsic evidence at the time the contract is made is also admissible. The circumstances surrounding the execution of a contract may always be shown and are always relevant to a determination of what the parties intended by the words they chose. In construing a contract, a court seeks to ascertain the meaning of the contract at the time and place of its execution. Thus, the circumstances surrounding the execution of the contract will always bear upon the contract's meaning: see Richard Lord, *A Treatise on the Law of Contracts* vol 11 (US: West Group, 4th Ed, 1999) at pp 435–436. The term “surrounding circumstances” refers to the commercial or other setting in which the contract was negotiated and other objectively determinable factors that give a context to the transaction between the parties. It would include, for example, whether one or both parties was new to the trade, whether either or both had counsel, the

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that the background factual matrix surrounding the execution of the contract may be taken into account to aid the court in the interpretation of the written words of a document. This is because words used in a contract cannot be divorced from the circumstances prevailing at the time the contract was made, and a court seeking to ascertain the meaning of a contract must look to the factual matrix surrounding its execution.

11 The significant point to note is that under the common law position, background evidence that is admissible is limited to *facts, circumstances in reality* and *factual matrices*. The emphasis is upon **what happened** and **what a party did or did not do**; there is no question of why a party did what he did. A party's motivations for doing what he did or did not do do not impact upon the interpretation of the contract (or whether he has been in breach) and should be disallowed as irrelevant²⁰ (although questions

nature and length of their relationship, as well as their relative age, experience, education and sophistication: see Richard Lord, *A Treatise on the Law of Contracts* vol 11 (US: West Group, 4th Ed, 1999) at p 439.

²⁰ This is the position in England, Australia, Canada and the US. However, in Singapore, a recent High Court case has interpreted the seminal Singapore Court of Appeal case on contractual interpretation – *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 – as being consistent with the principle that the subjective intentions of the parties are admissible if they go towards the proof of what the parties objectively intended: see *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 (“*Sheng Siong*”) at [44]. Andrew Ang J in *Sheng Siong* noted that the reason for the *prima facie* inadmissibility of subjective intent at English law is that evidence of subjective intent is likely to violate the principle of objective contractual interpretation. From this premise, he then concluded that it follows that declarations of subjective intent should be admissible if they are useful in proving what the parties, from an objective viewpoint, ultimately agreed upon. This view is one which has been adopted by numerous academics: see, *eg*, Donald Nicholls, “My Kingdom for a Horse: The Meaning of Words” (2005) 121 LQR 577 at 583; David McLauchlan, “Contract Interpretation: What is it about?” (2009) 31(5) Syd LR 5 at 13; and Goh Yihan, “Contractual Interpretation in Singapore: Continued Refinement after *Zurich Insurance*” (2012)
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of admissibility are not decided in arbitration on the basis of rules of evidence, but on the tribunal's perception of what is relevant or helpful to its decision). Cross-examination questions that concern the surrounding facts, circumstances and factual matrices go to the background and context of the transaction and are therefore relevant. In contrast, questions which seek to cast light on a party's private intentions and motivations are not.

12 There are two exceptions to this principle:

- (a) The contract itself makes motive a relevant element (*eg*, a clause that allows a right to terminate a contract if one party has reasonable cause to believe in a certain state of facts).
- (b) The issue is assessment of damages, the principle of mitigation is important, and questions may legitimately be asked about the innocent party's attempts to mitigate his damage which will often involve questions about the reasons for the innocent party's acts or omissions in mitigation.

13 Consequently, these exceptions apart, counsel in a common law international arbitration would be ill-advised to subject the tribunal to questions about *why* X did or did not do something, or questions which explore each individual party's motivations for how they negotiated, or even internal e-mails within each individual party (where the party is a company) which discussed the clauses of the contract, such questions being inadmissible where the applicable law of the contract is common law.

14 Questions on motives, however, may potentially find applicability in arbitrations governed by civil law, which places fewer restrictions on the admissibility of evidence. For instance, French law does not place *a priori* limitations on the admissibility of materials deemed relevant for that purpose: all materials likely to help shed light on the parties' actual intention in principle are admissible, including materials pertaining to such contextual factors as pre-contractual, collateral, or subsequent statements or actions by the parties, even such materials as may pertain to one

24 SAclJ 275 at 290. It remains to be seen whether it will be approved by the Singapore Court of Appeal.

party's intention undisclosed to the other.²¹ However, even civil law tribunals do not in practice find questions on unarticulated motives or intentions relevant to questions of contractual intention.

(3) Questions of construction are a matter for the tribunal or dictionaries. Further, pre-contractual negotiations and post-contract conduct may generally not be taken into account for contractual interpretation (Question 3)

15 Aside from avoiding questions on unarticulated intention and motives, counsel should also abstain from asking questions about the witness's interpretation of letters or contractual documents (unless the interpretation impacted on that witness's subsequent actions). This is for two reasons.

- (a) Questions of construction, whether of domestic or foreign documents, are matters of law and not of fact and belong exclusively to the court and the opinions of experts thereon are irrelevant.²² In short, the interpretation of contractual or commercial documents is a matter for the tribunal to decide, and it makes no sense for counsel to cross-examine a witness on his interpretation of a particular document unless his understanding of the document (right or wrong) is helpful in explaining why he took a particular course of action (provided the reasons for his action are themselves relevant in deciding the critical issues in the case).
- (b) Where the tribunal is unable to interpret certain terms in a written instrument, its first course of action would be to construe the terms by reference to dictionaries and other material²³ and a witness's

²¹ Catherine Valcke, "Contractual Interpretation at Common Law and Civil Law – An Exercise in Comparative Legal Rhetoric" in *Exploring Contract Law* (University of Toronto, Faculty of Law, 2008) at pp 23–24.

²² Michael Howard *et al*, *Phillips on Evidence* (London: Sweet & Maxwell, 16th Ed, 2005) at p 1032. See also *LHS Holdings Ltd v Laporte plc* [2001] EWCA Civ 278; [2001] 2 All ER (Comm) 563.

²³ *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 913.

interpretation will seldom be relevant. Accordingly, Question 3-type questions should be avoided.

16 Of course, some counsel believe that it is good advocacy to develop a case (which is capable of argument on the documents alone) through the mouths of witnesses, particularly by forcing witnesses on the other side to agree with the interpretation canvassed by cross-examining counsel. While it is debatable whether this achieves a greater forensic effect than a well-reasoned brief, I suggest that, in commercial arbitration, cross-examination should generally be confined to matters of fact rather than matters of argument.

17 Questions about a witness's interpretation of letters or contractual documents can relate to the witness's knowledge of contractually related matters before as well as after the making of the contract. Another reason for discouraging "why" questions about a witness's interpretation of letters or contractual documents is that the common law generally excludes from evidence, the pre-contractual negotiations and post-contract conduct of parties²⁴ (this general exclusion is of course subject to

²⁴ The English position is that evidence of pre-contractual negotiations is generally inadmissible in support of the construction of a contract because, in the course of negotiations, parties' positions are constantly changing, and their agreement is only recorded in their final agreement: see Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381 ("*Prenn v Simmonds*"). This position was re-affirmed in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1131 ("*Chartbrook*"), where the House of Lords was invited to reconsider the rule in *Prenn v Simmonds*, but declined on the basis that (a) to allow such evidence would create uncertainty of outcome in disputes over interpretation and add to the cost of advice, litigation or arbitration, given that statements in the course of pre-contractual negotiations were subjective and could, if oral, be disputed; and (b) it was not often easy to distinguish between statements which reflected the aspirations of a party and those which embodied a provisional consensus which might help in the interpretation of the contract eventually concluded. Under English law, the exclusion of pre-contractual negotiations is not absolute and evidence of pre-contractual negotiations is admissible to establish (a) that a fact was known to both parties; (b) where the parties have agreed on the meaning of

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a word or phrase in negotiations; (c) to decide (in a consumer contract) whether a term has been individually negotiated; and (d) to determine which party put forward a particular term: Kim Lewison, *The Interpretation of Contracts* (London: Sweet & Maxwell, 5th Ed, 2011) at para 3.09. Pre-contractual negotiations could also be used to support a claim for rectification or estoppel: *Chartbrook*. In respect of the subsequent conduct of parties, the general rule is that English courts do not look at subsequent conduct to interpret a written agreement. However, where the agreement is partly written and partly oral, subsequent conduct may be examined for the purpose of determining what the full terms of the contract were. Additionally, the subsequent conduct of the parties may be examined where an estoppel by convention is alleged; where it is alleged that the agreement was a sham; and probably for the purposes of determining the boundaries of an ambiguous grant of land: Kim Lewison, *The Interpretation of Contracts* (London: Sweet & Maxwell, 5th Ed, 2011) at para 3.19.

In Singapore, there is no absolute or rigid prohibition against previous negotiations or subsequent conduct, although, in the normal case, such evidence is likely to be inadmissible for non-compliance with the three conditions that (a) the material must be relevant; (b) the material must have been reasonably available to all contracting parties; and (c) the material must relate to a clear and obvious context: *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [125], [127]–[129] and [132(d)]. In *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094, before applying these three requirements of admissibility, Andrew Ang J stated that the “ultimate lynchpin” in the admission of extrinsic evidence is “what [the] court seeks to do with the extrinsic evidence”, namely, whether it is “relying on such evidence to interpret the contract in its proper context [which] is permissible [or] relying on the same to ‘contradict or vary or add to or subtract from’ the contract [which] is impermissible”: at [37]. This in turn depends on the “scope of the meanings that [the contractual] words can bear”: if the extrinsic evidence renders the meaning of the term “completely at odds” with an express contractual clause or the meaning that the contractual words are capable of bearing, the purpose of their admission is the former (at [38]). Goh Yihan argues that the court’s approach essentially creates an additional overarching “purpose” test – a useful threshold question which gives proper effect to the parole evidence rule, which is exclusionary in nature: see Goh Yihan, “Contractual Interpretation in Singapore: Continued Refinement after
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Zurich Insurance" [2012] 24 SAclJ 275 at 285–286. In *Goh Guan Chong v Aspentech, Inc* [2009] 3 SLR(R) 590 at [58], Andrew Ang J opined that in addition to previous negotiations and subsequent conduct, drafts of contracts which satisfy the three conditions could also be admissible. This was because there was no reason, in principle, to differentiate drafts from contractual negotiations. Ang J also commented that documentary evidence of negotiations as they appeared in drafts would tend to be more reliable than oral evidence though where the parties' respective positions changed with each draft, drafts would provide only scant assistance and ultimately, the weight (if any) to be given to drafts as extrinsic evidence would have to differ from case to case depending on the factual matrix.

In Australia, where parties have recorded the terms of their contract in a document, the parol evidence rule applies to exclude evidence of pre-contractual terms that "subtract from, add to, vary or contradict the language of a written instrument". In respect of whether the subsequent conduct of the parties is admissible, the Australian courts have not been unanimous. The objection to such evidence is that post-contractual conduct may be deliberately tailored so as to give veracity to a meaning not intended at the time of formation of the contract. Many courts have professed adherence to the rule that subsequent conduct is inadmissible, but at the same time, the dogmatic application of this view has been openly criticised by others: N C Seddon, R Bigwood & M P Ellinghaus, *Cheshire and Fifoot Law of Contract* (Australia: LexisNexis, 10th Ed, 2012) at p 416.

In the US, the admissibility of pre-contractual negotiations between the parties is also one of difficulty. On one hand, pre-contractual negotiations are not admissible to prove that the actual intent of the parties is at variance with the words of the written instrument when those words are given their appropriate local meaning. On the other hand, pre-contractual negotiations are admissible to prove that the parties were dealing with regard to a particular matter or to secure a particular object, or under circumstances where the local usage would give a particular meaning to the language. Negotiations are also admissible, where the local meaning is ambiguous, to show that the parties attached one appropriate meaning to their words, rather than another equally appropriate meaning: Richard Lord, *A Treatise on the Law of Contracts* vol 11 (US: West Group, 4th Ed, 1999) ("*US Contract Law*") at p 836; Glen Banks, *New York Contract Law* (West's New York Practice Series vol 28) (Thomson West, 2006) ("*New York Contract Law*") at pp 360–361 and 364–367. The US is quite likely the most liberal

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where admission of evidence of the parties' subsequent conduct is concerned. The US courts take the position that, given that the purpose of judicial interpretation is to ascertain the parties' intentions, the parties' own practical interpretation of the contract, *ie*, how the parties actually acted, thereby giving meaning to their contract in the course of performing it, can be an important aid to the court: *US Contract Law* at pp 491–492; *New York Contract Law* at pp 361–363. The US courts therefore give great weight to the parties' practical interpretation, unless it is contrary to the plain meaning of the contract, or clearly one sided. The conduct of the parties therefore provides nearly conclusive evidence of the parties' contractual intentions. This is particularly true when the contract is ambiguous: *US Contract Law* at p 507; *New York Contract Law* at pp 361–363.

The Canadian position in respect of pre-contractual negotiations is not absolute. Evidence of what took place during the negotiations may or may not be considered by the court that is asked to interpret an agreement. If the agreement is held to be the sole and final expression of the parties' agreement, evidence of what occurred during the negotiations will be irrelevant. On the other hand, what happened during the negotiations may provide useful and important evidence of the meaning to be given to the words and expressions used by the parties and of their expectations. Evidence, for example, of what one party knew (or should have known) of what the other expected may be sufficient to deny the first party the right to enforce the contract on any terms but those accepted or proposed by the other party: John Swan, *Canadian Contract Law* (Canada: LexisNexis, 1st Ed, 2006) ("*Canadian Contract Law*") at p 525. However, a balance has to be found between an examination of every scrap of evidence that a party may offer to prove that the agreement does not mean what it appears to mean, and a refusal to consider anything outside the four corners of the agreement. The Canadian courts find the necessary balance by considering a number of factors:

- (a) Is the transaction or the relation created by the agreement and the language of the agreement standard or common?
- (b) Is the language (or at least on a first impression) clear and are the consequences of applying the plain words reasonable?
- (c) Is the position of the party who is claiming that the agreement is not the final expression unreasonable and implausible?
- (d) To the extent that the agreement is a standard agreement governing many similar cases, is there an argument that similarly situated parties should be treated in the same way?

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exceptions). Hence, the answers to questions asking what the witness interpreted certain pre-contractual letters which deal with the price of goods to be sold or questions seeking to show that the witness behaved in a manner inconsistent with the words of a contract after the dates of the contract (to show that the contract does not mean what it says) may (depending on the governing law) be irrelevant (unless some argument based on estoppel is being mounted) and it would make little sense to waste the tribunal's time on such questions. Consequently, unless a careful scrutiny of the laws of contractual interpretation has been conducted, Counsel may wish to reconsider questions seeking to uncover a witness's interpretation of pre- or post-contractual documents or even post-contractual behaviour as a tool of contractual interpretation.

18 As mentioned above, civil law (theoretically) places a different emphasis on the relevance of evidence of contractual intention. Consequently, while counsel in a common law case should abstain from doing so, counsel in a civil law case theoretically starts with the right to ask questions about the witness's interpretation of letters or contractual documents. However, because civilian lawyers in practice adhere to the objective technique of contractual interpretation, questions about the

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- (e) Does the relation between the parties, their relative sophistication, knowledge, access to legal advice and bargaining power indicate that one party does not need protection from the other?

To the extent that these five questions can be answered in the affirmative, the party who seeks to adduce evidence of prior negotiations or other external factors will bear a heavy burden to persuade the court that these external factors are relevant: *Canadian Contract Law* at p 526. In Canada, there is no prohibition against the use of subsequent conduct to aid in interpretation of the contract. The rule with respect to subsequent conduct is that if, after considering the agreement itself, including the words used in their immediate context and in the context of the agreement as a whole, there remain two reasonable alternative interpretations, then certain additional evidence (such as subsequent conduct) may be both admitted and taken to have legal relevance if that additional evidence will help to determine which of the two reasonable alternative interpretations is the correct one: *Canadian National Railways v Canadian Pacific Ltd* [1979] 1 WWR 358 at 372.

parties' actual intentions do not generally interest civilian trained arbitrators, who tend to interpret contracts based on the actual words used and their normal meaning. Therefore, unless there is a reason to believe that both parties to a contract understood particular words in a contract differently from their plain and ordinary meaning (as in the *Haakjöringsköd* case), cross-examination of the actual intentions of the parties in agreeing to the words used in a contract are unlikely to be of great interest, even to a civilian arbitrator.

B. As a matter of practice, “forensic” questions (Questions 4, 5, 6 and 7) are not helpful and merely waste time unnecessarily

19 “Forensic” questions are questions which do not enlighten the tribunal, but are solely designed to introduce what are largely uncontroversial matters and are therefore asked either as “throat-clearing” exercises for the cross-examiner or because counsel wants to use the witness to demonstrate his own folly or lack of credibility to prejudice the tribunal or simply for dramatic effect. These types of questions will seldom be welcome by arbitral tribunals and should be avoided by counsel whether at an arbitration governed by common or civil law. The first *thing* that arbitration neophytes have to learn is that arbitrators (even common law arbitrators) both in Europe and Asia do not like fixing long evidential hearings to the same length as a court trial. This is particularly true if the arbitration is institutional rather than *ad hoc*, as institutional rules like those of the Singapore International Arbitration Centre²⁵, the International Chamber of Commerce²⁶, Badan Arbitrase Nasional Indonesia (Indonesian Arbitration Institute) and the Korean Commercial Arbitration Board²⁷ (Korea’s national arbitration institution) fix fees by reference to the value of the claim rather than by the time spent. Accordingly, a tribunal held

²⁵ Singapore International Arbitration Centre Arbitration Rules (5th Ed, 1 April 2013).

²⁶ International Chamber of Commerce Arbitration Rules (entry into force 1 January 2012).

²⁷ Korean Commercial Arbitration Board Arbitration Rules (amended 16 November 1989).

under the auspices of these rules will often be disinclined to fix long hearings because the arbitrators are not going to be paid anything more for the longer hours that they will spend. The institutions value efficiency in disposing of a case, so arbitrators are under an incentive to complete a hearing as soon as they decently can consonant with the principle of giving each party a (reasonably) full opportunity to present its case.

20 Even if parties have a large number of witnesses, the tribunal is more likely than not to adopt some form of case management system to bring both time and costs under control. The tribunal may therefore exhort parties to get together to agree the maximum time each witness will have, subject to the final discretion of the tribunal to extend time. The tribunal may even adopt the “chess clock” method and confine parties to a total amount of time and then making all parties stick to it no matter what excuses may be made.

21 Under such circumstances, counsel in such fixed-time arbitrations will need to be frugal with use of time, and will have to be very selective about the line of cross-examination he wants to adopt. In short, he needs to get to the point very quickly and there is no room in arbitration for forensic questions.

22 International arbitration does not allow a time budget for questions which are purely designed to rattle a witness without advancing the knowledge of the tribunal about the matters in issue. With regard to questions which demonstrate what is or not in a document, counsel should note that most tribunals respond better to a reasoned and structured argument from counsel on undisputed facts rather than hearing them emerge in piecemeal fashion on cross examination.

23 Consequently, such questions serve little practical purpose and should not be asked. Instead, counsel should concentrate on developing his points about what emerges from the documents in his opening or closing submissions so that facts and documents can be blended into a proper theory of the case.

24 With regard to questions for dramatic effect or questions which do not add to what is in the record or knowledge of the tribunal (as well as questions designed to make the witness concede facts in favour of the

opposing party which are apparent from the record and not denied), counsel should note that such questions are only exercises in forensic skill which do not assist the tribunal in its decision but serve to spend (if not to waste) valuable hearing time. Further, if the witness is not co-operative in answering, a disproportionate amount of time will have been lost by such techniques which in turn will destroy the value of this weapon in counsel's armoury, and simply frustrate the tribunal if one party runs out of time. While some counsel will be skillful enough to achieve their desired effect (depending on their forensic skill and the defensive ability of the witness), such questioning, is, in arbitration terms, a luxury which will generally not be tolerated and should therefore be eschewed.

25 Although the common law rule in litigation is that cross examination need not be confined to evidence-in-chief of the witness but may extend to any relevant issue in the case, courts generally allow cross-examination questions which are justified as testing the credibility of the witness, even if they do not relate to any relevant issue to be decided. However, given that in the great majority of commercial arbitrations, the credibility of a witness is not usually the key factor in determining whether or not the tribunal accepts that witness's evidence, most arbitral tribunals are unlikely to be so generous, and would be unwilling to give a roving commission to counsel to ask a series of questions about an unrelated matter simply to demonstrate that the witness is generally untruthful or unreliable. Questions attacking credibility should thus be avoided unless necessary to prove a critical element in the case.

26 Questions aimed at prejudice are closely related to questions aimed at attacking credibility and are questions which, while related to the factual narrative or background of the case, nevertheless do not bear on the legal issues of liability or quantum, but are asked solely to establish that a witness (being a party representative) has acted in a questionable manner viewed from a moral perspective but not directly bearing on the issue of liability. Many lawyers forget that the law of contract is based on strict liability. For better or worse, the law of contract is not concerned with who the "good guy" is and who the "bad guy" is, but rather who has acted in breach of the terms of the contract. Admittedly, however, the position is somewhat different in civil law where the concept of good faith is an important feature in the law of contract. Even then, good faith

is not an excuse for roving attacks on a witness's character and is only relevant under clearly defined principles where the conduct of the contracting party can be said to have breached the legal standard of good faith. In the result, aside from abstaining from questions attacking credibility save when absolutely necessary, questions which aim to should also be avoided.

C. *Legal issues are matters for submission (Question 8)*

27 Nothing pains a tribunal more than to hear a counsel trying to debate a point of law with a lay witness, *eg*, "Is it not clear that clause X means ...?" Any tribunal should (and usually will) stop counsel with the pained admonition: "Is that not a matter for counsel's submission?"

D. *Questions which take a witness through facts and documents with a view to making the witness agree with the other party's interpretation of a document or characterisation of events (rather than the actual facts themselves) are generally not worth the time (Question 9)*

28 The questions are a variant of Questions 4 to 7. They are forensic to a degree but involve a high degree of argument with the witness as counsel seeks to take an undisputed fact or document and put a spin on it which he endeavours to persuade the witness to accept. As the saying goes, "nice work if you can do it", but realistically, in the limited time available for cross-examination in international arbitration, such an exercise is likely to end in frustration as the tribunal is not going to be generous in allowing counsel extra time to persuade a witness to agree with counsel's version of interpreting or characterising facts or documents.

E. *"Yes" or "no" questions may be unfair (Question 10)*

29 A favourite technique of some cross-examining counsel is to tell a witness to "please answer 'yes' or 'no'". While this technique is justifiable to some extent in ensuring clarity in the position taken by witnesses, there are times when such an approach is unfair and when the question is

not really capable of a “yes” or “no” answer (the classic example taught in law school being “and when did you stop beating your wife?”).

30 This warning can further be extended to include questions based on a false or unproven premise. An alert opposing party (or tribunal) will usually spot the impropriety of such questions and make an objection. Some of such questions, however, inevitably fall through the cracks and can lead a witness to be confused and give an answer which will give cross-examining counsel temporary satisfaction but which will eventually have to be explained or modified when the misunderstanding of the witness is revealed.

31 Like the server in tennis, cross-examining counsel has an advantage in his interaction with a witness of being able to frame a question in the way he likes, but if he abuses that privilege and frames a question in an unfair way, he will lose the sympathy of the watching tribunal without corresponding strategic gain. These warnings apply equally whether the arbitration is conducted under common or civil law.

IV. Conclusion

32 The importance of cross-examination in international arbitration is often overrated. It is not a prerequisite of natural justice²⁸ and can be

²⁸ *University of Ceylon v Fernando* [1960] 1 WLR 223. However, it may be possible that the lack of an opportunity to cross-examine the opposing party’s witnesses or experts may amount to a denial of the right to be heard or a breach of natural justice where there is a legitimate expectation of one’s entitlement to cross-examination. In *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98, the Singapore Court of Appeal overturned the High Court’s decision to set aside an arbitral award on the ground of denial of the right to be heard, specifically the respondent’s deprivation of the opportunity to cross-examine the claimant’s expert witness. The High Court had held that on the facts, the arbitrator’s conduct and the vigorous cross-examination of the experts that had previously taken place together created an expectation that new expert evidence would not be accepted or rejected without giving the experts the opportunity to defend their view through cross-examination, and that the failure to give the

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eschewed completely or substantially if the case is primarily about interpretation of documents, or if there are no substantial disputes of fact. Common lawyers are familiar with the litigation procedure known as originating summons, where the court rules on a case without hearing oral evidence, simply on the basis of affidavit evidence alone, so it is possible to conduct an arbitration on the basis of documentary evidence alone, with no or minimal oral evidence in support.

33 Arbitrators have more often than not been disappointed by how little they have learnt from hearing the witnesses, as opposed to reading their witness statements and reviewing the relevant documents. Indeed, what arbitrators find lacking in international arbitration is the time spent on oral advocacy, where counsel explain their written submissions before the tribunal, which can then exercise a Socratic dialogue with counsel in clarifying and testing those submissions. If more time is spent on oral submissions, that would add more value to the tribunal's appreciation of the facts and issues and arguments than long hours with the witnesses. However, if we are to have oral witness evidence in an international arbitration, then counsel should bear the following precepts in mind: He should ascertain what the rules of contractual interpretation and liability are under the applicable law, and plan his cross-examination based on what is necessary to establish or deny contractual liability (as the case

respondent its right of cross-examination was a breach of natural justice causing prejudice to the respondent. The Court of Appeal disagreed with this finding of facts, holding instead that (a) there was nothing on record which showed that the respondent had requested and the arbitrator had refused to allow it to cross-examine the claimant's expert; and (b) even if the respondent had so requested and the arbitrator had refused its request, the respondent had waived its right to object on this basis by failing to raise any objection when its request was turned down: at [63]. The Court of Appeal further held that the crucial question regarding the denial of the right to be heard was whether the respondent had been given the opportunity to submit its expert witness's written opinion evidence: at [64]. The court did not decide on whether, if the respondent indeed had a legitimate expectation of a right to cross-examination, the denial of that right would amount to a breach of natural justice.

may be) under that law. Further, considering the time constraints in international arbitration, counsel should limit cross-examination to areas which are most necessary. As a rule of thumb, he should test his proposed questions by asking himself: "What use can I make of the answers to these questions in my Post Hearing Brief?" If he cannot answer his own question, then he should probably omit that question. The mantra for cross-examination should be "less is more".

Background to Essay 10

This was a presentation I made in Seoul at the Asia Pacific Regional Arbitration Group Conference in June 2009 and this is the live transcript of my oral presentation, which I have reproduced unexpurgated. It is an issue on which I hold strong views and always try and persuade counsel to adopt.

I wish to extend my thanks to Transnational Dispute Management for kindly granting me permission to republish this paper in this book.

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TRIAL BY ISSUES

Michael HWANG SC*

1 I have ten minutes, two stories to tell and five points to make.

I. First story

2 I was sole arbitrator in a construction dispute over a hotel in Vietnam where the claimant contractor was claiming for unpaid sums due under the contract, and the defence was that there were a number of defects in different parts of the project, *viz*,

- (a) the leaking roof;
- (b) the wall tiles that popped out;
- (c) the scratched window panes;
- (d) the defective fire doors;
- (e) *etc, etc*.

3 The claimant put his project manager in as his first witness, and the cross-exam started on Day one. On Day ten he was still being

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cross-examined on one defect after the other, and then we adjourned for two months to the second tranche, and his cross-exam was only completed on Day 15, after which other claimant's witnesses came to testify. And throughout this cross exam, I was only hearing one witness' version of the facts on these many factual disputes. It was not until several months after the project manager had finished his evidence that I was able to hear the respondent's chief witness, who was the architect, and he in turn was cross-examined for another ten days about the same defects but in a different order from the project manager. By then, I had forgotten most of the evidence given by the project manager and it was a nightmare trying to match the architect's evidence in the transcript to the project manager's evidence to compare the different accounts. Eventually, even the lawyers and clients found the arbitration too expensive and unmanageable, and settled.

II. Second story

4 Compare this with another case which I did more recently involving the supply and installation of a boiler for a power plant in Indonesia where again there were numerous defects alleged in the plant. The lineup of witnesses was 29 factual witnesses and ten expert witnesses. Eleven factual issues were identified as requiring oral evidence and we had allocated three weeks for the whole arbitration. The tribunal decided that we could only finish the hearing in the three weeks by adopting radical procedures. We ordered the following.

- (a) Witness statements would be divided into sections under the various issues. In other words, each witness would have to present his evidence under the relevant issue rather than telling his story chronologically and leaving it to the tribunal to work out which part was relevant to which issue.
- (b) At the hearing, evidence was to be presented by both parties sequentially under each of the agreed issues, so that claimant's evidence on each issue would be presented followed by respondent's evidence on that issue before we moved onto the next issue.
- (c) Evidence was to be given by witness conferencing of all factual witnesses relevant to a particular issue giving evidence in the same

session. Claimant's witnesses were to be jointly cross-examined and re-examined followed by respondent's witnesses also being jointly cross-examined re-examined. Expert witnesses were to be separately examined in conference but different conferencing sessions were to be held for experts of different disciplines.

5 The arrangement worked well and the hearing finished within the three weeks. Both law firms have publicly stated that they found their experience satisfactory.

III. First point

6 Ignore for this purpose the fact that evidence was taken by witness conferencing. The point I want to make here is that we in effect created a series of mini trials on each major issue. The evidence from both sides was presented sequentially issue by issue, and we could have ordered the mini trial to take place in the traditional way with claimant's witnesses coming on first for cross-exam and then followed by respondent's witnesses doing the same thing, except that they would have appeared before the tribunal in separate sessions for each issue. This made the task of the counsel much easier when they came to prepare their post hearing briefs as their submissions were made on an issue by issue basis, and all the evidence on a particular issue was together in one place as far as the transcript was concerned. So all they had to do was to read the evidence from the beginning of the relevant section in the transcript to the end of that section and then compose their submissions. Likewise, the tribunal could deliberate on the evidence issue by issue by reading all the evidence from page 1 to 100 on one issue and then the relevant section of the parties' post hearing briefs, and then make its finding on that issue. Then it would move onto the next issue and do the same thing until it had made all its findings on all the issues. So the award came out faster than it would otherwise have done.

IV. Second point

7 The only disadvantage in segregating or bunching up all the evidence by issue is that many witnesses will have to make repeat appearances and

will not be able to depart from the arbitration after giving their evidence for the first time if they have made witness statements concerning issues to be dealt with later in the hearing. But this is a small logistical inconvenience compared with the gains.

8 So my conclusion is that, where there are more than a few issues to be examined and decided, the tribunal should as far as possible separate the presentation of evidence from the stage of witness statements to the actual hearing so that all submissions and evidence are presented on an issue basis.

V. Third point

9 So this takes us back to the framing of issues which is a practice adopted by several institutions, notably the International Chamber of Commerce (“ICC”) and now the Singapore International Arbitration Centre (“SIAC”), both of which mandate or at least strongly encourage tribunals to define at a relatively early stage the relevant issues to be decided. The ICC Rules of Arbitration (“ICC Rules”) (Article 23(d)) now make the defining of issues discretionary and this may be dispensed with if the tribunal considers it inappropriate,¹ but the SIAC Rules (Article 17.4) make it mandatory and also provide that the tribunal must decide the issues so defined in the award.² Article 8.2 of the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration³ allows a tribunal to arrange testimony by particular issues. The problem is that parties do not always co-operate sensibly to make this work well, as they tend to create more issues than are necessary or helpful. Tribunals usually have to cut down the number of issues because the micro-defining of issues leads to an

¹ International Chamber of Commerce Rules of Arbitration (entry into force 1 January 2012) Art 23(d).

² This was provided for in Art 17.4 of the 2007 Singapore International Arbitration Centre (“SIAC”) Arbitration Rules (3rd Ed, 1 July 2007). The 2010 SIAC Rules (4th Ed, 1 July 2010) repealed this article and the 2013 SIAC Rules (5th Ed, 1 April 2013) continued with the repeal.

³ 29 May 2010.

unmanageably high number of issues that will fragment the evidence and create administrative and forensic confusion. So tribunals have to be strict with counsel and not allow a multiplicity of issues to be defined which delay the settling of the Terms of Reference (“TOR”) (in the case of the ICC) or the Memorandum of Issues (“MOI”) (in the case of the SIAC). One technique used to get rid of the problem is the “Goldman formula” which simply says, “The Tribunal will decide such issues as arise from the claims and counter claims of the parties.” But if we agree that trial by issues is a positive tool in the hands of the tribunal, then I would urge tribunals not to take the easy way out but to persevere with a trimming down of unnecessary issues to a manageable level for the efficient hearing of the evidence in due course.

VI. Fourth point

10 Relatively little has been written about how to define an issue for this purpose. My suggestion is this. An issue is a question which, if decided in a certain way, is dispositive either of the entire case or an important part of the case. So most jurisdictional questions or legal defences are genuine issues because, if they are decided against the claimant, it will usually result in the dismissal of the claim or a substantial part of it. For example, the lack of standing to sue (*eg*, the status of investor under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States⁴), or the lack of essential element which makes up the legal wrong (*eg*, ownership of an asset) or an overriding defence (*eg*, time bar) are all necessary issues to be addressed. Issues of fact which are dispositive are sometimes more difficult to define, but if a tribunal looks for the underlying test of dispositiveness, then it will have the correct approach for defining the issue. There may well be sub-issues within the main issues, but so long as there is room to argue a sub-issue within a main issue, the tribunal can choose not to list that sub-issue if there is argument about its relevance.

⁴ 575 UNTS 159 (18 March 1965; entry into force 14 October 1966).

VII. Fifth point

11 The other major advantage of presentation by issues is that it makes scrutiny by institutions like ICC and SIAC much easier as they do not have to trawl through the judgment to find where the tribunal has dealt with the issues raised in the TOR or the MOI. And it also reduces the chances of the award being challenged on the grounds that the tribunal had not addressed an issue raised by one party or the other.

VIII. Conclusion

12 I hope I have persuaded you that trial by issues is the way to go. Why would you not want to do so?

Background to Essay 11

This is another presentation I made at the 12th International Arbitration Day “Due Process in International Arbitration” in Dubai in February 2009 which was recorded verbatim by real time transcript reporters on the subject of witness conferencing of which I am a passionate supporter.

I wish to extend my thanks to *Transnational Dispute Management* for kindly granting me permission to republish this paper in this book.

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WITNESS CONFERENCING AND PARTY AUTONOMY*

Michael HWANG SC

1 **Yves Fortier:** Thank you very much Antonias. We started with Paris, we’ve gone to Athens, and now we go to Singapore. We will hear from Deputy Chief Justice Michael Hwang who is going to address the question as to what extent can an arbitral panel innovate in respect of evidentiary process. Michael.

2 **Michael Hwang:** My topic is witness conferencing and party autonomy. I’ve got ten minutes. I’ve got nine points.

* Transcript, afternoon panel session, “Control over Proceedings: What are the Limits of Party Autonomy?” (16 February 2009) during the 12th International Arbitration Day “Due Process in International Arbitration”: a conference presented by the International Bar Association (“IBA”) Arbitration Committee in association with Dubai International Financial Centre-London Court of International Arbitration Arbitration Centre and supported by the IBA Arab Regional Forum, Jumeirah Emirates Towers, Dubai, United Arab Emirates (15–16 February 2009).

3 The first point: what is witness conferencing? That is set out in the paper which is on your CD, so I won't go into that at length. For those of you who are not very familiar, basically witness conferencing is where you have two or more witnesses appearing together before the tribunal to give their evidence in the same session and to be examined jointly. So that's a very quick description. In the field of expert evidence, witness conferencing is quite well accepted in international arbitration. But we have moved on from there to develop this tool to encompass conferencing between witnesses of fact as well. This is described at some length in the seminal articles written by Wolfgang Peter in 2002 and 2004.¹ I'm sure he would be happy to give you copies; he's around here somewhere.

4 The second question is: when, in fact, is witnessing conferencing for witnesses of fact suitable? To sum up in one sentence: in my view, it is suitable when you have a case with many witnesses and separate and discrete issues of fact which need to be addressed separately in the award. Then I come to the \$64m question: how does witness conferencing affect party autonomy? My thesis is, first of all, it is a legal process; it complies with due process, but it impinges on parties' expectations. And so the question is: Should a tribunal impose on the parties a solution which the tribunal believes to be for the greater good of the parties but which the parties may not necessarily accept?

5 Parties traditionally expect a defined order of procedure where claimant goes first, respondent goes next and you have two watertight boxes for each side's case. Whether you are a common law lawyer or a civil lawyer, this is the expected method of proceeding. But in many cases, this is not the best way of running the case. My classic example is a case that I did in Vietnam where it was a 20-storey building and there were defects on every floor. For three or four weeks, over two stretches, I heard nothing but the claimant's case, just on 20 floors of defects. So by the time I heard the respondent's case, it was six months down the line;

¹ Wolfgang Peter, "Witness Conferencing" (2002) 18 *Arb Int'l* 47; Wolfgang Peter, "Witness Conferencing Revisited" in *Arbitral Procedure at the Dawn of the New Millenium*, Reports of the International Colloquium of CEPANI, (Brussels: Bruylant, 2005) at p 155.

I had forgotten what the claimant's case was. I thought: there must be a better way of doing this.

6 There are two ways of dealing with this kind of scenario. First, you break up the case into separate issues, bifurcation, trifurcation and you run out of how many "-furcations" there are. Then you have a series of mini trials. So you do it the traditional way with a traditional order, but you multiply it by a number of times. So the process is orderly. It is still within the parties' traditional expectations, but it is lengthy. The other way of dealing with it is to still have trial by issues, but you inject witness conferencing in by having each issue heard with all of the witnesses who need to testify on that particular issue in the same room at the same time. Each party then cross-examines any or all of the other parties' witnesses; and he can use his own witnesses to respond to the answers of the other side's witnesses immediately, instead of waiting for his witnesses to come at a much later stage and give their contradiction of the evidence, by which time, as I said, the tribunal may have forgotten what the claimant's witnesses have said.

7 I come back and answer my own question again. Does this comply with due process? The first point, there is nothing in most national arbitration codes or institutional rules which would prevent this kind of procedure. Just taking the 1985/2006 United Nations Commission of International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration² ("Model Law") as an example. If you look at Articles 18 and 19 together, the effect of Articles 18 and 19 read together is this: provided parties are treated equally and are given a full opportunity of proving their case, then two consequences follow. First, parties can agree on the procedure to be adopted; and, second, failing agreement, the tribunal can conduct the arbitration in such manner as it considers to be appropriate. If you read this together with the 1976

² UN Doc A/40/17, annex I; UN Doc A/61/17, annex I (21 June 1985; amended 7 July 2006).

UNCITRAL Arbitration Rules Article 25.4,³ it says explicitly the arbitral tribunal is free to determine the manner in which witnesses are examined. Read that together with Article 8.2 of the International Bar Association Rules on the Taking of Evidence in Commercial Arbitration⁴ (“IBA Rules of Evidence”). Article 8.2 of the IBA Rules of Evidence is a rather long rule. I’m going to skip the first part. The first part of Article 8.2 says the traditional or the conventional order is claimant first, respondent next; you have the cross-examination and re-examination in the usual way. But then it goes on to say:

The arbitral tribunal, upon request of a party, or on its own motion, may vary this order of proceeding, including the arrangement of testimony by particular issues or in such a manner that witnesses presented by different parties be questioned at the same time and in confrontation with each other. The arbitral tribunal may ask questions to a witness at any time.

So, in terms of hard and soft law, it would seem that witness conferencing is fully justified to be adopted by the tribunal.

8 Another question which sometimes people ask is: what do you lose by witness conferencing? Well, the only tangible thing that you lose in witness conferencing is the sequestration of witnesses, meaning the traditional practice where only one witness is giving evidence at one time, and all the other witnesses are then out of the room not listening to what that witness has to say. But as a matter of pure law, sequestration, as far as I can tell, is never mandatory. No national arbitration law, no institutional rule, makes the sequestration of witnesses mandatory. Where it is mentioned at all, it is usually mentioned as an optional procedure that the tribunal can adopt. Against that, if you come back to Article 18 of the Model Law, you can’t deny that even within witness conferencing each party is given full opportunity of presenting its case. All that happens is that it has to present its case at the same time. So the conclusion is that

³ GA Res 31/98, UN GAOR, 31st Sess (15 December 1976). Or Art 28.2 of the 2010 United Nations Commission of International Trade Law Arbitration Rules GA Res 65/22, UN GAOR 65th Sess (2010).

⁴ 29 May 2010.

witness conferencing is certainly a process that is not prohibited unless, of course, the parties have written into their arbitration agreement: we shall have no witness conferencing, or we shall apply, for example, particular national litigation rules, which some parties do. Some parties actually write in that the rules of procedure shall be the rules of civil procedure adopted by courts of a particular country. But absent that kind of a provision, a tribunal is free to impose, if it wants to, the witness conferencing procedure. But we're not talking about rights; we're talking about what is in the best interests of the process. My view is that it is not a good thing to impose a procedure against the will of the parties, because, in the first place, the parties need to know that this is going to work. Secondly, they, the parties, need to embrace this procedure to make it work properly. So if I want to introduce witness conferencing because it is, in my view, the best procedure for that particular case – and I'm not saying that it is universally to be adopted in every case – I go on a charm offensive. There are some people in this room who have experienced witness conferencing with me as arbitrator. I think some of them have spoken out publicly; some of them have written favourably about the results of that experience.

9 The question then is: How do I sell witness conferencing to the parties? The first step, of course, is that you remind them that this is done in expert conferencing; and most of them will have some knowledge, either directly or indirectly, that expert witnesses normally are examined together and in conference. Then you educate counsel on how fact witnesses are examined in conference. Then I give them a copy of my article.⁵ That's the sort of the primer, the basic text. Then, for further reading, I give them Wolfgang Peter's two articles. And by the time they absorb that, they are kind of ready. Then I tell them a few punchlines. Punchline one: it saves time and money. This is not always as killing an argument as you might think. There are counsel who don't think that saving time and money is the object of arbitration. But,

⁵ Michael Hwang SC, "Witness Conferencing" in *The 2008 Guide to the World's Leading Experts in Commercial Arbitration* (Jamie McKay ed) (The Legal Media Group, 2008).

nevertheless, that's usually line one in the presence of their clients anyway. Secondly: witness conferencing does not deprive counsel of any of their rights as counsel. And the final punchline is this: witness conferencing is, in fact, an enhancement of counsel's forensic tools, because it gives them an additional weapon. It gives them the benefit of using their own witnesses to rebut the testimony of the other side's witnesses at the time when the other witnesses are making assertions which require instant contradiction for maximum impact on the tribunal. That usually is what sells the process to the parties, in principle. Then, as a wrap up, maybe I will do a draft order which sets out the rules of the game, circulate it to the parties so that they can comment on it, maybe they can actually make a contribution to the rules of the process, which gives them some pride of authorship in actually having created the ground rules. Occasionally you might get some counsel who says: it's important I need this particular witness to be alone without anybody prompting him. Right. We can discuss that. We can take that as a separate issue and treat one witness differently, not necessarily even for the entire evidence given by the witness but for a particular aspect of evidence for particular confidentiality. But, at the end of the day, we can help, together, between tribunal and counsel, to craft a process which we hope will work.

10 So my conclusion is that the way to go is co-operation rather than coercion by the tribunal, both to avoid problems of challenge and, more importantly, to get the parties to willingly and enthusiastically participate in the process to ensure its success.

11 Thank you.

12 **Yves Fortier:** Thank you, Michael.

Background to Essay 12

This paper was prepared for delivery at the Asian Society of International Law Conference in Tokyo in 2010. For a while I became famous (or rather infamous) in the international arbitration world for an award I had delivered in an International Centre for Settlement of Investment Disputes (“ICSID”) arbitration *Malaysian Historical Salvors, SDN, BHD v Malaysia*, where I dismissed an investment treaty claim for want of jurisdiction because I took the view that the nature of the claimant’s interest in the transaction about which he was complaining was not an “investment” within the meaning of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”). This decision was controversial and attracted a lot of comments in the investment treaty arbitration universe, culminating in the eventual annulment of my award by an *ad hoc* committee (but by a 2:1 majority, with a spirited defence of my point of view by the minority panel member). I felt that I had to write something to address these criticisms and specifically asked Jennifer to be objective in her preparation of the first draft. In short, I asked her to tell me her own opinion on whether she agreed with my award or not before I finally decided on the approach to take in this self-critique. After completing her research, she told me that she felt that my views were correct, and we then wrote the paper together on that basis.

However, for the sake of completeness, I should mention that, when I wrote my original award, my then associate, Desmond Ang (now with the disputes team of O’Melveny & Myers in Hong Kong), who was assisting me with the case, had expressed his caveat about the correctness of my views, as did the ICSID Counsel in charge of the case. So I had been warned before finally signing off my award that there might be disagreements with my view, but an arbitrator has no choice but to decide in accordance with what he considers to be right and take the consequences of his decision.

In retrospect, I think I was simply the victim of a historical process. When I did my research for my award, all the previous cases had applied the *Salini* principles for determining the criterion of an “investment” under the ICSID Convention and I was simply following in their wake. However, at the time I published my award there was a shift in opinion in the treaty arbitration world about the validity of the *Salini* principles, and my award therefore became the focal point for this re-appraisal of the basis of the meaning of “investment”.

I wish to extend my thanks to the *Asian Journal of International Law* for kindly granting me permission to republish this paper in this book.

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DEFINITION OF “INVESTMENT” – A VOICE FROM THE EYE OF THE STORM*

Michael **HWANG** SC[†] and Jennifer **FONG** Lee Cheng[‡]

This article traces the development of the definition of “investment” under Article 25(1) of the International Centre for Settlement of Investment Disputes (“ICSID”) Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”). It proposes that the definition should act as an outer limit to the usually broad definition of “investment” (encompassing every kind of asset) in international investment agreements (“IIAs”). The article discusses the various characteristics (hallmarks) of an investment which should constitute the definition. It argues that the hallmark of “significant contribution to economic development” can be refined to reduce uncertainty while giving effect to the intent of the ICSID Contracting States by drawing a distinction between an ordinary commercial transaction and an investment. Recent IIA definitions of “investment” adopting *Salini* hallmarks show that states adopt the “every kind of asset” definition of “investment” in IIAs out of a concern that the form which the

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investment may take should not be restricted and that states do not necessarily view the *Salini* hallmarks as unwelcome.

Contents

I.	Definition of “Investment”	411
A.	The outer limit approach	416
B.	The <i>Salini</i> test	419
II.	The fate of the outer limit approach	422
A.	Why future tribunals may hold that the outer limit approach should apply.....	425
(1)	It is difficult to imagine that states intended very broad BIT definitions such as “every kind of asset” to constitute a definition of “investment” for the purposes of ICSID jurisdiction	425
(2)	The “party autonomy” reasoning should be applied with circumspection with respect to IIA definitions of investment, owing to the nature of an IIA	427
(3)	There is unlikely to be an international consensus on BIT definitions of investment	428
(4)	The definition of investment in Article 25(1) of the ICSID Convention serves a protective function	430
(5)	Article 25(4) notifications are not the appropriate tool to limit broad BIT definitions of investment.....	435
(6)	ICSID jurisprudence would benefit from a common definition of investment under Article 25(1) of the ICSID Convention.....	438
B.	Other concerns of the <i>MHS annulment</i> majority with the outer limit approach	439
III.	An interesting alternative to the <i>Salini</i> -type test: To construe the BIT definition of “investment” as having the same characteristics as the <i>Salini</i> test	443
IV.	Discussion of the hallmarks of investment	445
A.	Contribution/significant contribution to economic development.....	449
V.	Developments in treaty drafting	458
VI.	Conclusion.....	469
VII.	Postscript.....	469

I. Definition of “Investment”

1 The definition of “investment” is important to ICSID arbitrations because unless an asset or economic activity constitutes an investment

under Article 25 of the ICSID Convention,¹ it is not subject to ICSID jurisdiction. Unfortunately, the drafters of the ICSID Convention chose not to define the meaning of “investment” within the Convention, sparking off a stormy definitional debate which rages today.

2 Article 25(1) of the ICSID Convention merely states:

- (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an *investment*, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally. [emphasis added]

3 The ordinary meaning of investment is defined as “the action or process of investing. A thing worth buying because it may be profitable in future”.² “Invest” is defined as:³

v 1 put money into financial schemes, shares or property with the expectation of achieving a profit. Devote (one’s time or energy) to an undertaking with the expectation of a worthwhile result. (Invest in) informal: buy (a product) whose usefulness would repay the cost.

4 Some tribunals, such as the majority of the Annulment Committee of *Malaysian Historical Salvors, SDN, BHD v Malaysia* (“*MHS Annulment*”) in 2009⁴ and *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*

¹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into force 14 October 1966) Art 25.

² *Concise Oxford English Dictionary* (Catherine Soanes & Angus Stevenson eds) (Oxford: Oxford University Press, 11th Ed, 2008) at p 748.

³ *Concise Oxford English Dictionary* (Catherine Soanes & Angus Stevenson eds) (Oxford: Oxford University Press, 11th Ed, 2008) at p 748.

⁴ *Malaysian Historical Salvors, SDN, BHD v Malaysia* [Decision on the Application for the Annulment of the Award] ICSID Case No ARB/05/10 (16 April 2009).

("Bewater"),⁵ have rejected the outer limit approach,⁶ holding that there is no definition of "investment" in Article 25 of the ICSID Convention that is separate from the definition of "investment" in the relevant treaty or agreement from which the dispute arises (*ie*, the bilateral investment treaty ("BIT") definition).⁷

5 Other tribunals have accepted that "investment", as used in Article 25 of the ICSID Convention, has its own definition and criteria separate from the BIT definition.⁸ However, many of these tribunals

⁵ *Bewater Gauff (Tanzania) Ltd v United Republic of Tanzania* [Award] ICSID Case No ARB/05/22 (24 July 2008).

⁶ The term "outer limit" was first used by the Chairman of the *Regional Consultative Meeting of Legal Settlement of Investment Disputes* (9 July 1964) when he reported that:

The purpose of Section 1 is not to define the circumstances in which recourse to the facilities to the Center would in fact occur, but rather to indicate the *outer limits within which the Center would have jurisdiction provided the parties' consent had been attained. Beyond these outer limits no use could be made of the facilities of the Center even with such consent.* [emphasis added]

See ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* vol 2(1) (Washington, DC: ICSID, 1968) at p 566.

⁷ *Malaysian Historical Salvors, SDN, BHD v Malaysia* [Decision on the Application for the Annulment of the Award] ICSID Case No ARB/05/10 (16 April 2009); *Bewater Gauff (Tanzania) Ltd v United Republic of Tanzania* [Award] ICSID Case No ARB/05/22 (24 July 2008).

⁸ Recent decisions to this effect, issued subsequent to the original publication date of this article, include *Inmaris Perestroika Sailing Maritime Services GmbH v Ukraine* [Decision on Jurisdiction] ICSID Case No ARB08/8 (8 March 2010); *Saba Fakes v Republic of Turkey* [Award] ICSID Case No ARB/07/20 (14 July 2010); *Alpha Projekholding GmbH v Ukraine* [Award] ICSID Case No ARB/07/16 (8 November 2010); *Global Trading Resource Corp v Ukraine* [Award] ICSID Case No ARB/09/11 (1 December 2010); *RSM Production Corp v Central African Republic* [Decision on Competence and Responsibility] ICSID Case No ARB/07/02 (7 December 2010); *Quiborax SA v Plurinational State of Bolivia* [Decision on Jurisdiction]

(continued on next page)

differ as to which criteria should constitute the Article 25 definition and whether these criteria should be considered as jurisdictional or simply treated as the “typical characteristics” of an investment. This causes complications when the tribunals try to measure whether a particular transaction meets the definition of investment under Article 25 of the ICSID Convention.

6 The *MHS Annulment*⁶ is another development in the definitional debate. However, one would be wrong to think that this storm has ended with the *MHS Annulment* Committee’s decision – we are merely in the eye of the storm. Indeed, the case of *Saba Fakes v Republic of Turkey*¹⁰ (“*Saba Fakes*”), released just as this article was being published, now supersedes the *MHS Annulment* as the last word (for the time being) on the definition of investment under Article 25 of the ICSID Convention. As the awareness and popularity of ICSID arbitration grows, claimants who have entered into transactions which are not the traditional infrastructural or mining type investments will continue to test the boundaries of the definition of investment.

7 This multifaceted definition of investment reminds us that the word “investment” can be understood in many ways, even by applying its plain (dictionary) meaning. It is therefore necessary to consider the context in which the word “investment” is used in Article 25 of the ICSID Convention. It is necessary to consider previous ICSID decisions on investment because, despite such decisions having no strict binding effect, there is a

ICSID Case No ARB/06/2 (27 September 2012); *Ambiente Ufficio SpA v Argentine Republic* [Decision on Jurisdiction and Admissibility] ICSID Case No ARB/08/9 (8 February 2013).

⁹ *Malaysian Historical Salvors, SDN, BHD v Malaysia* [Decision on the Application for the Annulment of the Award] ICSID Case No ARB/05/10 (16 April 2009).

¹⁰ *Saba Fakes v Republic of Turkey* [Award] ICSID Case No ARB/07/20 (14 July 2010). Currently, the most recent case at the time of the updating of this article is *Ambiente Ufficio SpA v Argentine Republic* [Decision on Jurisdiction and Admissibility] ICSID Case No ARB/08/9 (8 February 2013).

growing trend in ICSID jurisprudence for tribunals to recognise the role of precedent in ICSID cases and even holding that:¹¹

... unless there are compelling reasons to the contrary, [an ICSID tribunal] ought to follow solutions established in a series of consistent cases that are comparable to the case at hand, subject to the specificity of the treaty under consideration and the circumstances of the case.

8 Hence, the storm surrounding the definition of "investment" in Article 25 of the ICSID Convention must be clarified and discussed. There are three aspects to this debate, namely:

- (a) whether the definition of investment in Article 25 of the ICSID Convention acts as an outer limit to any bilateral investment treaty ("BIT") definition of investment (the "outer limit" approach);
- (b) assuming that Article 25 does act as an outer limit to any BIT definition of investment, what the proper definition of the term "investment" under Article 25 of the ICSID Convention is; and
- (c) whether the test in *Salini Costruttori SpA v Kingdom of Morocco*¹² ("the *Salini* test") adequately represents such a definition with the result that failure to satisfy the *Salini* test will mean that there is no investment under Article 25 of the ICSID Convention (the "jurisdiction" approach). An alternative approach is to regard the *Salini* test only as a yardstick indicating the typical characteristics of an investment (the "typical characteristics" approach).

9 This article will focus its discussion only on (a) and (b) above as the principal author has, in writing the award in *Malaysian Historical Salvors, SDN, BHD v Malaysia* in 2007, already taken the view that (c) is academic in scope.¹³ In doing so, the authors will consider the relevant case law as how investment in Article 25 of the ICSID Convention should be

¹¹ *Saba Fakes v Republic of Turkey* [Award] ICSID Case No ARB/07/20 (14 July 2010) at [96].

¹² *Salini Costruttori SpA v Kingdom of Morocco* [Decision on Jurisdiction] ICSID Case No ARB/00/4 (23 July 2001); (2003) 42 ILM 609; (2004) 6 ICSID Rep 400.

¹³ *Malaysian Historical Salvors, SDN, BHD v Malaysia* [Award] ICSID Case No ARB/05/10 (17 May 2007).

interpreted. It is hence necessary to begin with an explanation of the outer limit approach as well as the hallmarks of an investment identified in the seminal case of *Salini*.¹⁴

A. The outer limit approach

10 The *Salini* tribunal held, following the decision of the tribunal in *Československá Obchodní Banka, AS v Slovak Republic* (“*CSOB*”),¹⁵ that it had to apply a twofold test in order to determine its jurisdiction. The twofold test involved determining:

- (a) whether the dispute arises out of an investment within the meaning of the ICSID Convention; and, if so,
- (b) whether the dispute relates to an investment as defined in the parties’ consent to ICSID arbitration, in their reference to the BIT, and the pertinent definitions contained in Article 1 of the BIT.

11 The twofold test is a manifestation of the outer limit approach. In *CSOB*, where the test was first derived, the *CSOB* tribunal explained:¹⁶

The concept of an investment as spelled out [in Article 25(1) of the ICSID Convention] is objective in nature in that the parties may agree on a more precise or restrictive definition of their acceptance of the Centre’s jurisdiction but they may not choose to submit disputes to the Centre which are not related to an investment.

12 In other words, an agreement of the parties describing their transaction as an investment was not conclusive in resolving the question

¹⁴ *Salini Costruttori SpA v Kingdom of Morocco* [Decision on Jurisdiction] ICSID Case No ARB/00/4 (23 July 2001); (2003) 42 ILM 609; [2004] 6 ICSID Rep 400.

¹⁵ *Československá Obchodní Banka, AS v Slovak Republic* [Decision on Objections to Jurisdiction] ICSID Case No ARB 97/4 (24 May 1999); (1999) 14 ICSID Rev-FILJ 251.

¹⁶ *Československá Obchodní Banka, AS v Slovak Republic* [Decision on Objections to Jurisdiction] ICSID Case No ARB 97/4 (24 May 1999); (1999) 14 ICSID Rev-FILJ 251 at para 68.

whether the dispute involves an investment under Article 25(1) of the ICSID Convention.

13 Some cases, such as *Phoenix Action Ltd v Czech Republic* ("*Phoenix Action*"),¹⁷ adopt the outer limit approach on the basis that a bilateral agreement between an investor and a State cannot contradict the definition of "investment" in the ICSID Convention, a multilateral treaty. As long as it fits within the ICSID notion, the BIT definition is acceptable; it is not if it falls outside such a definition.¹⁸ For example, if a BIT provides that ICSID arbitration is available for sales contracts which do

¹⁷ *Phoenix Action Ltd v Czech Republic* [Award] ICSID Case No ARB/06/5 (15 April 2009). See also the dissenting opinion of Professor Abi-Saab in *Abaclat v Argentine Republic* [Decision on Jurisdiction and Admissibility, Dissenting Opinion (Professor Georges Abi-Saab)] ICSID Case No ARB/07/5 (31 October 2011) at [46].

¹⁸ Other cases which adopt the outer limit approach, such as *Inmaris Perestroika Sailing Maritime Services GmbH v Ukraine* [Decision on Jurisdiction] ICSID Case No ARB08/8 (8 March 2010) ("*Inmaris*") and *Ambiente Ufficio SpA v Argentine Republic* [Decision on Jurisdiction and Admissibility] ICSID Case No ARB/08/9 (8 February 2013) have held that an explicit definition of "investment" in the relevant bilateral investment treaty ("BIT"), combined with a *general* authorisation in the BIT itself for the investor to resort to International Centre for Settlement of Investment Disputes ("ICSID") arbitration, should be given great weight in deciding whether or not the transaction in question is an investment for the purposes of Art 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into force 14 October 1966) ("ICSID Convention"), but that the *Salini* test may be useful as "non-binding and non-exclusive" guidelines in identifying "a transaction which would not normally be characterized as an investment under any reasonable definition": see *Inmaris* at [131].

David Williams QC and Simon Foote support this particular version of the outer limit approach as being consistent with the historical context of the definition of "investment" in Art 25(1) of the ICSID Convention: see David Williams QC & Simon Foote, "Recent Developments in the Approach to Identifying an 'Investment' Pursuant to Article 25(1) of the ICSID Convention" in *Evolution in Investment Treaty Law and Arbitration* (Chester Brown & Kate Miles eds) (Cambridge University Press, 2012) at p 64.

not imply any investment, such a provision cannot be enforced by an ICSID tribunal.

14 Other tribunals, such as those in *CSOB* and *RSM Production Corp v Grenada* (“*RSM v Grenada*”),¹⁹ take the approach that an express acceptance and *specific* consent to ICSID jurisdiction (such as an ICSID arbitration clause in a direct contract between investor and the State) creates a strong presumption that parties considered their transaction to be an investment within the meaning of the ICSID Convention. *RSM v Grenada* goes further to qualify that:²⁰

... only where the economics of the disputed transaction are clearly lacking one or more of the recognized characteristics of an investment should an ICSID tribunal decline to enforce the parties' will and find that it has no jurisdiction; other than that, the true abuse of power would be to defeat their expectations.

¹⁹ *RSM Production Corp v Grenada* [Award] ICSID Case No ARB/05/14 (13 March 2009). See also *RSM Production Corp v Central African Republic* [Decision on Competence and Responsibility] ICSID Case No ARB/07/02 (7 December 2010) at [47] and [48].

²⁰ *RSM Production Corp v Grenada* [Award] ICSID Case No ARB/05/14 (13 March 2009) at [238]. See also *RSM Production Corp v Central African Republic* [Decision on Competence and Responsibility] ICSID Case No ARB/07/02 (7 December 2010) at [47]–[48]:

This presumption, however, is not irrefutable and can be overturned. One has to establish the distinction between, on the one hand, consent to arbitration, and on the other hand, the objective existence of an investment. The existence of consent does not dispense with the objective requirement of an 'investment' since the parties are not free to consider as an investment an economic transaction which is not an investment. Numerous ICSID tribunals have come to this conclusion before, amongst which the tribunal in the *RSM v Grenada* case which involved the same investor as in the present case.

...

It falls on the tribunal to determine that this transaction does in fact have the characteristics of an 'investment'.

[a translation of the French decision]

[emphasis added]

In other words, under the approach in *RSM v Grenada*,²¹ a broad BIT definition would not be taken to trump the definition of "investment" under Article 25 of the ICSID Convention. However, a *specific* consent or agreement between parties to refer disputes arising out of a particular agreement to ICSID arbitration can create a presumption that the definition of "investment" under Article 25 of the ICSID Convention has been fulfilled, even though not all of the recognised characteristics of an investment have been satisfied on the facts. The authors find that this approach strikes the right balance between flexibility and the legitimate expectations of the ICSID Contracting States.

B. The Salini test

15 The *Salini* test stands for two propositions: first, "investment" in Article 25 of the ICSID Convention has an intrinsic definition of its own; and second, this definition holds four characteristics of an investment within the meaning of the ICSID Convention. The *Salini* tribunal famously identified these four characteristics (hallmarks) as:²²

- (a) contribution;
- (b) a certain duration of performance of the contract;
- (c) a participation in the risks of the transaction; and
- (d) contribution to the economic development of the host State of the investment (derived from the ICSID Convention's preamble).

²¹ See also the approach of *RSM Production Corp v Central African Republic* [Decision on Competence and Responsibility] ICSID Case No ARB/07/02 (7 December 2010).

²² *Salini Costruttori SpA v Kingdom of Morocco* [Decision on Jurisdiction] ICSID Case No ARB/00/4 (23 July 2001); (2003) 42 ILM 609; (2004) 6 ICSID Rep 400 at [52].

16 The *Salini* tribunal considered that these four hallmarks are interdependent, such that one may depend on the other and that the various hallmarks should be assessed globally.²³

17 The requirement of “regularity of profit and return” was not mentioned by the *Salini* tribunal although it had been mentioned in *Fedax NV v Republic of Venezuela* (“*Fedax*”).²⁴ However, by the time the award in *Joy Mining Machinery Ltd v Arab Republic of Egypt* (“*Joy Mining*”)²⁵ was issued, regularity of profit and return was included as a fifth hallmark in the definition of “investment”, although this requirement was not popularly adopted by later tribunals. In addition, the case of *Phoenix Action*²⁶ recently added two further requirements.²⁷ It remains to be seen whether the two further *Phoenix Action* requirements would be followed in future ICSID awards. Currently, the hallmarks of an investment identified by the ICSID jurisprudence appear to be:

- (a) a certain duration of performance;
- (b) assumption of risks by both sides;

²³ *Salini Costruttori SpA v Kingdom of Morocco* [Decision on Jurisdiction] ICSID Case No ARB/00/4 (23 July 2001); 42 ILM 609 (2003); [2004] 6 ICSID Rep 400 at [52].

²⁴ *Fedax NV v Republic of Venezuela* [Decision on Objections to Jurisdiction] ICSID Case No ARB/96/3 (11 July 1997); (1998) 37 ILM 1378; (2002) 5 ICSID Rep 186.

²⁵ *Joy Mining Machinery Ltd v Arab Republic of Egypt* [Award] ICSID Case No ARB/03/11 (6 August 2004).

²⁶ *Phoenix Action Ltd v Czech Republic* [Award] ICSID Case No ARB/06/5 (15 April 2009).

²⁷ These requirements were adopted in the later case of *RSM Production Corp v Central African Republic* [Decision on Competence and Responsibility] ICSID Case No ARB/07/02 (7 December 2010) but subsequently rejected in *Quiborax SA v Plurinational State of Bolivia* [Decision on Jurisdiction] ICSID Case No ARB/06/2 (27 September 2012).

- (c) a substantial commitment or contribution²⁸ which should be looked at not only in financial terms but also in terms of know-how, equipment, personnel and services;²⁹
- (d) contribution or significance to the (economic) development of the host State;³⁰
- (e) regularity of profit and return (added to the original *Salini* test by *Joy Mining*);
- (f) investment made in good faith (added by *Phoenix Action*);³¹ and
- (g) investment made in accordance with the law (added by *Phoenix Action*).³²

18 Of the hallmarks listed above, the first three are commonly accepted by ICSID tribunals which agree in principle with the *Salini* twofold test.

²⁸ In this article, the word "commitment" (the wording originally adopted by the tribunal in *Fedax NV v Republic of Venezuela* [Decision on Objections to Jurisdiction] ICSID Case No ARB/96/3 (11 July 1997); 37 ILM 1378 (1998); (2002) 5 ICSID Rep 186) is used to describe this hallmark to avoid confusion with contribution to the host State's development.

²⁹ Christoph Schreuer, *The ICSID Convention: A Commentary: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Cambridge: Cambridge University Press, 2nd Ed, 2009) at p 130, para 161.

³⁰ *Patrick Mitchell v Democratic Republic of the Congo* [Award] ICSID Case No ARB/99/7 (9 February 2004), cf *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan* [Award] ICSID Case No ARB/03/29 (27 August 2009) and *Alpha Projekholding GmbH v Ukraine* [Award] ICSID Case No ARB/07/16 (8 November 2010) at [312].

³¹ This requirement was adopted by *RSM Production Corp v Central African Republic* [Decision on Competence and Responsibility] ICSID Case No ARB/07/02 (7 December 2010) but rejected by *Quiborax SA v Plurinational State of Bolivia* [Decision on Jurisdiction] ICSID Case No ARB/06/2 (27 September 2012).

³² This requirement was adopted by *RSM Production Corp v Central African Republic* [Decision on Competence and Responsibility] ICSID Case No ARB/07/02 (7 December 2010) but rejected by *Quiborax SA v Plurinational State of Bolivia* [Decision on Jurisdiction] ICSID Case No ARB/06/2 (27 September 2012).

There is less agreement with respect to the remaining hallmarks, especially with the hallmark of contribution or significance to economic development.

19 Most tribunals³³ which adopt the outer limit approach and the *Salini* test recognise the need to distinguish investments from ordinary sales contracts³⁴ and the prevalent problem of BITs and IIAs defining “investment” so broadly that even ordinary sales and service contracts could qualify as an investment.

II. The fate of the outer limit approach

20 The majority decision of the *MHS Annulment* stated that the definition of “investment” for the purposes of ICSID arbitration must yield to the definition of “investment” in any particular BIT. This is similar to the approach adopted by the tribunal in *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* (“*SGS*”),³⁵ as well as a line of other cases above. This creates the immediate expansion of the claims available for ICSID arbitration.

³³ *Fedax NV v Republic of Venezuela* [Decision on Objections to Jurisdiction] ICSID Case No ARB/96/3 (11 July 1997); 37 ILM 1378 (1998); (2002) 5 ICSID Rep 186; *Československá Obchodní Banka, AS v Slovak Republic* [Decision on Objections to Jurisdiction] ICSID Case No ARB 97/4 (24 May 1999); (1999) 14 ICSID Rev-FILJ 251; *Phoenix Action Ltd v Czech Republic* [Award] ICSID Case No ARB/06/5 (15 April 2009); *Joy Mining Machinery Ltd v Arab Republic of Egypt* [Award] ICSID Case No ARB/03/11 (6 August 2004).

³⁴ See, eg. *Phoenix Action Ltd v Czech Republic* [Award] ICSID Case No ARB/06/5 (15 April 2009); *Global Trading Resource Corp v Ukraine* [Award] ICSID Case No ARB/09/11 (1 December 2010) at [55] and [56].

³⁵ *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* [Decision on Objections to Jurisdiction] ICSID Case No ARB/01/13 (6 August 2003); 18 ICSID Rev-FILJ 301; (2003) 42 ILM 1290; (2005) 8 ICSID Rep 406.

21 According to the *MHS Annulment*, the BIT is the:³⁶

58 ... medium through which the Contracting States have given their consent to the exercise of jurisdiction of ICSID.

...

71 ... By terms of their consent, they could define jurisdiction under the Convention. ...

...

73 ... some 2,800 bilateral, and three important multilateral, treaties have been concluded, which characteristically define investment in broad, inclusive terms ... It is those bilateral and multilateral treaties which today are the engine of ICSID's effective jurisdiction. To ignore and depreciate the importance of the jurisdiction they bestow upon ICSID, and rather to embroider upon questionable interpretations of the term 'investment' as found as Article 25(1) of the Convention, risks crippling the institution.

[emphasis added]

22 In contrast, a dissenting member of the *MHS Annulment* Committee, Judge Mohamed Shahabuddeen, was of the view that the word "investment" in Article 25(1) of the ICSID Convention had to be construed in order to place an outer limit to an ICSID investment beyond which party agreement to what constitutes an investment would be ineffectual to create an ICSID investment. He drew a distinction between the contents of jurisdiction and the limits within which those contents exist.

23 The dissenting opinion in the *MHS Annulment* represented a significant and irreconcilable difference in principle between the tribunal

³⁶ *Malaysian Historical Salvors, SDN, BHD v Malaysia* [Decision on the Application for the Annulment of the Award] ICSID Case No ARB/05/10 (16 April 2009) at [58], [71] and [73]. See also, *eg, Philippe Gruslin v Malaysia* [Award] ICSID Case No ARB/99/3 (27 November 2000), which states at [13.6] that: [Article 25(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into force 14 October 1966)] does not operate to define the particular investment. That is a matter to be determined by the terms of the IGA as the document relied upon as constituting the consent.

members. Indeed, the debate over the outer limit approach in the *MHS Annulment* was, as Judge Shahabuddeen described in his dissent, the result of “a titanic struggle between ideas, and correspondingly between capital exporting countries and capital importing ones”.³⁷ He observed:³⁸

A reasonable inference is that Contracting States [to the ICSID Convention] did not agree that these burdens on them would apply to benefit transactions which did not promote the economic development of the host State. It is difficult to see why a purely commercial entity, intended only for the enrichment of its owners and not connected with the economic development of the host State, is entitled to bring before ICSID a dispute concerning an investment in the host State. Schreuer notes that ‘it was always clear that ordinary commercial transactions’ would not be covered by the Centre’s jurisdiction. It is pedantic to spend time on the meaning of ‘ordinary commercial transactions’.

24 The authors agree with Judge Shahabuddeen and disagree with the *MHS Annulment* majority decision that the word “investment” in Article 25 of the ICSID Convention has no meaning independent of the BIT definition of investment because many BITs contain an overbroad definition of “investment” that would capture transactions which the drafters of the ICSID Convention have arguably never contemplated would constitute an investment under the ICSID Convention.

25 A salvage award like the one in *MHS*, a shell company like the one in *Phoenix Action* buying shareholdings for the purpose of bringing an ICSID arbitration, and commercial bank guarantees like the ones in *Joy Mining* are clearly not the kind of investments which states had intended to be at the heart of any ICSID arbitration. Even if ultimately dismissed, defending such claims would be a drain on state resources. Without Article 25(1) as a device to control access to ICSID arbitration, using the BIT definition

³⁷ *Malaysian Historical Salvors, SDN, BHD v Malaysia* [Dissenting Opinion (attached to the Decision on the Application for Annulment) (Judge Mohamed Shahabuddeen)] ICSID Case No ARB/05/10 (16 April 2009) at [62].

³⁸ *Malaysian Historical Salvors, SDN, BHD v Malaysia* [Dissenting Opinion (attached to the Decision on the Application for Annulment) (Judge Mohamed Shahabuddeen)] ICSID Case No ARB/05/10 (16 April 2009) at [21].

alone opens a possible floodgate of arbitration claims against the State because most BIT definitions of “investment” are broad to the point of being unhelpful. For example, Article 1(a) of the UK–Malaysia BIT defines “investment” as “every kind of asset and in particular, though not exclusively, includes ... (iii) claims to money or to any performance under contract, having a financial value”.³⁹

26 Although there are differing views as the definition of “investment” under Article 25(1) of the ICSID Convention, the hallmarks are capable of providing a common platform for discussion and coherent development by all ICSID tribunals, unlike the BIT definitions of “investment”, which may differ from case to case.

27 As an update, the most recent decision of *Saba Fakes*⁴⁰ also adopts the outer limit approach.

A. Why future tribunals may hold that the outer limit approach should apply

(1) *It is difficult to imagine that states intended very broad BIT definitions such as “every kind of asset” to constitute a definition of “investment” for the purposes of ICSID jurisdiction*

28 As Christoph Schreuer observes:⁴¹

³⁹ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia for the Promotion and Protection of Investments (TS No 16) (21 May 1981; entry into force 21 October 1988) Art 1(a).

⁴⁰ *Saba Fakes v Republic of Turkey* [Award] ICSID Case No ARB/07/20 (14 July 2010). Note, however, that the most recent case at the time of the updating of this article is *Ambiente Ufficio SpA v Argentine Republic* [Decision on Jurisdiction and Admissibility] ICSID Case No ARB/08/9 (8 February 2013).

⁴¹ Christoph Schreuer, *The ICSID Convention: A Commentary: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Cambridge: Cambridge University Press, 2nd Ed, 2009) at p 129.

[T]he BIT clause providing for ICSID jurisdiction is drafted in general terms referring to future disputes ...

Almost all BITs contain definitions of the term investment. In modern BITs, these have very similar features, which may be described in generalized way. They are introduced by a broad general description followed by a *non-exhaustive* list of typical rights. The general description frequently refers to “every kind of asset”. The list of typical rights usually includes:

- Traditional property rights;
- Participation in companies;
- Intellectual and industrial property rights;
- Concession or similar rights.

[emphasis added]

29 Model BITs from the UK, Germany, France and the Netherlands contain definitions similar to the one described by Schreuer in the above paragraph.⁴² The UK–Malaysia BIT in the *MHS Annulment* case also defined “investment” as “every kind of asset” with a similar list of typical rights as Schreuer noted.⁴³ The *MHS Annulment* found that a salvage contract was:⁴⁴

... a claim to money and to performance under a contract having financial value; the contract involves intellectual property rights; and the right granted to salvage may be treated as a business concession conferred under contract.

30 On a literal wording of a typical BIT which allows for investment disputes to be referred to ICSID arbitration, it would seem that (using the

⁴² Campbell McLachlan, Laurence Shore, & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford/New York: Oxford University Press, 2007) at p 171.

⁴³ Christoph Schreuer, *The ICSID Convention: A Commentary: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Cambridge: Cambridge University Press, 2nd Ed, 2009).

⁴⁴ *Malaysian Historical Salvors, SDN, BHD v Malaysia* [Decision on the Application for the Annulment of the Award] ICSID Case No ARB/05/10 (16 April 2009) at [60].

MHS Annulment approach) nearly any dispute involving any kind of asset would qualify for ICSID arbitration as long as the definition of "investor" is fulfilled.

31 For example, the US–Congo BIT in *Patrick Mitchell v Democratic Republic of the Congo* ("*Patrick Mitchell*")⁴⁵ defined "investment" as "every kind of investment".⁴⁶ This inherent circularity renders the definition virtually useless. Similarly, since the common BIT definition (every kind of asset) usually includes claims to money having a financial value, they could arguably include every conceivable contractual claim. It is noteworthy that the tribunal in *Joy Mining* could only say that a bank guarantee was "different" from a claim in money (comparing it to promissory notes) and ultimately referred to Article 25 of the ICSID Convention because the BIT definition of "investment" was too broad to be helpful. In situations where the BIT definition is all-encompassing, it is difficult to imagine that states had, by signing the ICSID Convention, intended to open themselves up to ICSID arbitration on disputes relating to every kind of asset or every kind of investment.

(2) *The "party autonomy" reasoning should be applied with circumspection with respect to IIA definitions of investment, owing to the nature of an IIA*

32 The approach taken in *MHS Annulment* is similar to the party autonomy principle in civil law jurisdictions with respect to contract law.

33 However, an IIA differs from a regular contract. An IIA is primarily an agreement between two or more Contracting States. When an IIA is negotiated and signed, states have every interest in ensuring that the definition of "investment" is as wide as possible in order to ensure that

⁴⁵ *Patrick Mitchell v Democratic Republic of the Congo* [Award] ICSID Case No ARB/99/7 (9 February 2004).

⁴⁶ Treaty between the Government of the United States of America and the Government of the People's Republic of the Congo Concerning the Reciprocal Encouragement and Protection of Investment (Treaty Doc 102-1) (12 February 1990; entry into force 13 August 1994) Art 1(b).

the treaty obligation owed to the other State is to protect all investments emanating from the other states, *a fortiori*, when the term “investment” is defined for the purposes of a multilateral treaty. The consent to investor-state arbitration then makes present and future investors “third-party beneficiaries” to the obligation undertaken by the State and is usually contained in a single separate clause, while the term “investment” permeates all parts of the treaty.

34 In addition, countries increasingly are negotiating broad IIAs, such as free-trade agreements (“FTAs”) and economic co-operation agreements that cover a far wider scope of issues than a traditional BIT. While states intend the definition of “investment” to be all-encompassing with respect to defining their treaty obligations to other states, it is reasonable to presume that their primary concern in adopting the broadest possible definition of “investment” would be to promote freedom of trade, and it is even clearer that they may not necessarily have intended such a definition of “investment” to grant wholesale access to ICSID arbitration.

(3) *There is unlikely to be an international consensus on BIT definitions of investment*

35 In *Biwater*,⁴⁷ the tribunal had raised the possibility that there might be an “international consensus” to be found in the fact that substantial numbers of BITs express the definition of “investment” more broadly than the *Salini* test. The majority in *MHS Annulment* seemed to agree, as they had quoted the relevant passage in *Biwater* to that effect.⁴⁸

36 However, as pointed out by one commentator:⁴⁹

⁴⁷ *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* [Award] ICSID Case No ARB/05/22 (24 July 2008).

⁴⁸ *Malaysian Historical Salvors, SDN, BHD v Malaysia* [Decision on the Application for the Annulment of the Award] ICSID Case No ARB/05/10 (16 April 2009) at [79].

⁴⁹ Farouk Yala, “The Notion of ‘Investment’ in ICSID Case Law: A Drifting Jurisdiction Requirement?” (2005) 22 J Int Arb 105 at 123. However, it has been noted that:

(continued on next page)

... the mere reproduction of similar definitions in various international treaties, be they bilateral or multilateral, is insufficient to establish a kind of 'customary definition' of the term.

37 One of the requirements for the establishment of customary international law is the evidence of state practice. As will be seen below, states themselves have argued in various ICSID arbitrations against the applicability of such broad BIT definitions and in support of an autonomous definition of "investment" under the ICSID Convention (*eg*, Morocco in *Salini*, Grenada in *RSM v Grenada*, Malaysia in *MHS*, Turkey in *PSEG Global Inc v Republic of Turkey* ("PSEG"),⁵⁰ Bangladesh in *Saipem SpA v People's Republic of Bangladesh*,⁵¹ Pakistan in *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan* ("Bayindir")⁵² and Egypt in *Jan de Nul NV v Arab Republic of Egypt*⁵³).⁵⁴ Moreover, BIT

... academic commentary and arbitral jurisprudence ... have more recently looked to the understanding of the term in the broad treaty practice of states. The more treaties were concluded based on the same (or similar) definition by an increasing number of states, the more natural it became to rely on this contemporary legal practice ... This view is supported by a careful review of the *travaux préparatoires* which has established that the ICSID negotiations did not base their approach on any particular traditional (economic or legal) etymology ... so as to leave room for an understanding by the parties. ... what was to determine the content of the term 'investment' was the manner in which the states and the parties to a dispute understood the concept.

See Christoph Schreuer & Rudolf Dolzer, *Principles of International Investment Law* (Oxford University Press, 2nd Ed, 2013) at pp 65–66.

⁵⁰ *PSEG Global Inc v Republic of Turkey* [Award] ICSID Case No ARB/02/5 (19 January 2007).

⁵¹ *Saipem SpA v People's Republic of Bangladesh* [Award] ICSID Case No ARB/05/7 (30 June 2009).

⁵² *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan* [Award] ICSID Case No ARB/03/29 (27 August 2009).

⁵³ *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt* [Decision on Jurisdiction] ICSID Case No ARB/04/13 (16 June 2006).

⁵⁴ Other examples that have emerged after the original date of publication of this article include Ukraine in *Inmaris Perestroika Sailing Maritime Services GmbH v Ukraine* [Decision on Jurisdiction] ICSID Case No ARB08/8

(continued on next page)

definitions of “investment” have been evolving in various ways in response to the *Salini* test.⁵⁵ Accordingly, there is no consistent state practice which would support a finding of such an international consensus.⁵⁶

(4) *The definition of investment in Article 25(1) of the ICSID Convention serves a protective function*

38 Although it is possible to see Article 25 of the ICSID Convention as a “specification of the concept of investment under the BIT” (as suggested by the *Bayindir* tribunal),⁵⁷ it would be conceptually better to think of Article 25 as an independent requirement which is part of the State’s consent to the ICSID Convention. As stated above, the definition of “investment” in an IIA may be pertinent to aspects of the IIA other than the consent to ICSID arbitration. Moreover, Article 25 is more than a specification of the concept of investment of the BIT as it arguably serves a protective function.

39 The Report of the International Bank for Reconstruction and Development (“IBRD”) Executive Directors stated:⁵⁸

(8 March 2010), *Alpha Projektholding GmbH v Ukraine* [Award] ICSID Case No ARB/07/16 (8 November 2010) and *GEA Group AG v Ukraine* [Award] ICSID Case No ARB/08/16 (31 March 2011).

⁵⁵ As will be illustrated in paras 105–121 below.

⁵⁶ The tribunal in *Ambiente Ufficio SpA v Argentine Republic* [Decision on Jurisdiction and Admissibility] ICSID Case No ARB/08/9 (8 February 2013) (“*Ambiente*”) has also noted that it is hard to identify a common pattern given the existence of both wide and restrictive definitions of the term “investment” in BITs and national investment legislation: see *Ambiente* at [464].

⁵⁷ *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan* [Award] ICSID Case No ARB/03/29 (27 August 2009) at [122].

⁵⁸ International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (18 March 1965) at paras 23, 25 and 27. See also the summary of the tribunal in *Ambiente Ufficio SpA v Argentine Republic* [Decision on Jurisdiction and Admissibility]

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23. Consent of the parties is the cornerstone of the jurisdiction of the Centre. ...

...

25. While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, *consent alone will not suffice to bring a dispute within its jurisdiction*. In keeping with the purpose of the Convention, the jurisdiction of the Centre is *further limited* by reference to the nature of the dispute and the parties thereto.

...

27. *No attempt⁵⁹ was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).*

[emphasis added]

40 The second paragraph of the quotation above was relied upon by both the *Biwater* tribunal and the *MHS Annulment* majority. It links the definition of "investment" with the concept of consent to ICSID jurisdiction and reminds us that, for the purposes of the ICSID

ICSID Case No ARB/08/9 (8 February 2013) of the background of Art 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into force 14 October 1966) at [453], which ultimately noted that the term "investment" in Art 25(1) is:

... the product of a liberal understanding of the concept of 'investment', *combined with possible restrictions to the consent to arbitration as provided by the host State ... [which] may be effected by the interplay of pertinent declarations on the parts of the States involved, including (i) notifications under Art 25(4) and, in particular, definitions of investment as contained in (ii) national investment legislations as well as (iii) in the applicable BITs.* [emphasis added]

⁵⁹ As observed in Christoph Schreuer, *The ICSID Convention: A Commentary: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Cambridge: Cambridge University Press, 2nd Ed, 2009) at p 116, para 119, this was historically incorrect. Attempts were made to define "investment" but none were successful.

Convention, the definition of “investment” in Article 25 specifically concerns access to ICSID arbitration. The statement that the jurisdiction of the Centre is “further limited” by reference to the nature of the dispute, the express reference to the word “investment” in Article 25, and the suggestion that the mechanism in Article 25(4) could be used by states to shape the definition of “investment” in Article 25 all point towards the elements of Article 25 (including the word “investment”) being used as a safeguard.

41 Compared to the BIT definition of “investment”, which was usually formulated in the general context of encouraging trade relations, Article 25 is more specific to the context of consent to ICSID arbitration. It is unlikely that the ICSID Contracting States intended a general definition of “investment” in a BIT to equate to consent to ICSID arbitration without the further consideration of the definition of “investment” in Article 25, which (together with the other elements of Article 25) more specifically represented the outer limit of the ICSID Contracting States’ consent to arbitration under the ICSID regime.

42 One should note the comments of Dr Aron Broches, General Counsel of the World Bank, who chaired the consultative meetings at which the 15 October 1963 preliminary draft of the ICISD Convention was also discussed, set out below:⁶⁰

⁶⁰ Aron Broches, *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (Dordrecht/Boston: Martinus Nijhoff Publishers, 1996) at 208. These comments were adopted by Christoph Schreuer & Rudolf Dolzer, *Principles of International Investment Law* (Oxford University Press, 2nd Ed, 2013) at pp 75–76:

The negotiating history of the ICSID Convention speaks in favour of a party-defined approach. ...

Practice illustrates that issues other than the distinction of trade may arise in the definition of investment: for instance as regards a bank guarantee, articles bought by a foreign tourist, land acquired by way of inheritance, or the building of a church by a foreign organization or other matters. For such issues, the *Salini* criteria understood as benchmarks may indicate the proper solution. *At the same time, the party-based approach*

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I believe that [giving up the effort to devise a definition of investment] was a wise decision, fully consonant with the consensual nature of the Convention, which leaves a large measure of discretion to the parties. *It goes without saying, however ... that this discretion is not unlimited and cannot be exercised to the point of being clearly inconsistent with the purposes of the Convention.*

[emphasis added]

In short, the consent of the parties, subject to consistency with the purposes of the ICSID Convention, is the predominant basis of ICSID jurisdiction. If one accepts that the definition of "investment" in Article 25 is linked to consent to ICSID jurisdiction, it would become easier to explain why states can contractually agree that a specific transaction is an investment even if it is outside the scope of a BIT or does not satisfy the hallmarks (cumulatively or otherwise) which constitute the Article 25 definition, *eg*, the *RSM v Grenada* case.⁶¹ Some tribunals have taken the view that Article 25 is absolute because the ICSID Convention is a multilateral treaty, whose terms cannot be changed by bilateral agreement. This might be too rigid an approach.

43 The outer limit represented by Article 25(1) exists solely for the benefit of the Contracting States in defining their consent to jurisdiction, and it is submitted that a State can waive such an outer limit by specifically consenting to submit a particular dispute with a known investor to ICSID arbitration or by specifically stating that a particular transaction

may be limited in such cases in light of the 'nature of an investment', in line with the travaux of Article 25 of the ICSID Convention. ...

Inasmuch as the will of the parties will properly be considered as the primary guidepost, deference to this will is appropriate and the 'nature of an investment' will operate as a corrective only in cases of a manifest departure from the ordinary understanding of 'investment' by the parties.

[emphasis added]

See also Andrés Rigo Sureda, *Investment Treaty Arbitration: Judging under Uncertainty* (Cambridge; New York: Cambridge University Press, 2012) at p 57.

⁶¹ *RSM Production Corp v Grenada* [Award] ICSID Case No ARB/05/14 (13 March 2009).

will be considered an investment. This would justify why the *Joy Mining* tribunal alluded to an exception to the requirements of Article 25 if there was an “arbitration clause”, namely, an ICSID arbitration clause between the parties, as opposed to a general consent to an unknown class of investors in a BIT.

44 However, the authors submit that words such as “every kind of asset” are too broad to be construed as the parties’ consent to ICSID jurisdiction in a situation where the investment is inconsistent with the purposes of the Convention. There should be a stronger or more expressly worded indication sufficient to amount to a waiver of the Article 25(1) definition of “investment” in order for the BIT definition of consent to prevail in a case where the investment does not satisfy the definition of “investment” under the ICSID Convention.

45 Moreover, apart from the 72 BITs which were concluded before the ICSID Convention was drafted, most were signed after the ICSID Convention had come into existence in 1966, and states might have assumed that Article 25(1) acting as an outer limit to the definition of “investment” would be part of their consent to ICSID arbitration.

46 The *MHS Annulment* majority was concerned with respecting the intention of Contracting States in their BITs. However, states themselves have not violently objected to the concept that “investment” pursuant to Article 25 of the ICSID Convention has a definition independent of the BIT definition as well as the concept that the subject matter of the dispute should satisfy some basic criteria before it can be called an investment.

47 It has been nine years since the decision of the tribunal in *Salini*⁶² endorsed the concept of the “hallmarks” of an investment in 2001. In this period, various state respondents (*eg*, Malaysia in *MHS Annulment*,⁶³

⁶² *Salini Costruttori SpA v Kingdom of Morocco* [Decision on Jurisdiction] ICSID Case No ARB/00/4 (23 July 2001); (2003) 42 ILM 609; (2004) 6 ICSID Rep 400.

⁶³ *Malaysian Historical Salvors, SDN, BHD v Malaysia* [Decision on the Application for the Annulment of the Award] ICSID Case No ARB/05/10 (16 April 2009).

Tanzania in *Biwater*,⁶⁴ the Czech Republic in *Phoenix Action*,⁶⁵ the Slovak Republic in *CSOB*⁶⁶ and Venezuela in *Fedax*⁶⁷⁶⁸ have adopted the position that "investment" within the meaning of Article 25(1) of the ICSID Convention can be different from the BIT definition. This is the clearest illustration that Article 25(1) was intended by ICSID Contracting States to serve a protective function in their favour.

(5) *Article 25(4) notifications are not the appropriate tool to limit broad BIT definitions of investment*

48 If one accepts the *MHS Annulment* majority's approach, the consequence would be that the BIT definition prevails over the *Salini* test (in whatever version).

49 Article 25(4) states:⁶⁹

⁶⁴ *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* [Award] ICSID Case No ARB/05/22 (24 July 2008) at [307].

⁶⁵ *Phoenix Action Ltd v Czech Republic* [Award] ICSID Case No ARB/06/5 (15 April 2009).

⁶⁶ *Československá Obchodní Banka, AS v Slovak Republic* [Decision on Objections to Jurisdiction] ICSID Case No ARB 97/4 (24 May 1999); (1999) 14 ICSID Rev-FILJ 251.

⁶⁷ *Fedax NV v Republic of Venezuela* [Decision on Objections to Jurisdiction] ICSID Case No ARB/96/3 (11 July 1997); (1998) 37 ILM 1378; (2002) 5 ICSID Rep 186.

⁶⁸ Since the original date of publication of this article, other state respondents have adopted a similar position. They include the Plurinational Republic of Bolivia in *Quiborax SA v Plurinational State of Bolivia* [Decision on Jurisdiction] ICSID Case No ARB/06/2 (27 September 2012) and Ukraine in *Inmaris Perestroika Sailing Maritime Services GmbH v Ukraine* [Decision on Jurisdiction] ICSID Case No ARB08/8 (8 March 2010); *Alpha Projekholding GmbH v Ukraine* [Award] ICSID Case No ARB/07/16 (8 November 2010); and *GEA Group AG v Ukraine* [Award] ICSID Case No ARB/08/16 (31 March 2011).

⁶⁹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into force 14 October 1966) Art 25(4).

(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

50 As suggested by the *CJOB* and *Fedax* tribunals, the most convenient way for ICSID Contracting States to limit the scope of ICSID jurisdiction is to make a declaration under Article 25(4) of the ICSID Convention as the Report of the IBRD's Executive Directors expressly refers to the Article 25(4) mechanism when explaining why "investment" was not defined in the ICSID Convention.⁷⁰ However, as explained below, this method is not feasible.

51 The tribunal in *PSEG* held that notifications only help the interpretation of the parties' consent but does not have an autonomous legal operation. The *PSEG* tribunal stated that notifications are not reservations and:⁷¹

⁷⁰ International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (18 March 1965) at para 27.

⁷¹ *PSEG Global Inc v Republic of Turkey* [Decision on Jurisdiction (attached to the Award)] ICSID Case No ARB/02/5 (4 June 2004) at [145]. See also *Ambiente Ufficio SpA v Argentine Republic* [Decision on Jurisdiction and Admissibility] ICSID Case No ARB/08/9 (8 February 2013) at [452], which reiterated the above view, but added the caveat that Art 25(4) notifications may be useful in interpreting an ambiguous consent clause:

While such notifications do not amount to limiting as such the jurisdiction *ratione materiae* of the Centre and while those notifications cannot replace the specific consent to arbitration required under Art 25 ... *they may have an indirect bearing on jurisdiction: a consent clause which is not entirely clear may be interpreted by reference to a prior notification of classes of disputes in respect of which the host State has expressed its intentions.* [emphasis added]

... to be effective the contents of a notification will always have to be embodied in the consent that the Contracting Party will later give in its agreements or treaties. If, as in this case, consent was given in the Treaty before the notification, that treaty could have been supplemented by means of a Protocol to include the limitations of the notification into the State's consent. Otherwise the consent given in the Treaty stands unqualified by the notification.

52 The *PSEG* tribunal raises the example of the various BITs entered into by the People's Republic of China which reproduce the terms of the notification made by the People's Republic of China.

53 If one adopts the *PSEG* approach in conjunction with the approach adopted by the *MHS Annulment* majority, states will not be able to use Article 25(4) as a convenient way of limiting the scope of ICSID jurisdiction.

54 Given that some Article 25(4) notifications are strongly worded as a clear refusal of consent to ICSID jurisdiction (*eg*, Ecuador's Article 25(4) notification) and that treaties such as the Energy Charter Treaty⁷² clearly give "unconditional consent" to international arbitration or conciliation, it would be interesting to see how future tribunals will resolve conflicting expressions of consent and non-consent in the BIT and Article 25(4) notifications respectively. Since Article 25(4) notifications are not a reservation to the ICSID Convention, it is likely that a clearly-worded BIT would prevail even over a strongly-worded refusal to consent contained in an Article 25(4) notification.

55 Moreover, only six out of 142 states have made Article 25(4) notifications in practice.⁷³

56 Article 25(4) is thus not likely to be a useful, or popular, device through which states can refine the definition of "investment". If the approach of the *MHS Annulment* majority is correct, states which wish to further refine the definition of "investment" must do so by amending

⁷² The Energy Charter Treaty (17 December 1994) Art 26(3)(a).

⁷³ These states are Jamaica, Papua New Guinea, Saudi Arabia, Turkey, China and Guatemala.

their BITs. However, it is arguable that amending BITs to qualify the broad definition of “investment” will create its own problems.

57 Even if a State were to renegotiate the definition in some of its BITs, it is at least arguable that most-favoured nation (“MFN”) clauses may cause any broader definition of investment in another BIT to apply to the renegotiated BIT,⁷⁴ unless the renegotiating State has the foresight and bargaining power to expressly preclude the application of the MFN clause in this respect.

58 Any class or classes of disputes submitted to the jurisdiction of the ICSID may still be over inclusive if not carefully drafted, in the sense that certain investments may superficially fall within such classes (whether by accident or design) but in substance would still not be an investment envisaged in ICSID practice and jurisprudence. It is entirely foreseeable that states would still need to rely on tribunals to filter out claimants such as *Phoenix Action* and “ordinary commercial claims” which states enter into as part of normal commercial life.

(6) *ICSID jurisprudence would benefit from a common definition of investment under Article 25(1) of the ICSID Convention*

59 The confusion over the definition of “investment” has not gone unnoticed by states. In the Report of the Multi-year Expert Meeting on Investment for Development, attended by representatives of 81 state members of the United Nations Conference on Trade and Development (“UNCTAD”), it is noted that:⁷⁵

⁷⁴ See Noah Rubins, “The Notion of ‘Investment’ in International Investment Arbitration” in *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (Norbert Horn & Stefan Kröll eds) (The Hague: Kluwer Law International, 2004) at p 320 for a discussion of arguments both for and against the application of most-favoured nation clauses to the definition of “investment”.

⁷⁵ United Nations Conference on Trade and Development, *Report of the Multi-year Expert Meeting on Investment for Development on its First Session* (UN Doc TD/B/C.II/MEM.3/3) (Geneva, 10–11 February 2009) at paras 21–22.

21. A third trend related to the divergent interpretations of treaty obligations made by international tribunals. While some suggested that these divergences of interpretation were sometimes more related to differences in the assessment of facts, and less to differences in interpretation, a great number of examples of divergent interpretations were discussed by experts. These included ... the scope of covered investments, with some tribunals considering the *Salini* criteria as specific requirements and others considering them to be merely possible aspects for determining whether an investment was covered by the IIA or not ...

22. *The potential for divergent interpretations was seen as a source of great concern and lack of predictability.* As a response to these developments, some IIAs included specific interpretations of key provisions, with a view to fostering a more consistent and rigorous application of international law in arbitral awards and in order to prevent divergent interpretations. *Some speakers noted the absence of general principles of law in the area of investment.*

[emphasis added]

60 The IIA system is highly atomised, with different tests under different BITs. It is submitted that the formulation of a clear and uniform test would help in reducing the number of divergent interpretations and aid in articulating some general principles in relation to the concept of "investment". The idea is to have a common framework while still allowing for "customisation" of that framework by states through express provision in IIAs and specific investor-state agreements. Accordingly, the concept of Article 25(1) of the ICSID Convention operating as a common standard for outer limits to the definition of "investment" still remains attractive in terms of promoting consistency and predictability of access to ICSID arbitration, especially because BIT definitions tend to be overly broad.

B. Other concerns of the MHS annulment majority with the outer limit approach

61 The other policy-based concerns of the *MHS Annulment* majority with the outer limit approach will be dealt with in this section. One concern is that it would deprive investors of their only arbitral recourse

contrary to the intent of the state parties to the BIT. As stated by the *MHS Annulment* committee:⁷⁶

It cannot be accepted that the Governments of Malaysia and the United Kingdom concluded a treaty providing for arbitration of disputes arising under it in respect of investments so comprehensively described, with the intention that the only arbitral recourse⁷⁷ provided between a Contracting State and a national of another Contracting State, that of ICSID, could be rendered nugatory by a restrictive definition of a deliberately undefined term of the ICSID Convention, namely, ‘investment’, as it is found in the provision of Article 25(1). It follows that the Award of the Sole Arbitrator is incompatible with the intentions and specifications of the States immediately concerned, Malaysia and the United Kingdom.

62 The outer limit approach does not equate to a “restrictive definition of a deliberately undefined term of the ICSID Convention”.⁷⁸

63 First, the fact that the drafters of the ICSID Convention left the term “investment” undefined is a familiar refrain in many awards which take a similar position to that taken by the *MHS Annulment* committee.

⁷⁶ *Malaysian Historical Salvors, SDN, BHD v Malaysia* [Decision on the Application for the Annulment of the Award] ICSID Case No ARB/05/10 (16 April 2009) at [62].

⁷⁷ As a peripheral point, the International Centre for Settlement of Investment Disputes arbitration was not the “only arbitral recourse” of the claimant in *Malaysian Historical Salvors, SDN, BHD v Malaysia* [Decision on the Application for the Annulment of the Award] ICSID Case No ARB/05/10 (16 April 2009) (“*MHS Annulment*”). Parties had agreed under the salvage contract to submit to arbitration under the UNCITRAL Arbitration Rules GA Res 31/98, UN GAOR, 31st Session (15 December 1976) and the Kuala Lumpur Regional Centre for Arbitration Arbitration Rules then in existence on 27 May 1996. The claimant in *MHS Annulment* did in fact submit to UNCITRAL arbitration but was dissatisfied with the award against it: see *Malaysian Historical Salvors, SDN, BHD v Malaysia* [Award] ICSID Case No ARB/05/10 (17 May 2007) at [15]–[16].

⁷⁸ *Malaysian Historical Salvors, SDN, BHD v Malaysia* [Decision on the Application for the Annulment of the Award] ICSID Case No ARB/05/10 (16 April 2009) at [62].

However, the reason that the definition of investment was deliberately left undefined was simply because states could not agree on an acceptable definition and not because a definition under Article 25(1) was unnecessary. As Schreuer noted: "The subsequent discussions [of the Preliminary Draft of the ICSID Convention] showed a widely held opinion that a definition of the term 'investment' was necessary".⁷⁹

64 Second, an outer limit approach need not be restrictive. Indeed, most tribunals which support the outer limit approach acknowledge that an Article 25 definition of "investment" must be flexible.⁸⁰

65 Third, even though "investment" was not defined, "it was always clear that ordinary commercial transactions would not be covered by the ICSID's jurisdiction no matter how far-reaching the parties' consent might

⁷⁹ Christoph Schreuer, *The ICSID Convention: A Commentary: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Cambridge: Cambridge University Press, 2nd Ed, 2009) at [114]. In *Alpha Projektholding GmbH v Ukraine* [Award] ICSID Case No ARB/07/16 (8 November 2010), the tribunal noted at [44] that:

... had the drafters of the Convention wished to accord an absolute freedom of that kind [to state parties to deem an activity as an 'investment' without regard to whether it meets the meaning of that term as used within Article 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ((575 UNTS 159) (18 March 1965; entry into force 14 October 1966)], they would have said so, not simply left Article 25 without a formal definition for the term 'investment'.

⁸⁰ The tribunal in *Ambiente Ufficio SpA v Argentine Republic* [Decision on Jurisdiction and Admissibility] ICSID Case No ARB/08/9 (8 February 2013) ("*Ambiente*") illustrates this point aptly. After accepting that the limits set by Art 25(1) are not subject to consensual change by the parties to a dispute, the tribunal proceeded to observe that it would resist endorsing an overly narrow definition of investment but would rather understand the term "investment" (*Ambiente* at [462]):

... in the broad terms suggested by the provision itself and seconded by the definition in the BIT that arises from the very consent of the parties, in conjunction with an express authorization for investors to submit such protected investments to ICSID arbitration.

be”.⁸¹ In adopting the outer limit approach, tribunals are not seeking to adopt a more restrictive definition of investment, but rather to give effect to the substance of the Contracting States’ consent to the ICSID Convention.

66 Moreover, it can be argued that the very act of choosing ICSID arbitration illustrates the intent of state parties to a BIT to overlay the requirements of the ICSID Convention (including the interpretation of Article 25 in relation to the scope of their consent to ICSID arbitration) over the broad BIT definition of investment. The state parties to a BIT could easily have provided for non-ICSID arbitration (*eg*, United Nations Commission on International Trade Law (“UNCITRAL”), International Chamber of Commerce International Court of Arbitration, or London Court of International Arbitration arbitration), in which case the tribunal would be free to apply the IIA definition of “investment”.⁸² Alternatively, if the investor possessed sufficient bargaining power, it could obtain the State’s consent to arbitration under other rules.

67 Another concern of the *MHS Annulment* majority is that the ICSID institution would be “crippled” by “questionable interpretations” of the

⁸¹ Christoph Schreuer, *The ICSID Convention: A Commentary: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Cambridge: Cambridge University Press, 2nd Ed, 2009) at p 117, para 122.

⁸² See *Eureka BV v Republic of Poland [Ad hoc]* [Partial Award] (19 August 2005) <<http://ita.law.uvic.ca/documents/Eureka-PartialAwardandDissentingOpinion.pdf>> (accessed 10 May 2013) (“*Eureka*”). Even in such cases, the tribunal might qualify the bilateral investment treaty (“BIT”) definition of “investment”. For example, in *Eureka*, an *ad hoc* arbitration where the tribunal only considered the BIT definition of “investment” (*ie*, every kind of asset) in deciding whether corporate governance rights could be an investment, the tribunal added the qualification that in order to qualify as investments entitled to protection, the corporate governance rights in question must have “economic value”. Since there would have been no investment without the grant of the corporate governance rights, the tribunal concluded that the rights had some economic value and were therefore entitled to protection.

term “investment” as found in Article 25(1) of the ICSID Convention.⁸³ Alternatively, investors (or even states) might seek another forum which would not require parties to jump over the ICSID hurdle of the Article 25 definition of “investment”. However, these concerns seem to be exaggerations. Despite the brewing debate, ICSID cases have increased rather than decreased in the recent years.

68 Accordingly, the above two peripheral, policy-based concerns of the *MHS Annulment* majority do not detract from the desirability of having an Article 25 definition of “investment” serve as a unifying minimum standard for ICSID jurisdiction.

III. An interesting alternative to the *Salini*-type test: To construe the BIT definition of “investment” as having the same characteristics as the *Salini* test

69 Interestingly, the recent Permanent Court of Arbitration case of *Romak SA v Republic of Uzbekistan* (“*Romak*”)⁸⁴ (which was under the UNCITRAL Arbitration Rules⁸⁵ and not under the ICSID regime) has advanced a new approach. *Romak* was a case where the claimant tried to claim that a contract for the supply of wheat was an investment under the Switzerland–Uzbekistan BIT. The tribunal in *Romak* agreed that a literal interpretation of the BIT definition of “investment” in that case (*ie*, every kind of asset) would render meaningless the distinction between investments and purely commercial transactions. It held that a mechanical application of the usual listed categories in such a definition (*eg*, claims to money, *etc*) would produce a result which is “manifestly absurd or unreasonable”. Such an outcome was contrary to Article 32(b)

⁸³ *Malaysian Historical Salvors, SDN, BHD v Malaysia* [Decision on the Application for the Annulment of the Award] ICSID Case No ARB/05/10 (16 April 2009) at [73].

⁸⁴ *Romak SA v Republic of Uzbekistan* [Award] PCA Case No AA280 (26 November 2009).

⁸⁵ UNCITRAL Arbitration Rules GA Res 31/98, UN GAOR, 31st Sess (15 December 1976).

of the Vienna Convention on the Law of Treaties (“Vienna Convention”).⁸⁶ If the intention of the Contracting States was to accord to the term “investment” an extraordinary and counterintuitive meaning, the wording must leave no room for doubt that this was the intention.

70 Although the *Romak* tribunal opined that there was no basis to suppose that the word “investment” had a different meaning in the context of the ICSID Convention than it bore in relation to the Switzerland–Uzbekistan BIT, it examined the ICSID jurisprudence and concluded that the inherent meaning of “investment” under the BIT entailed a contribution that extends over a certain period of time and that involves risk. In other words, the tribunal construed the *Salini* test developed in ICSID jurisprudence into the BIT definition of “investment”.

71 The approach of the *Romak* tribunal is similar to the one proposed by Zachary Douglas in his book *The International Law of Investment Claims*, in which he took the view that:⁸⁷

... the open-textured nature of the standard formulation in investment treaties [defining ‘investment’ to be ‘any asset’ and then providing a non-exhaustive list of assets that might qualify as an investment] preserves the ordinary meaning of the term ‘investment’ and therefore its consistency with the characteristics that must be attributed to the same term as employed in Article 25 of the ICSID Convention.

72 As the saying goes, “there are many ways to skin a cat”. It is evident that non-ICSID tribunals face the same problem of trying to define the difference between an investment and a commercial transaction for the supply of goods and services. ICSID tribunals have given the word “investment” in Article 25 an inherent meaning, while a non-ICSID tribunal in *Romak* gave the already defined term “investment” in the BIT a further inherent meaning that coincided largely with the inherent meaning ICSID tribunals had previously given. If non-ICSID tribunals are also of the view that “investment” in the BIT is the same as that in

⁸⁶ Vienna Convention on the Law of Treaties (1155 UNTS 331) (23 May 1969; entry into force 27 January 1980) Art 32(b).

⁸⁷ Zachary Douglas, *The International Law of Investment Claims* (Cambridge/New York: Cambridge University Press, 2009) at p 164, para 343.

Article 25, this further reinforces the practical need for an inherent meaning of "investment".⁸⁸

IV. Discussion of the hallmarks of investment

73 The discussion in this section takes place on the premise that Article 25(1) of the ICSID Convention acts as an outer limit to the BIT definition of "investment" and will focus on which hallmarks should constitute the defining characteristics of "investment" under Article 25(1).

74 The key weakness of the *Salini* test and the jurisdiction approach was that such a definition might be too narrow and inflexible, resulting in the arbitrary exclusion of the disputes relating to certain transactions from the jurisdiction of the Centre. This was one of the reasons why the tribunal in the *Bewater* case did not support a jurisdiction approach.⁸⁹

75 Emmanuel Gaillard was a member of the tribunal in the recent case of *Saba Fakes*, where the tribunal affirmed the three criteria of: "(i) a contribution, (ii) a certain duration, and (iii) an element of risk, are both necessary and sufficient to define an investment within the framework of the ICSID Convention".⁹⁰ However, the tribunal in *Saba*

⁸⁸ "It may be that the battleground has merely shifted to whether a certain transaction qualifies as an 'investment' under the relevant treaty, the argument being that save for explicit wording, general definitions of an investment under BITS or MITs still implicitly require the transaction to be in the nature of an investment as opposed to an ordinary commercial transaction": see Williams QC & Simon Foote, "Recent Developments in the Approach to Identifying an 'Investment' Pursuant to Article 25(1) of the ICSID Convention" in *Evolution in Investment Treaty Law and Arbitration* (Chester Brown & Kate Miles eds) (Cambridge University Press, 2012) at p 59.

⁸⁹ *Bewater Gauff (Tanzania) Ltd v United Republic of Tanzania* [Award] ICSID Case No ARB/05/22 (24 July 2008).

⁹⁰ *Saba Fakes v Republic of Turkey* [Award] ICSID Case No ARB/07/20 (14 July 2010) at [110].

Fakes rejected a contribution to the host State's economic development, good faith, and legality of the investments as hallmarks.⁹¹

76 However the hallmarks may be described, the authors of this article agree with a need for a certain and yet non-restrictive test. Even tribunals in support of a jurisdiction approach have recognised that the criteria cannot operate too restrictively, as they have been careful to say that the criteria should be evaluated as a whole and not individually. As observed above, and in the *MHS Award*,⁹² the distinction between the jurisdiction and the typical characteristics approach may be academic. However, with either approach, the larger problem is what the hallmarks of investment should be.

77 At present, the existing hallmarks are at risk of being over or under inclusive, and the search for a "perfect" definition of "investment" continues. It is suggested that the criteria of an investment should be:

- (a) a financial commitment (in money or other terms);⁹³
- (b) risk;
- (c) duration; and
- (d) significant contribution to the host State's development.

78 In addition, the "good faith" or *bona fides* of an investment can be considered as a separate principle or subsumed under the fourth hallmark of "significant contribution".⁹⁴

⁹¹ The tribunal in the more recent case of *Quiborax SA v Plurinational State of Bolivia* [Decision on Jurisdiction] ICSID Case No ARB/06/2 (27 September 2012) ("*Quiborax*") also adopted the same approach: see *Quiborax* at [218]–[219].

⁹² *Malaysian Historical Salvors, SDN, BHD v Malaysia* [Award] ICSID Case No ARB/05/10 (17 May 2007).

⁹³ This is sometimes referred to as "contribution", but the word "commitment" is used here to distinguish this criterion from the fourth criterion.

⁹⁴ The tribunal in *Quiborax SA v Plurinational State of Bolivia* [Decision on Jurisdiction] ICSID Case No ARB/06/2 (27 September 2012) ("*Quiborax*"), however, takes the differing view that the issues of illegality and bad faith are separate from the question of whether the transaction in question. See

(continued on next page)

79 "Regularity of profit and return" is now understandably not favoured as a hallmark. Such a hallmark will not be applicable where, as in *Biwater*, the project was a loss leader. Some projects may be contingent on extraneous events (*eg*, the successful discovery of natural resources) and may not be structured in such a way that there would always be an expectation of a regular profit and return. An article by Luke Eric Peterson even raises the possibility of not-for-profit organisations bringing claims in ICSID arbitration.⁹⁵

80 Douglas proposes two new rules for the definition of "investment", accompanied by a comprehensive analysis of the authorities:⁹⁶

Rule 22: The legal materialization of an investment is the acquisition of a bundle of rights in property that has the characteristics of one or more categories of an investment defined by the applicable investment treaty where such property is situated in the territory of the host state or is recognized by the rules of the host state's private international law to be situated in the host state or is created by the municipal law of the host state.

Rule 23: The economic materialization of an investment requires the commitment of resources to the economy of the host state by the claimant entailing the assumption of risk in expectation of a commercial return.

81 Douglas's rule 23 retains only three of the *Salini* hallmarks, namely, commitment, risk and expectation of a commercial return. It does not include duration or economic development. In conclusion, Douglas emphasises that whatever may be the definition of "investment", it must be certain so that investors will know at the time of investment whether

Quiborax at [226]: "[A]n investment remains an investment ... it may not be a protected investment ... but that is a different matter."

⁹⁵ Luke Eric Peterson, "Bringing Not-for-profit Investment Claims to ICSID" *Kluwer Arbitration Blog* (26 April 2009) <<http://kluwerarbitrationblog.com/blog/2009/04/26/bringing-not-for-profit-investment-claims-to-icsid/>> (accessed 10 May 2013).

⁹⁶ Zachary Douglas, *The International Law of Investment Claims* (Cambridge/ New York: Cambridge University Press, 2009) at pp 161 and 189.

they are making an investment to which the ICSID Convention applies. One cannot have an inchoate list of criteria.

82 On the other hand, Devashish Krishnan proposes that the definition of “investment” under the ICSID Convention should be consistent with what is treated as an investment under a country’s capital account, as well as the International Monetary Fund’s description of “investment” as direct, portfolio and other investment.⁹⁷

83 Currently, the development of ICSID case law appears to favour the adoption of the three hallmarks of contribution, risk and duration.⁹⁸ Gaillard⁹⁹ supports the outer limit approach, but suggests that only three criteria (contribution, risk and duration) should be used as the hallmarks of investment (without a separate criterion of contribution to the economic development of the host State) as a solution which would keep the definition flexible and non-restrictive. This position was largely consistent with *Consorzio Groupement LESI-DIPENTA v People’s Democratic Republic of Algeria* (“*Consorzio*”)¹⁰⁰ and *Saba Fakes*,¹⁰¹ where Gaillard was part of a three-member tribunal in both cases. The *Consorzio* tribunal elaborated upon the three factors of contribution, duration and risk as follows:

- (a) contribution must be made at least in part in the host country and bring with it economic value;¹⁰²

⁹⁷ Devashish Krishnan, “A Notion of ICSID Investment” in *Investment Treaty Arbitration and International Law* (Todd Weiler ed) (Huntington, New York: Jurisnet, 2008) at p 61.

⁹⁸ See, eg, *Alpha Projektholding GmbH v Ukraine* [Award] ICSID Case No ARB/07/16 (8 November 2010) at [312].

⁹⁹ Emmanuel Gaillard & Yas Banifatemi, “‘Bewater’, Classic Investment Bases: Input, Risk, Duration” *New York Law Journal* (31 December 2008).

¹⁰⁰ *Consorzio Groupement LESI-DIPENTA v People’s Democratic Republic of Algeria* [Award] ICSID Case No ARB/03/08 (10 January 2005).

¹⁰¹ *Saba Fakes v Republic of Turkey* [Award] ICSID Case No ARB/07/20 (14 July 2010).

¹⁰² *Consorzio Groupement LESI-DIPENTA v People’s Democratic Republic of Algeria* [Award] ICSID Case No ARB/03/08 (10 January 2005) part II at [14(i)].

- (b) with respect to duration, there must be economic commitments of significant value sufficient for one to agree that the operation is of a nature to promote the economy and development of the country concerned;¹⁰³ and
- (c) with respect to risk, any contract that implies risk for the contracting party such that there should be a particular guarantee of jurisdiction to firms seeking to invest in another country allowing for intervention by international arbitrators, in addition to ordinary mechanisms.¹⁰⁴

84 On the face of it, *Conorzio* is in support of only the first criteria of contribution. However, it can be seen that the "economic development" requirement seems elided into the "duration" requirement in *Conorzio*.

85 If one takes the *Conorzio* definition of duration as authoritative, the debate over whether economic development constitutes a hallmark may well be academic. However, the duration requirement is usually understood as the length of the investment in terms of time.

A. Contribution/significant contribution to economic development

86 This hallmark (which was identified as a possible additional requirement in *Salini*) is derived from the Preamble of the ICSID Convention, which states: "the Contracting States [are] considering the need for international cooperation for economic development, and the role of private international investment therein".¹⁰⁵

¹⁰³ *Conorzio Groupement LESI-DIPENTA v People's Democratic Republic of Algeria* [Award] ICSID Case No ARB/03/08 (10 January 2005) part II at [14(ii)].

¹⁰⁴ *Conorzio Groupement LESI-DIPENTA v People's Democratic Republic of Algeria* [Award] ICSID Case No ARB/03/08 (10 January 2005) part II at [14(ii)].

¹⁰⁵ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into force 14 October 1966) Preamble.

87 The description of this hallmark varies from a significance for the host State's development,¹⁰⁶ "an international transaction which contributes to cooperation designed to promote the economic cooperation of a Contracting State may be deemed an investment [under the ICSID Convention]",¹⁰⁷ "contribution to the economic development of the host State as an essential ... characteristic of the investment",¹⁰⁸ "a significant contribution to the host State's economy", "a contribution to the economic and social development of the host State" to "an operation made in order to develop an economic activity in the host State".¹⁰⁹

88 The requirement of contribution/significant contribution to the economic development of the host State (while not perfect) is a way of capturing the amorphous distinction between an investment in the ICSID sense and an ordinary commercial transaction. Moreover, it is exactly the idea behind the ICSID Convention, which is to afford investors an avenue to arbitration with the State in order to encourage them to invest in activities which would benefit the State.¹¹⁰

89 Some commentators have questioned whether the significant contribution should be to the economic, as opposed to political, social, or cultural development of the State. Schreuer comments:¹¹¹

¹⁰⁶ *Fedax NV v Republic of Venezuela* [Decision on Objections to Jurisdiction] ICSID Case No ARB/96/3 (11 July 1997); (1998) 37 ILM 1378; (2002) 5 ICSID Rep 186.

¹⁰⁷ *Československá Obchodní Banka, AS v Slovak Republic* [Decision on Objections to Jurisdiction] ICSID Case No ARB 97/4 (24 May 1999); (1999) 14 ICSID Rev-FILJ 251 at para 64.

¹⁰⁸ *Patrick Mitchell v Democratic Republic of the Congo* [Decision on the Application for Annulment of the Award] ICSID Case No ARB/99/7 (1 November 2006) at [33]

¹⁰⁹ *Phoenix Action Ltd v Czech Republic* [Award] ICSID Case No ARB/06/5 (15 April 2009) at [114].

¹¹⁰ *Malaysian Historical Salvors, SDN, BHD v Malaysia* [Dissenting Opinion (attached to the Decision on the Application for Annulment) (Judge Mohamed Shahabuddeen)] ICSID Case No ARB/05/10 (16 April 2009) at [20]–[22].

¹¹¹ Christoph Schreuer, *The ICSID Convention: A Commentary: A Commentary on the Convention on the Settlement of Investment Disputes between States* (continued on next page)

[I]t does not follow that an activity that does not obviously contribute to economic development must be excluded from the Convention's protection. Any concept of economic development, if it were to serve as a yardstick for the existence of an investment and hence for protection under ICSID, should be treated with some flexibility. It should not be restricted to measurable contributions to GDP but should include development of human potential, political and social development and the protection of the local and the global environment.

90 Others have questioned whether economic development should be a hallmark at all. For example, Gaillard¹¹² takes the position that the Preamble was a mere acknowledgment that investment fosters economic development but did not mean that economic development is essential to

and Nationals of Other States (Cambridge: Cambridge University Press, 2nd Ed, 2009) at p 14, paras 173 and 174. See also Yulia Andreeva, "Salvaging or Sinking the Investment? MHS v Malaysia Revisited" (2008) 7 *The Law and Practice of International Courts and Tribunals* 161 at 174–175; Andrés Rigo Sureda, *Investment Treaty Arbitration: Judging under Uncertainty* (Cambridge/New York: Cambridge University Press, 2012) at p 73. On the other hand, the tribunal in *RSM Production Corp v Central African Republic* [Decision on Competence and Responsibility] ICSID Case No ARB/07/02 (7 December 2010) ("*RSM v CAR*"), while adopting the criteria in *Salini Costruttori SpA v Kingdom of Morocco* [Decision on Jurisdiction] ICSID Case No ARB/00/4 (23 July 2001); (2003) 42 ILM 609; (2004) 6 ICSID Rep 400 as the starting point of ascertaining whether a transaction is an "investment" within the meaning of Art 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into force 14 October 1966), noted that the criterion of contribution to development is too subjective and should be replaced by the criterion of contribution to the economy, the latter of which has been considered as subsumed under the first three criteria of contribution, duration and risk: see *RSM v CAR* at [56].

¹¹² Emmanuel Gaillard, "Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice" in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Christina Binder *et al* eds) (Oxford/New York: Oxford University Press, 2009) at p 403.

the notion of investment. The recent case of *Saba Fakes*¹¹³ takes a similar position. Douglas takes the view that the economic development criterion is unworkable owing to its subjective nature, because:¹¹⁴

... whether or not a commitment of capital or resources ultimately proves to have contributed to the economic development of the host state can often be a matter of appreciation and generate a wide spectrum of reasonable opinion.

Krishnan is of the view that an economic transaction constituting an investment by definition contributes to development, that no economist would consider private foreign investment to be anti-development, and, in any event, it is not for ICSID tribunals and arbitrators to pronounce on what type of investment have deleterious or anti-development effects.¹¹⁵

91 The concerns of the various commentators are not without merit. However, it might be possible to further refine the concept of “economic development” to reduce subjectivity and uncertainty instead of eliminating this hallmark from the tribunals’ consideration altogether. The reason why economic development may reasonably be regarded as a necessary criterion is as follows.

¹¹³ *Saba Fakes v Republic of Turkey* [Award] ICSID Case No ARB/07/20 (14 July 2010).

¹¹⁴ Zachary Douglas, *The International Law of Investment Claims* (Cambridge/New York: Cambridge University Press, 2009) at p 202, para 408. See also Andrés Rigo Sureda, *Investment Treaty Arbitration: Judging under Uncertainty* (Cambridge; New York: Cambridge University Press, 2012) at p 73. Schreuer and Dolzer add that this view is supported by the “uncontroversial position that each state has the sovereign right to decide which foreign investments will foster the development of its economy and will accordingly admit and regulate such investments”: see Christoph Schreuer & Rudolf Dolzer, *Principles of International Investment Law* (Oxford University Press, 2nd Ed, 2013) at p 75.

¹¹⁵ Devashish Krishnan, “A Notion of ICSID Investment” in *Investment Treaty Arbitration and International Law* (Todd Weiler ed) (Huntington, New York: Jurisnet, 2008) at pp 61–84. See also the tribunal in *Alpha Projektholding GmbH v Ukraine* [Award] ICSID Case No ARB/07/16 (8 November 2010) at [312].

92 Although the Preamble of the ICSID Convention is not binding, it does reflect a major (if not primary) basis upon which Contracting States entered into the ICSID Convention. The encouragement of non-economic development (such as arts and culture) was not one of the stated purposes of the ICSID Convention. In the modern era, many "non-economic" activities, *eg*, cultural and historical preservation, have also been credited with an economic value (*eg*, Egypt's economy relies heavily on its tourist industry).¹¹⁶ It is also logical to use economic development as a marker as the investor would invariably be compensated for his improvement to the State with money or something of monetary value; hence, the tribunal will ultimately have to attach an economic value to any commitment made by the investor. That economic value would indirectly represent, in economic terms, the value that the investor has brought to the State.¹¹⁷

93 Moreover, non-economic development to which no economic value can be credited would be difficult to measure. One needs only to imagine the type of evidence and submissions needed in order to prove a contribution to the political, social, or cultural development of the State in order to realise that any tribunal would be hard put to make any firm assessment of such a contribution in practice. The exercise undertaken by tribunals is not to pronounce on whether investments have deleterious or anti-development effects, but rather to distinguish between ordinary commercial transactions (*eg*, buying a metro ticket may in its small way "contribute" to the economy) and the type of investments to which parties to the ICSID Convention envisioned being submitted to ICSID arbitration.

¹¹⁶ See also *Culture Counts, Financing Resources, and the Economics of Culture in Sustainable Development* (The World Bank, 2000), Annex A: "The World Bank has always recognised that tourist revenues provide benefits that can help justify investments in conserving cultural heritage. This perspective remains valid ...".

¹¹⁷ To take a random example, if McDonald's were to make an offer to a State to open (or procure the opening of) a chain of McDonald's restaurants throughout the State, that could be agreed to be an "investment". What if McDonald's offered to open only one restaurant?

94 If one were to completely exclude the criteria of economic development, the danger is that the three criteria of commitment (in money or other terms), risk and duration (if understood only in terms of number of years) can easily be superficially satisfied.¹¹⁸ For example, many commercial loans can fulfil the three criteria but probably only certain loans will qualify as an investment under Article 25 of the ICSID Convention. In the *CSOB* case, the tribunal, in determining that a particular loan was an investment, stated:¹¹⁹

[T]he Tribunal considers that the broad meaning which must be given to the notion of an investment under Article 25(1) of the Convention is opposed to the conclusion that a transaction is not an investment merely because, as a matter of law, it is a loan. This is so, if only because under certain circumstances a loan may contribute substantially to a State's economic development ...

95 The fourth hallmark of significant contribution to host State development focuses a tribunal's attention on the object of the ICSID Convention in such cases.

96 At least some states have reaffirmed that economic development is a major purpose of concluding IIAs. The role of IIAs on development was discussed at length in the *Report of the Multi-Year Expert Meeting on Investment for Development*, which states:¹²⁰

¹¹⁸ See Muthucumaraswamy Sornarajah, "The Descent into Normlessness" in *Evolution in Investment Treaty Law and Arbitration* (Chester Brown & Kate Miles eds) (Cambridge University Press, 2012) at p 646: "The [*MHS Annulment*] decision [that economic development was not a necessary criterion of an "investment"] would convert any commercial dispute into a foreign investment dispute as long as there is a transborder flow of assets."

¹¹⁹ *Československá Obchodní Banka, AS v Slovak Republic* [Decision on Objections to Jurisdiction] ICSID Case No ARB 97/4 (24 May 1999); (1999) 14 ICSID Rev-FILJ 251 at para 76.

¹²⁰ United Nations Conference on Trade and Development, *Report of the Multi-year Expert Meeting on Investment for Development on Its First Session* (Geneva, 10–11 February 2009) (UN Doc TD/B/C.II/MEM.3/3) at paras 29–31.

29. Experts also discussed *the impact of IIAs on FDI* [ie, foreign direct investment] flows. Views concurred regarding the difficulty of establishing tangible proofs that the conclusion of IIAs would increase FDI inflows to developing countries ... participants also stressed the importance of IIAs for providing a stable and predictable investment framework ... However, *for some countries that had concluded IIAs in the hope of attracting FDI, the particular experience was that IIAs turned into a source of litigation, instead. Some countries felt that such agreements had not achieved their initial aim of increasing FDI flows.*

30. In that context, there was a debate about the objectives of IIAs and the extent to which they should reflect development aspects. In discussing IIA objectives, experts distinguished between the protection of foreign investors; the enhancement of FDI flows and the furtherance of economic development. With countries reporting on their particular experience and expectations, different nuances about the importance of the different objectives emerged.

31. Although some participants noted that IIAs, at their core, were intended to support economic development, others believe that they needed to do more to reflect development objectives and incorporate investment promotion. Suggestions included a closed definition for investment that provided certainty and clarity ...

[emphasis added]

97 Sebastien Manciaux, in his article "The Notion of Investment: New Controversies",¹²¹ described the criteria of "significant contribution" to economic development as a quantitative threshold that is unspecified. He also points out that mergers and acquisitions do not result in a significant contribution to economic development but yet account for more than half the annual flow of foreign direct investment. Another example raised was that of a failed construction project.¹²² He argues that this hallmark

¹²¹ Sebastien Manciaux, "The Notion of Investment: New Controversies" (2008) 9 J World Investment & Trade 16.

¹²² The example was a failed investment was also cited in the jurisdictional decision of the tribunal in *Quiborax SA v Plurinational State of Bolivia* [Decision on Jurisdiction] ICSID Case No ARB/06/2 (27 September 2012) ("*Quiborax*") as the main reason for rejecting the element of contribution to
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should be discounted or ignored because it does not constitute a discriminating criterion from a legal perspective.

98 Manciaux's example of the failed construction project was considered in the case of *RSM v Grenada*, and the tribunal was not deterred from finding that there had been a contribution to the economic development of the host State, notwithstanding the lack of actual oil exploration activities. In *RSM v Grenada*, the tribunal stated:¹²³

[T]here would be no need for actual expenses to have been incurred ... the relevant criterion being the *commitment* to bring in resources toward the performance of such exploration ... Had the Exploration Licence been issued, *RSM* would have been irrevocably committed to bring in, directly or indirectly by turning to other sources, the necessary capital. If oil was not found, or was not found in sufficient quantities, or was found to lie in locations that did not make exploitation economically viable, that capital would have been spent in vain.

[A]s to the contribution to the economic and social development of the host State, in the unlikely situation where the exploration expenses themselves would not be sufficient to satisfy it, the condition must be assessed in consideration of a successful adventure. It is not the actual or the final contribution that matters, precisely because the exploration may not lead to exploitation.

[emphasis added]

99 The hallmark of significant contribution is not meant to be a "hard" or calculable measurement. As a legal norm, it does not necessarily have to translate into an appreciable increase in gross domestic product or any other economic indicator. It is simply no more than what common law countries would deem in domestic law as purposive interpretation of

economic development as a requirement of an "investment": see *Quiborax* at [220]. In this regard, *Quiborax* followed the trend of a series of recent decisions including *Phoenix Action Ltd v Czech Republic* [Award] ICSID Case No ARB/06/5 (15 April 2009) and *Saba Fakes v Republic of Turkey* [Award] ICSID Case No ARB/07/20 (14 July 2010).

¹²³ *RSM RSM Production Corp v Grenada* [Award] ICSID Case No ARB/05/14 (13 March 2009) at paras 243–244.

legislation. The question is: What sort of investment did Contracting States intend to protect by signing the ICSID Convention?

100 The Contracting States clearly did not intend ordinary commercial transactions to be protected.¹²⁴

101 The "economic development" hallmark is a useful tool for a tribunal to distinguish between an ordinary commercial transaction and an investment contemplated by the ICSID Contracting States. A failed project which never took off and never contributed in the hard mathematical sense to the growth of the economy could still satisfy this hallmark if the investor had significantly invested in the project to such a degree that it could have made a significant contribution to economic development had the project been brought to fruition. As for mergers and acquisitions made with genuine business goals, a reasonable tribunal could also consider that a particular acquisition did satisfy this hallmark. Conversely, one could argue that a large enough "ordinary commercial

¹²⁴ See Muthucumaraswamy Sornarajah, "The Descent into Normlessness" in *Evolution in Investment Treaty Law and Arbitration* (Chester Brown & Kate Miles eds) (Cambridge University Press, 2012) at pp 645–646, where the learned author aptly notes that:

Developing States make investment treaties which involve considerable erosion of their sovereignty in the belief that the treaties will promote the flow of foreign investment and thereby foster economic development. Whatever its correctness, it is this belief that justifies the sacrifice of sovereignty. It is also a reason why they accept ICSID arbitration which also has been sold to them on the basis that acceptance of such an argument and the consequent exclusion of their own judicial sovereignty over investment disputes, as required by the Calvo doctrine and Article 2(2)(c) of the Charter of Economic Rights and Duties of the States, will promote economic development.

... The World Bank has no mandate to provide general arbitration services. *The only justification for the creation of ICSID, an arm of the World Bank, is that it is based on the rationale, false or true, that its existence will create investor confidence and result in flows of investment into its developing-country members.* Economic development lies at the very root of ICSID arbitration.

[emphasis added]

transaction” (*eg*, a hypothetically very large purchase – or very expensive – order for a particular good) might cause gross domestic product to increase and thereby contribute to the economy of a State, but as mentioned above, the economic development hallmark is not to be mechanistically applied. Ultimately, each case is fact-specific, and the tribunal would have to assess the investment carefully to determine whether this hallmark is satisfied.

102 Although the hallmark of economic development might be considered a “softer” standard than the other hallmarks, the law does have a place for such standards, *eg*, “good faith” or “unconscionability”. In any event, the tribunal can be guided by previous case law and developments in investor-state practice in determining what investments should satisfy this hallmark. This should address the concerns of uncertainty and subjectivity raised by some tribunals and commentators.

103 Ultimately, the Article 25 definition is a definition protective of the scope of the State’s consent to jurisdiction that fills the gap, especially in circumstances when the BIT definition of “investment” is overly broad. A criterion of “significant contribution to economic development” would help to sieve out vexatious and *de minimis* claims, reducing the financial cost to states of defending such claims. If the circumstances show that the State has already contemplated what would constitute an investment in detail, for example in the newer IIAs discussed below, then it is acknowledged that the tribunal should consider the wording of the BIT as a relevant reflection of what the State considers to be a fulfilment of the Article 25 definition. Accordingly, the four hallmarks proposed¹²⁵ should suffice as the key components of an Article 25 definition.

V. Developments in treaty drafting

104 States are also exploring new ways of defining “investment”. The draft Free Trade Area of the Americas (“FTAA”)¹²⁶ itself contains nine

¹²⁵ See paras 16–20.

¹²⁶ Free Trade Area of the Americas (FTAA.TNC/w/133/Rev.3) (21 November 2003) Chapter XVII.

proposed definitions of "investment".¹²⁷ This shows that the struggle to define "investment" exists not only in ICSID jurisprudence, but also continues in the arena of treaty drafting.

105 In response to the debate on definition, the newer IIAs and treaties have adopted negative definitions of "investment". For example, the multiple definitions proposed in the third draft agreement of the FTAA¹²⁸ contain many suggestions as to what the word "investment" does not mean. The common theme to these proposals is that "investment" should exclude commercial contracts for goods and services and the extension of credit in commercial contexts. Among the many versions of negative definitions are:¹²⁹

¹²⁷ See also the South African Development Community Model Bilateral Investment Treaty (July 2012) <<http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf>> (accessed 10 May 2013), which contains three proposed definitions of investment.

¹²⁸ Free Trade Area of the Americas (FTAA.TNC/w/133/Rev.3) (21 November 2003) Chapter XVII, Art 1.

¹²⁹ Free Trade Area of the Americas (FTAA.TNC/w/133/Rev.3) (21 November 2003) Chapter XVII, Art 1.

Similarly, the multiple definitions of "investment" in the South African Development Community Model Bilateral Investment Treaty (July 2012) ("SADC BIT") each contain a negative definition of "investment". The enterprise-based definition, which requires the establishment or acquisition of an enterprise, as one classically associates with foreign direct investment, excludes from the term "investment" (see Art 2 of the SADC BIT):

1. Debt securities issued by a government or loans to a government
2. Portfolio investments
3. Claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or the extension of credit in connection with a commercial transaction, or any other claims to money that do not involve the kind of interests set out in subparagraphs (a) through (g) above.

The closed list, exhaustive and non-exhaustive asset-based definitions, modeled after the 2004 Canadian Model Bilateral Investment Treaty and the 2004 US Model Bilateral Investment Treaty respectively, exclude:

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[I]nvestment does not mean:

- (i) a debt instrument of the State;
- (j) claims to money that arise solely from:
 - (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party; or
 - (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph d) *supra*; or
- (k) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h) *supra*;

...

[Investment] does not include:

- (a) a payment obligation of the State or a State enterprise and the granting of such credit to the State or a State enterprise; nor
- (b) claims to money derived exclusively from:
 - (i) commercial contracts for the sale of goods and services by a national or enterprise in the territory of a Party to a national or enterprise in the territory of another Party; or
 - (ii) the granting of credit in relation to a commercial transaction, whose period of maturity is less than three (3) years, such as financing of trade;

...

This definition [of investment] does not include:

- (a) assets not directly linked to a productive activity; and

... assets that are solely in the nature of portfolio investments; goodwill; market share, whether or not it is based on foreign origin trade, or rights to trade; claims to money deriving solely from commercial contracts for the sale of goods or services to or from the territory of a Party to the territory of the other Party, or a loan to a Party or to a State enterprise; a bank letter of credit; the extension of credit in connection with a commercial transaction, such as trade financing; or a loan to, or debt security issued by a State Party or a State enterprise thereof.

- (b) loans and other operations resulting in debt, as well as flows of capital related strictly to a commercial transaction;

...

But investment does not mean:

- (f) merely financial flows, such as those destined only to gain indirect access to the financial market of the other Party;
- (g) claims to money that arise solely from:
 - (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party; or
 - (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d) *supra*; or
- (h) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (e) *supra* ...

106 The 2004 US Model BIT¹³⁰ also describes certain exclusions to the definition of "investment":¹³¹

- 1 Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to

¹³⁰ Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment 2004 <www.state.gov/documents/organization/117601.pdf> (accessed 10 May 2013). The 2012 US Model Bilateral Investment Treaty contains the same exclusions: see Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment 2012 <<http://www.state.gov/documents/organization/188371.pdf>> (accessed 10 May 2013).

¹³¹ Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, US Department of State 2004 <www.state.gov/documents/organization/117601.pdf> (accessed 10 May 2013) at pp 3 and 4, fnn 1–3.

payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

- 2 Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.
- 3 The term “investment” does not include an order or judgment entered in a judicial or administrative action.

107 The Chile–Korea FTA¹³² combines one of the proposed definitions in the FTAA with an exclusion from the 2004 US Model BIT:¹³³

[but] investment does not mean,

- (f) claims to money that arise solely from:
 - (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party; or
 - (ii) the extension of credit in connection with a commercial transaction, such as trade financing; and
- (g) an order entered in a judicial or administrative action.

¹³² Free Trade Agreement between the Republic of Korea and the Republic of Chile (15 February 2003; entry into force 1 April 2004).

¹³³ Free Trade Agreement between the Republic of Korea and the Republic of Chile (15 February 2003; entry into force 1 April 2004) Art 10.1.

108 Some states have shifted back to traditional concepts of foreign direct investment. The EFTA–Mexico FTA¹³⁴ restricts "investment" to:¹³⁵

... direct investment ... for the purpose of establishing lasting economic relations with an undertaking such as, in particular, investments which give the possibility of exercising an effective influence in the management thereof.

109 Other states have resorted to using a "closed-list" definition of "investment". For example, Article 96 of the Japan–Mexico FTA¹³⁶ adopts such an approach, stating:

- (i) the term "investment" means:
 - (AA) an enterprise;
 - (BB) an equity security of an enterprise;
 - (CC) *a debt security of an enterprise;*
 - (aa) *where the enterprise is an affiliate of the investor; or*
 - (bb) *where the original maturity of the debt security is at least 3 years, but does not include a debt security, regardless of original maturity, of a Party or a state enterprise;*
 - (DD) a loan to an enterprise:
 - (aa) where the enterprise is an affiliate of the investor; or
 - (bb) *where the original maturity of the loan is at least 3 years, but does not include a loan, regardless of original maturity, of a Party or a state enterprise;*
 - (EE) an interest in an enterprise that entitles the owners to share in income or profits of the enterprise;

¹³⁴ Free Trade Agreement between the EFTA States and the United Mexican States (27 November 2000; entry into force 1 July 2001).

¹³⁵ Free Trade Agreement between the EFTA States and the United Mexican States (27 November 2000; entry into force 1 July 2001) Art 45.

¹³⁶ Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership (17 September 2004; entry into force 1 April 2005). See also the closed-list exhaustive test of "investment" in Art 1 of the South African Development Community Model Bilateral Investment Treaty (July 2012), which contains all the bullet points except (II) and (JJ).

- (FF) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution ...;
 - (GG) real estate or other property ... and any related property rights such as leases, liens and pledges, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
 - (HH) interests arising from the commitment of capital or other resources in the Area of a Party to economic activity in such Area, such as under:
 - (aa) contracts involving the presence of an investor's property in the Area of the Party, including turnkey or construction contracts, or concessions, or
 - (bb) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;
- but investment does not mean,
- (II) claims to money that arise solely from:
 - (aa) commercial contracts for the sale of goods or services by a national or enterprise in the Area of a Party to an enterprise in the Area of the other Party; or
 - (bb) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (DD) above; or
 - (JJ) any other claims to money that do not involve the kinds of interest set out in subparagraphs (AA) through (HH) above;
- [emphasis added]

110 In the face of such a specific “definition” of “investment” that already indicates the duration (three years) of certain types of investment, it is foreseeable that the tribunal will not be able to contradict the BIT when assessing whether the duration characteristic under Article 25 has been fulfilled for a loan or debt security to an enterprise. The closed list of investments also indicates to some extent what sort of risk or commitment is acceptable as an investment and the tribunal should also take that into account in considering whether the Article 25 definition has been fulfilled. However, there is still room for the fourth hallmark (if this is accepted as a hallmark), *ie*, significant

contribution to economic development, to act as a sieve for frivolous, insignificant, or ordinary commercial claims, although it is arguable that an investment within the closed-list would *prima facie* be a contribution to economic development. States may have to prove that the investment is as egregiously fictional as the one in *Phoenix Action*¹³⁷ in order for the tribunal to strike out a claim for the failure to satisfy the Article 25 definition. Accordingly, an Article 25 definition will still have a useful, though very limited, part to play where newer, more comprehensive closed-list BITs are involved.¹³⁸

111 However, it is acknowledged that its greatest role is as a protective definition where the BIT definition is "every kind of asset" or "every kind of investment". In fact, one reason why the *MHS Annulment* majority decision will not end the debate over the scope of the *Salini* test is because numerous recently negotiated IIAs incorporate a definition of "investment" in economic terms – that is, they cover, in principle, every asset that an investor owns and controls but add the qualification that such assets must have "the characteristics of an investment". For this purpose, they refer to the criteria developed in ICSID practice, such as "the commitment of capital or other resources, the expectation of gain or profit or the assumption of risk".¹³⁹

112 For example, Article 10.1 of the Chile–Korea FTA states:¹⁴⁰

¹³⁷ *Phoenix Action Ltd v Czech Republic* [Award] ICSID Case No ARB/06/5 (15 April 2009); *Abaclat v Argentine Republic* [Decision on Jurisdiction and Admissibility, Dissenting Opinion (Professor Georges Abi-Saab)] ICSID Case No ARB/07/5 (31 October 2011).

¹³⁸ This conclusion is supported by the fact that the closed-list exhaustive test of "investment" in the South African Development Community Model Bilateral Investment Treaty (July 2012) ("SADC BIT") also specifies, in addition to the above categories, that in order to qualify as an "investment", an asset must fulfill the *Salini* test: see SADC BIT at para 10.

¹³⁹ United Nations Conference on Trade and Development, *Investor-state Dispute Settlement and Impact on Investment Rulemaking* (New York/ Geneva: United Nations, 2007) at p 73.

¹⁴⁰ Free Trade Agreement between the Republic of Korea and the Republic of Chile (15 February 2003; entry into force 1 April 2004) Art 10.1.

'Investment' means every kind of asset that an investor owns or controls, directly or indirectly, *and that has the characteristics of an investment, such as the commitment of capital or other resources, the expectations of gains or profits and the assumption of risk ...* [emphasis added]

(Note that the US–Chile FTA¹⁴¹ also contains a similar reference to the “characteristics of investment”).)

113 The 2004 US Model BIT contains a similar but slightly longer definition:¹⁴²

'Investment' means every asset owned or controlled, directly or indirectly by an investor that has the characteristics of an investment. Where an asset lacks the characteristic of an investment, that asset is not an investment regardless of the form it may take. The characteristics of an investment *include* the commitment of capital, the expectation of gain or profit or the assumption of risk. Forms that an investment may take include [an enterprise, shares, futures, options, *etc*] [emphasis added]

114 Most recently, the ASEAN Comprehensive Investment Agreement¹⁴³ states:¹⁴⁴

¹⁴¹ Free Trade Agreement between the Republic of Korea and the Republic of Chile (15 February 2003; entry into force 1 April 2004) Art 10.27.

¹⁴² Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment 2004 <www.state.gov/documents/organization/117601.pdf> (accessed 10 May 2013) Art 1. This definition was used in Art 1 of the Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment 2012 <<http://www.state.gov/documents/organization/188371.pdf>> (accessed 10 May 2013), as well as Art 15.1 of the United States–Singapore Free Trade Agreement (6 May 2003; entry into force 1 January 2004).

¹⁴³ ASEAN Comprehensive Investment Agreement (signed 26 February 2009).

¹⁴⁴ ASEAN Comprehensive Investment Agreement (signed 26 February 2009) at p 6, fnn 2–3.

- 2 Where an asset lacks the characteristics of an investment, that asset is not an investment regardless of the form it may take. The characteristics of investment *include* the commitment of capital, the expectation of gain or profit or the assumption of risk.
- 3 For greater certainty, investment does not mean claims to money that arise solely from:
 - (a) commercial contracts for sale of goods and services; or
 - (b) the extension of credit in connection with such commercial contracts.

[emphasis added]

115 The definitions in the above BITs are interesting as they adopt hallmarks identified in the *Salini* test but do not mention the hallmarks of duration or significant contribution to economic development. Arguably, the use of the words “such as” and “include” indicates that the three listed hallmarks are merely examples of a characteristics of an investment and case law can be referred to supply other characteristics. It would be interesting to see if a loss-leader project would be considered an investment under this treaty, given the express mention of “expectations of gains of profits” as a characteristic of investment.

116 The 2004 US Model BIT and the ASEAN Comprehensive Investment Agreement is perhaps a good reflection of what the typical modern State intends when adopting an “every kind of asset” definition of “investment”. In doing so, the State is concerned that the *form* which the investment may take should not be restricted in any way and accordingly provides that an investment means every kind of asset. However, the State, cognizant of the fact that every kind of asset may be an over inclusive definition, may still wish the asset, whichever form it takes, to meet the characteristics of investment. The State is happy to leave the assessment of whether there are characteristics of investment in particular cases to the individual tribunals, but provides some guidance in the BIT with respect to what may be considered a characteristic of an investment, without precluding the tribunal from finding that there are other characteristics that have evolved, perhaps from ICSID case law or other investment treaty jurisprudence.

117 A question that may loom ahead for future tribunals would be whether a BIT which has been recently entered into and does not contain

refinements of the definition of “investment” described in this section, but instead still defines “investment” as “every kind of asset”, would be construed as an intention to rely on Article 25(1) and the existing ICSID case law on Article 25(1) to supply the outer limits of the definition of investment, or would now be construed as a conscious adoption of a broad definition intended to remove any barriers to ICSID arbitration which Article 25(1) may pose in relation to the definition of “investment”.

118 Some tribunals or commentators would adopt the view that it would not be possible for a bilateral or unilateral act of the parties to widen the scope of Article 25(1) as the ICSID Convention is a multilateral treaty.¹⁴⁵ However, one might also take the view that the protections of Article 25(1) are for the benefit of the individual host State, which the host State may expressly waive in a particular circumstance(s).¹⁴⁶

119 Even if the second approach is adopted, it might still be that an unequivocal waiver would be required in order for the tribunal to disapply the usual requirements of Article 25(1) and assume jurisdiction on the basis of state consent to the specific subject matter of the arbitration.

120 Accordingly, even if future IIAs adopt the general wording “every kind of asset”, they should not be taken as trying to expand the Article 25 definition. The trend towards more comprehensive definitions in newer BITs show that at least some states have appreciated the failings of an overbroad BIT definition and are helping to make the definition of investment more precise. This is a laudable process as both states and ICSID tribunals can mutually gain valuable feedback from ICSID awards and trends in treaty-drafting respectively.

¹⁴⁵ See Zachary Douglas, *The International Law of Investment Claims* (Cambridge/New York: Cambridge University Press, 2009) at p 165; *Phoenix Action Ltd v Czech Republic* [Award] ICSID Case No ARB/06/5 (15 April 2009); *Abaclat v Argentine Republic* [Decision on Jurisdiction and Admissibility, Dissenting Opinion (Professor Georges Abi-Saab)] ICSID Case No ARB/07/5 (31 October 2011).

¹⁴⁶ As discussed in paras 39–48 above.

VI. Conclusion

121 The definition of "investment" under Article 25(1) should consist of the hallmarks of commitment, duration, risk, and significant contribution to economic development, with "good faith" being subsumed under the fourth hallmark, or considered separately as a general principle applicable to the interpretation of treaties. These four hallmarks can operate as a useful and general outer limit to the BIT definition of "investment", especially when the BIT definition is a broad one such as "every kind of asset [or investment]".

122 Whether the four hallmarks are treated as jurisdictional (assessed cumulatively) or merely as typical characteristics may be an academic distinction. The important point is that that the tribunal must consider the degree to which the hallmarks have been fulfilled and if any of the hallmarks are not satisfied or only superficially satisfied, the tribunal must balance the fulfilment of the other satisfied hallmarks against any hallmarks that are not satisfied in its determination as to whether it has jurisdiction.

123 If none of the hallmarks are satisfied or if all of the hallmarks are satisfied, the residual consideration of the tribunal would be whether:

- (a) Despite the satisfaction of all the hallmarks, the investment is nevertheless contrary to the purpose of the ICSID Convention and the consent of the Contracting State to ICSID jurisdiction; or
- (b) Despite the non-satisfaction of all the hallmarks, the investment is still consistent with the purpose of the ICSID Convention and the consent of the Contracting State to ICSID jurisdiction.

VII. Postscript

124 Let the principal author close with a personal note. When I wrote the *MHS Award*,¹⁴⁷ I did not have the benefit of reading those awards which were decided after *MHS*, viz, *MCI Power Group, LC v Republic of*

¹⁴⁷ *Malaysian Historical Salvors, SDN, BHD v Malaysia* [Award] ICSID Case No ARB/05/10 (17 May 2007).

Ecuador,¹⁴⁸ *Biwater, RSM v Grenada* and *Phoenix Action*, nor did I have the benefit of the claimant's arguments before the *MHS Annulment* Committee (which were presented by a different legal team from the one that appeared before me). Were I to write the award today, I would certainly write it in a different way, but it would be wrong for me (or anyone else) to speculate whether my ultimate decision would be different. The point of this article is not to defend my award, but to point out that, in the light of the conflicting jurisprudence, the question of what an investment is still remains an open one in the future – even for me.

¹⁴⁸ *MCI Power Group, LC v Republic of Ecuador* [Award] ICSID Case No ARB/03/6 (31 July 2007).

Background to Essay 13

This was an article for the *Liber Amicorum* of Neil Kaplan and its genesis was a paper I delivered at an International Centre for Settlement of Investment Disputes (“ICSID”) Seminar in Seoul, South Korea in March 2011. The article was therefore completed in 2010 with the assistance of Kevin Lim but, as the *Liber* was meant for release only on Neil’s 70th birthday in 2012, my article had to lie fallow for all this time and could not be published. I was concerned that the freshness of the article might be lost if it was not published soon, so I eventually negotiated for it to be published in the online journal Transnational Dispute Management (“TDM”) in December 2011, so that it would not be outdated by later case developments. Fortunately, there were no significant decisions after that publication, so the version appearing in the *Liber* was the same as the TDM version. I had to look again at this article recently as I had to deliver a lecture on this topic before a demanding audience in January 2013, *viz*, the Secretariat of the Permanent Court of Arbitration in The Hague, and was pleased to note that the article was still current.

I wish to extend my thanks to Sweet & Maxwell for kindly granting me permission to republish this article in this book.

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ISSUE CONFLICT IN ICSID ARBITRATIONS*

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Contents

I.	Introduction.....	473
II.	Defining bias.....	474
	A. The relationship between issue conflict and procedural fairness.....	475
	B. Actual and apparent bias.....	475
	C. The concepts of independence, impartiality, and neutrality.....	478
	D. Common tests for apparent bias – <i>The Gough, Sussex Justices</i> and <i>Porter v Magill</i> tests	482
	E. What are the differences between <i>Sussex Justices, Porter v</i> <i>Magill</i> and <i>Gough</i> ?	486
	(1) What are the differences between the First Arms (vantage point) of the three tests?.....	486
	(2) What are the differences between the Second Arms (threshold) of the three tests?.....	487
	F. The challenge procedure and test for bias under the ICSID.....	489
	(1) ICSID Convention and Arbitration Rules.....	490
	(2) ICSID jurisprudence on the test for bias under ICSID	492
	(3) The relevance of the IBA Guidelines on conflicts of interest to the challenge regime under ICSID	499
III.	Issue conflict.....	506
	A. Arbitrator is concurrently acting, or has previously acted, as counsel in another case raising analogous issues (Type A)	507
	B. Arbitrator is to act as counsel in a subsequent case raising analogous issues (Type B).....	510

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C.	Arbitrator has rendered prior award(s) dealing with, or expressed a personal opinion on, a disputed issue in the case before him (Type C)	511
D.	Why issue conflicts are prevalent in international investment arbitration	522
IV.	What should be the test for bias in assessing issue conflict under the ICSID?	526
V.	Mitigating the problem of issue conflict.....	538

I. Introduction

1 It is self-evident that “[i]n order to maintain its legitimacy in the eyes of its users, and the public at large, international arbitration must ensure that its decision makers are perceived as trustworthy and independent”.¹ The imperative to maintain the procedural fairness and legitimacy of the arbitral process applies equally (if not more so) to investment treaty arbitration – that is, arbitrations brought by foreign investors against host states for the latter’s alleged violation of investment protection standards enshrined in international investment treaties – given that their outcomes can have significant impact on matters of public interest in host states.² Removal of potentially or actually biased arbitrators helps safeguard procedural fairness.

2 Nonetheless, while it is right to safeguard procedural fairness, commentators have pointed out that wily defendants may abuse the system and cry bias as a way of delaying proceedings, disrupting the claimant’s case and pressuring the arbitrator into standing down.³ Sam

¹ Natasha Peter & Clotilde Lemarié, “Is there a Different Yardstick for Arbitrator Bias in Investment Treaty Arbitrations?” (2008) 5(4) TDM at 1.

² Natasha Peter & Clotilde Lemarié, “Is there a Different Yardstick for Arbitrator Bias in Investment Treaty Arbitrations?” (2008) 5(4) TDM 1 at 1 and 2. See also para 62 below and n 229 and its accompanying text.

³ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 3.

Luttrell (“Luttrell”)⁴ describes this practice as the “Black Art” of bias challenge.⁵

3 These issues will be discussed in the context of a proposal to disqualify an arbitrator under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”),⁶ where the ground (or one of the grounds) advanced by a challenging party is that the arbitrator is affected by “issue conflict”. Issue conflict may arise when an arbitrator has taken, or gives the appearance of having taken, a particular stance on an issue to be decided in the case before him.⁷ In such circumstances, concerns may be raised as to his ability to address the issue with an open mind. Issue conflict is thus a form of conflict of interest stemming from the arbitrator’s relationship to the *subject matter of the dispute* (as opposed to his *relationship* with the disputing parties). In recent years, accusations of issue conflict have become one of the more popular weapons of choice of parties pursuing the disqualification of allegedly biased arbitrators in investor-state arbitrations. The phenomenon of issue conflict thus merits close examination by both tribunal members and parties alike.

II. Defining bias

4 Before further exposition of the phenomenon of issue conflict,⁸ it is first necessary to clarify certain key principles underlying the concept of procedural fairness, and how these principles relate to the disqualification of arbitrators for issue conflict bias.

⁴ Author of *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009).

⁵ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 4.

⁶ Convention on the Settlement of Investment Disputes between States and Nationals of Other States 17 UST 1270, TIAS No 6090, 575 UNTS 159 (18 March 1965; entry into force 14 October 1966) Art 57.

⁷ Nassib Ziade, “How Many Hats can a Player Wear: Arbitrator, Counsel and Expert?” (2009) 24(1) ICSID Rev-FILJ 49 at 49.

⁸ See paras 39–65.

A. The relationship between issue conflict and procedural fairness

5 Luttrell explains the relationship between issue conflict and procedural fairness as follows:⁹

Modern principles of procedural fairness are derived from two maxims of law. The first is that no man shall be condemned unheard. The second is that every man has a right to an impartial and independent adjudicator, a corollary of which is that no man may be a judge in his own cause: *nemo debet esse iudex in propria causa*. Abiding by the second will mean that only a person who has no significant interest in the cause, and no preference with respect to the parties involved, may sit in determination of it. It is this second maxim which operates in the context of issue conflict. [emphasis added]

B. Actual and apparent bias¹⁰

6 Bias is a generic term which describes a decision maker who is not impartial or independent with respect to one of the parties to the dispute or its subject matter. This paper is concerned with *apparent* rather than *actual* bias, since actual bias will always entitle the aggrieved party to challenge the arbitrator (and indeed, any award rendered by him or her¹¹), and accordingly is uncontroversial. In addition, the rule against

⁹ See generally Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 2.

¹⁰ See generally Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at pp 14–15.

¹¹ Articles 53 and 54 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into force 14 October 1966) (“ICSID Convention”) provide that arbitral awards of International Centre for Settlement of Investment Disputes (“ICSID”) tribunals are not subject to review by national courts. However, an award may be annulled by an *ad hoc* committee of three persons (appointed by the Chairman of the Administrative Council from ICSID’s Panel of Arbitrators) on a number of grounds, including the

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actual bias is distinctly factual and merely requires evidentiary proof: it does not rely on any legal test for its application, thus obviating the need for extensive discussion.

7 Most national arbitration laws (including those of all United Nations Commission of International Trade Law Model Law on International Commercial Arbitration¹² (“Model Law”) jurisdictions)¹³ and arbitration

ground “that there has been a serious departure from a fundamental rule of procedure”: ICSID Convention Art 52. The *ad hoc* committee in *Klockner v Cameroon* [Decision on Annulment] ICSID Case No ARB/81/2 (3 May 1985) observed in relation to this ground of annulment that:

Impartiality of an arbitrator is a fundamental and essential requirement. *Any shortcoming in this regard, that is any sign of partiality, must be considered to constitute, within the meaning of Article 52(1)(d), a ‘serious departure from a fundamental rule of procedure’* in the broad sense of the term ‘procedure’, *ie*, a serious departure from a fundamental rule of arbitration in general, and of ICSID arbitration in particular. [emphasis added]

Though not relevant for the purposes of this paper, it is interesting to note as a matter of contrast with the ICSID regime that, in international *commercial* arbitration, the test for arbitrator bias justifying the challenge and removal of arbitrators *during the course of arbitral proceedings* may not be the same where a party seeks (in proceedings before national courts) to *set aside or resist enforcement of an award* on the ground that it was rendered by an allegedly biased tribunal. This may be due to the pro-enforcement nature of the New York Convention and the national legislation of leading arbitral jurisdictions. The position in America in this regard is discussed in Catherine Rogers, “Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct” (2005) 41 *Stan J Int’l L* 53 at 76–81.

¹² UN Doc A/40/17, annex I; UN Doc A/61/17, annex I (21 June 1985; amended 7 July 2006).

¹³ As Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) points out at pp 14–15:

Article 12 of the Model Law reads, ‘An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence.’ In a 1995 arbitration between two states

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rules¹⁴ recognise an apparent lack of impartiality as a basis for challenging an arbitrator. As Lord Hewart CJ in *The King v Sussex Justices, Ex parte McCarthy* famously declared: “[I]t is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”¹⁵ Apparent bias in the form of issue conflict will be the focus of this paper.

under the UNCITRAL Arbitration Rules, the appointing authority elaborated on the standard created by Article 12(2) Model Law:

The test to be applied is that the doubts existing on the part of the Claimant here must be justifiable on some objective basis. Are they reasonable doubts as tested by the standard of a fair minded, rational, objective observer? Could that observer say, on the basis of the facts as we know them, that the Claimant has a reasonable apprehension of partiality on the part of the Respondents’ arbitrator? ... The courts of many other states, including those of the civil law tradition and seats supervised by the European Court of Human Rights at Strasbourg, have agreed that impartiality is a matter of ‘appearances’.

¹⁴ Article 10(1) of the United Nations Commission on International Trade Law (“UNCITRAL”) Arbitration Rules GA Res 31/98, UN GAOR 31st Sess (1976) and General Standard 2 of the International Bar Association (“IBA”) Guidelines on Conflicts of Interest in International Arbitration (22 May 2004) are very similar to Art 12 of the UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17 annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) (“Model Law”) (see n 13). As Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at pp 14–15 observes:

General Standard 2(c) of the IBA Guidelines expands on the test for ‘justifiable doubts’, explaining that doubts are justifiable when a reasonable and informed party would conclude that there was a likelihood that the arbitrator, in reaching his or her decision, may be influenced by factors other than the merits of the case as presented by the parties ... Commenting on General Standard 2 of the IBA Guidelines, Australian arbitrator Professor Doug Jones (a member of the IBA Working Party that produced the Guidelines) confirmed that ‘appearances, not fact, are the touchstone’.

¹⁵ *The King v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256 at 259.

C. *The concepts of independence, impartiality, and neutrality*¹⁶

8 Many commentators see impartiality and independence as “legally synonymous”, partly because “impartiality” is often paired with “independence” in national laws and procedural rules.¹⁷ However, the better view is that there *is* a difference between the two notions. Article 3.1 of the International Bar Association (“IBA”) Rules of Ethics for International Arbitrators (1987) explains that:

Partiality arises where an arbitrator favours one of the parties, or where he is prejudiced in relation to the subject matter of the dispute. Dependence arises from relationships between arbitrator and one of the parties, or with somebody closely connected with one of the parties.

9 Independence is thus concerned with a decision maker’s relationships with parties, which affect his or her views or attitudes on the merits of the dispute submitted for consideration. In contrast, when a

¹⁶ See generally Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at pp 15 and 19–25.

¹⁷ See Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 20: The due process ‘guarantee’ of Article 6 of the 1950 European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) uses both adjectives [*ie*, ‘impartial’ and ‘independent’], as does Article 14.1 of the United Nations International Covenant on Civil and Political Rights. The dual requirement of ‘impartiality and independence’ can be found in Article 5.3 of the Arbitration Rules of the LCIA, which states that, ‘Arbitrators shall be and shall remain at all times impartial and independent of the parties.’ Article 10(1) of the UNCITRAL Arbitration Rules states that, ‘Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.’ Article 12(2) of the UNCITRAL Model Law is cast in similar terms, with a corresponding disclosure requirement in Article 12(1). It follows that Model Law states recognize the dual requirement of impartiality and independence. In fact, few national laws and institutional rules depart from this norm, and the dual standard seems to prevail.

decision maker is said to lack impartiality, his or her state of mind is *directly* put in issue.¹⁸ Impartiality means “complete receptivity to the parties’ arguments”:¹⁹ an “impartial” arbitrator “is one who is not biased in favour of, or prejudiced against, a particular party or its case”.²⁰ “It is therefore logically sound to say that a decision maker who lacks independence will necessarily lack impartiality, but a decision maker who lacks impartiality will not necessarily lack independence.”²¹ This distinction between independence and impartiality was affirmed in *Suez v Argentine Republic*²² (“*Suez* (No 1)”) as follows:²³

The concepts of independence and impartiality, though related, are often seen as distinct, although the precise nature of the distinction is not always easy to grasp. Generally speaking *independence relates to the lack of relations with a party* that might influence an arbitrator’s decision. *Impartiality, on the other hand, concerns the absence of a bias or predisposition toward one of the parties.* Thus Webster’s Unabridged Dictionary defines ‘impartiality’ as ‘freedom from favoritism, not biased in favor of one party more than another.’ Thus it is possible in certain situations for a judge or arbitrator to be independent of the parties but not impartial. [emphasis added]

¹⁸ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 23.

¹⁹ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 15.

²⁰ R Doak Bishop & Lucy Reed, “Practical Guidelines for Interviewing, Selecting and Challenging Party-appointed Arbitrators in International Commercial Arbitration” (1998) 14(4) *Arb Int’l* 395 at 398.

²¹ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 22.

²² [Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal] ICSID Case No ARB/03/17 (22 October 2007).

²³ *Suez v Argentine Republic* [Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal] ICSID Case No ARB/03/17 (22 October 2007) at [29].

As issue conflicts stem from the arbitrator's views regarding the subject matter of the dispute (rather than his relationship with the parties), it raises concerns over his impartiality, rather than his independence.

10 It should be noted that the challenge and conflict disclosure provisions in the ICSID Convention and Rules of Procedure for Arbitration Proceedings²⁴ ("ICSID Arbitration Rules") only refer to the arbitrator's capacity for "independent judgment", without reference to impartiality.²⁵ This, however, does not mean that a challenge cannot be mounted on the basis of issue conflicts (which do not call into question the independence of the arbitrator). Schreuer in his commentary on the ICSID Convention notes that the debates "show that the delegates were actually concerned with the *impartiality* of members of ... arbitral tribunals"²⁶ [emphasis added]. To put the matter beyond doubt, recent decisions on arbitrator challenges, such as *Urbaser SA v Argentine Republic*²⁷ ("*Urbaser*"), have held that "both notions of independence and impartiality are to be considered as equally pertinent" in arbitrator challenges under the ICSID.²⁸ This is because the Spanish version of the ICSID Convention,

²⁴ Amended 10 April 2006.

²⁵ Article 14 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into force 14 October 1966) refers only to the arbitrator's "capacity to exercise independent judgment", whilst r 6(2) of the International Centre for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings (amended 10 April 2006) requires an arbitrator to sign a declaration which includes, *inter alia*, a disclosure of his "(a) past and professional, business and other relationships (if any) with the parties and (b) any other circumstance which might cause [the arbitrator's] reliability for *independent judgment* to be questioned by a party" [emphasis added].

²⁶ Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd Ed, 2009) at p 49.

²⁷ [Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator] ICSID Case No ARB/07/26 (12 August 2010).

²⁸ *Urbaser SA v Argentine Republic* [Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator] ICSID Case No ARB/07/26 (12 August 2010) at [36]. See also *Universal Compression International Holdings, SLU v Bolivarian Republic of Venezuela* [Decision on the Proposal
(continued on next page)

which has “equally authentic” status as the English and French versions, refers to the “notion of impartiality instead of independence”.²⁹

11 Impartiality must also be distinguished from the concept of neutrality. Luttrell explains that “neutrality” is “a term derived from the Public International Law of Armed Conflict, connoting the status of a sovereign entity that refrains from participation in an armed conflict and neither materially assists nor obstructs the belligerents involved in it”.³⁰ “An arbitrator may start off much like a neutral state in a time of war”,³¹ but he ultimately ends up taking a side. As Sir Robert Jennings observed in *Re Judge Broms*: “Any judge, though he ought to begin in an impartial stance, is required as a matter of judicial duty eventually and *on the basis of the presented arguments* to become partial to one side or the other.

to Disqualify Prof Brigitte Stern and Prof Guido Santiago Tawil, Arbitrators] ICSID Case No ARB/10/9 (20 May 2011) at [70] and *OPIC Karimum Corp v Bolivarian Republic of Venezuela* [Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator] ICSID Case No ARB/10/14 (5 May 2011) at [44].

²⁹ *Urbaser SA v Argentine Republic* [Decision on Claimant’s Proposal to Disqualify Professor Campbell McLachlan, Arbitrator] ICSID Case No ARB/07/26 (12 August 2010) at [36]. The Spanish version of Article 14 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into force 14 October 1966) refers to a person who “*inspirer plena confianza en su imparcialidad de juicio*”, *ie*, inspires full confidence in his impartiality of judgment. See also *Suez v Argentine Republic* [Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal] ICSID Case No ARB/03/17 (22 October 2007) at [28]–[30]; *Tidewater Inc v Bolivarian Republic of Venezuela* [Decision on Claimants’ Proposal to Disqualify Professor Brigitte Stern, Arbitrator] ICSID Case No ARB/10/5 (23 December 2010) at [37]; and *OPIC Karimum Corp v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/14 [Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator] (5 May 2011) at [44].

³⁰ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 24.

³¹ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 24.

To remain neutral to the end would be a dereliction of duty...”³² [emphasis added] In the same vein, Jan Paulsson points out that neutrality cannot be the litmus test for impartiality, for a “litigant will be certain to address perfectly open minds only if he is prepared to be judged by very young children”.³³

D. Common tests for apparent bias – The Gough, Sussex Justices and Porter v Magill tests³⁴

12 Luttrell has distilled from the leading arbitral seats of the world three competing tests for apparent bias. They provide useful reference points and conceptual tools to formulate a test for when issue conflict becomes actionable under the ICSID challenge regime. It is suggested that a tribunal called to decide an arbitrator challenge should ask itself: (a) from whose perspective it ought to view the circumstances giving rise to the issue conflict (whether it is from the point of view of the tribunal, or that of the public); and (b) the evidentiary threshold of proof required for the challenge to be sustainable.

13 The three competing tests, which can be found in English common law, illustrate different approaches to these two issues:

- (a) The “reasonable apprehension” test formulated in the judgment of Lord Hewart CJ in *The King v Sussex Justices, Ex parte McCarthy* (“*Sussex Justices* test”). This test requires that “a reasonable observer” have a “reasonable apprehension” that the arbitrator was biased. It can be broken down into two arms: (i) assessment of the impugned conduct from the vantage of a “reasonable observer” (First Arm); and (ii) a “reasonable apprehension” or “reasonable

³² Decision of Appointing Authority to the Iran-United States Claims Tribunal (7 May 2001) at pp 5–6.

³³ Jan Paulsson, “Ethics, Elitism, Eligibility” (1997)14(4) J Int Arb 13 at 13 and 15.

³⁴ See generally Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at pp 8 and 36–37.

suspicion” threshold (Second Arm).³⁵ The majority of common law states follow the *Sussex Justices* test (Singapore is one example, as the case of *Re Shankar Alan s/o Anant Kulkarni*³⁶ (“*Re Shankar Alan*”) and its progeny demonstrate).³⁷

- (b) The “real danger” test formulated by the House of Lords in *Regina v Gough*³⁸ (“*Gough* test”). The *Gough* test’s two arms are: (i) assessment of the impugned conduct through the eyes of the court (First Arm); and (ii) a “real danger” threshold (Second Arm).³⁹ The *Gough* test has a higher evidentiary threshold in its Second Arm, and a different First Arm from the *Sussex Justices* test (*Gough* does not use a “reasonable third person” vantage point; it uses the court’s). *Gough* no longer binds English courts after *Porter v Magill*^{40, 41} which supplies the third competing test for apparent bias.
- (c) The “real possibility” test formulated by the House of Lords in *Porter v Magill* (“*Porter v Magill* test”). This test was formulated by

³⁵ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 36.

³⁶ [2007] 1 SLR(R) 85. It now appears that the contrary Singapore decision in *Tang Kin Hwa v Traditional Chinese Medicine Practitioners Board* [2005] 4 SLR(R) 604, which suggested that the *Gough* and *Sussex Justices* tests were the same, is no longer followed by the Singapore courts. See *Ng Chee Tiong Tony v Public Prosecutor* [2008] 1 SLR(R) 900 at [14]–[21]; *Mohammed Ali bin Johari v Public Prosecutor* [2008] 4 SLR(R) 1058 at [160]–[163]; *Yong Vui Kong v Attorney-General* [2011] 1 SLR 1 at [74] and [77]; *Lim Mey Lee Susan v Singapore Medical Council* [2011] 4 SLR 156 at [52]; and *Manjit Singh s/o Kirpal Singh v Attorney-General* [2013] 2 SLR 1108 at [33].

³⁷ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at pp 184–185.

³⁸ [1993] AC 646.

³⁹ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 36.

⁴⁰ [2002] 2 AC 357.

⁴¹ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 38.

Lord Hope as “whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased”. *Porter v Magill* is a “middle ground or ‘compromise’ test between *Gough* and *Sussex Justices*”:⁴² its First Arm (reasonable observer vantage point) comes from *Sussex Justices*, while its Second Arm (real possibility) comes from *Gough*. Luttrell notes that “nearly all of the common law states that followed *Gough* now follow *Porter v Magill*”.⁴³

These three tests are summarised in table form below:

Test	First Arm (Vantage Point)	Second Arm (Threshold)
<i>Sussex Justices</i> : The reasonable apprehension test.	Assessment of the impugned conduct from the vantage of a “fair minded and informed observer”	A “reasonable apprehension” (or “reasonable suspicion”) threshold
<i>Gough</i> : The real danger test.	Assessment of the impugned conduct through the eyes of the court	A “real danger” threshold
<i>Porter v Magill</i> : The real possibility test.	Assessment of the impugned conduct from the vantage of a “fair-minded and informed observer, having considered the facts”	A “real possibility” threshold

14 These tests for apparent bias are by no means exclusive to English common law. The Convention for the Protection of Human Rights and Fundamental Freedoms⁴⁴ on bias is for all intents and purposes the same as the *Sussex Justices* test.⁴⁵ The French courts have at one time applied

⁴² Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 8.

⁴³ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 8.

⁴⁴ Eur TS No 5, 312 UNTS 221, 1953 UKTS No 71 (4 November 1950; entry into force 3 September 1953)

⁴⁵ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at pp 68–73.

the *Gough* test, but have now moved on to the *Sussex Justices* test.⁴⁶ In America, despite the confusion caused by the individual judgments issued in *Commonwealth Coatings Corp v Continental Casualty Co*,⁴⁷ it appears that a test akin to the *Porter v Magill* test has emerged.⁴⁸ Of course, not all jurisdictions' tests for bias will fall neatly under, or can be approximated to, one of the three English common law tests. For instance, the German courts evaluate bias challenges against a "grave and obvious partiality or dependence" standard,⁴⁹ which appears to be an even

⁴⁶ See the decisions of the Paris *Cour d'appel* of 2 June 1989 in *TAI v SIAPE* (1991) Rev Arb 87 and the *Cour de Cassation* in *Qatar v Creighton* (1999) Rev Arb 308, as explained in Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a "Real Danger" Test* (Kluwer Law International, 2009) at pp 82–83 and 86–87.

⁴⁷ 393 US 145 (1968).

⁴⁸ American Law Institute, *Restatement Third, The US Law of International Commercial Arbitration*, (Tentative Draft No 2, 16 April 2012) states at §§4–13 that:

In light of the confusion over [*Commonwealth Coatings Corp v Continental Casualty Co* 393 US 145 (1968)], and in the absence of more recent guidance, lower federal courts have diverged significantly in attempting to define 'evident impartiality' ... [However,] [t]he definition of evident partiality adopted by a majority of courts, and by the Restatement, requires an *objective, disinterested observer* who is fully informed of the facts relevant to the arbitrator's conduct or alleged conflicts to develop *a serious doubt* regarding the fundamental fairness of the arbitral proceedings. [emphasis added]

See also Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a "Real Danger" Test* (Kluwer Law International, 2009) at pp 130–162 (in particular pp 145 and 162).

⁴⁹ It is also interesting to speculate where the evidentiary threshold specified by General Standard (2)(b) of the International Bar Association Guidelines on Conflicts of Interest in International Arbitration is pegged at. General Standard 2(b) provides that an arbitrator will not be considered independent or impartial "if facts or circumstances exist ... that, *from a reasonable third person's point of view* having knowledge of the relevant facts, give rise to *justifiable doubts* as to the arbitrator's impartiality or independence ..." [emphasis added]. General Standard 2(c) in turn explains that:

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higher threshold than the “real danger” standard in *Gough*.⁵⁰ Nonetheless, the English common law tests address the crucial issues of vantage point and evidentiary threshold, and they have (as just discussed) substantial similarities with other jurisdictions’ tests for bias, which allows them to operate as meaningful points of reference to analyse the test for actionable issue conflict in ICSID arbitrations. For ease of reference (and not with the intention of disregarding the fact that non-common law jurisdictions may apply the same or similar tests), these tests for bias shall be referred to in their English common law manifestations.

E. What are the differences between *Sussex Justices*, *Porter v Magill* and *Gough*?⁵¹

(1) *What are the differences between the First Arms (vantage point) of the three tests?*

15 The vantage points from which the impugned decision maker is to be assessed differ as between the *Sussex Justices* and *Porter v Magill* tests on the one hand, and the *Gough* test on the other. The *Sussex Justices* and *Porter v Magill* tests use the vantage point of “a notional,

... [d]oubts are justifiable if a reasonable and informed *third party* would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case ... [emphasis added]

Since the existence of “justifiable doubts” of the arbitrator’s impartiality or independence on the part of the third party appears to be equated to circumstances which would cause a third party to conclude “that there was a likelihood” of arbitrator bias, one may arguably draw the conclusion (as is implied by the literal meaning of the term “likelihood”) that the tribunal must be satisfied that the third party would regard it to be *more likely than not* that the arbitrator may succumb to bias. *Cf* n 13.

⁵⁰ *Bundesgerichtshof* decision dated 4 March 1999, ZIP 859 (1999). See also Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at pp 103–104.

⁵¹ See generally Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at pp 37–39.

reasonable person with knowledge of the material facts”.⁵² Under the *Gough* test, the vantage point is that of the *court itself*.⁵³

16 *Re Shankar Alan* (citing with approval the High Court of Australia’s decisions in *Webb v The Queen*⁵⁴ (“*Webb*”) and *Johnson v Johnson*⁵⁵) pointed out that these vantage points differ, since the court does not personify the reasonable observer, who is generally more sensitive to the possibility of bias:⁵⁶

- 63 ...
... the interposition of the fictitious bystander ... lays emphasis on the need to consider the complaint ... not by what adjudicators and lawyers know, but by how matters might reasonably appear to the parties and to the public ...
...
... in deciding whether there is an apprehension of bias, it is necessary to consider the impression which the same facts might reasonably have upon the parties and the public. ... The public includes groups of people who are sensitive to the possibility of judicial bias.
...
65 ...
... emphasise[s] [on] the court’s view of the facts ... place[s] inadequate emphasis on the public perception of the irregular incident.

(2) *What are the differences between the Second Arms (threshold) of the three tests?*

17 Apart from their vantage points, the *Gough* and *Porter v Magill* tests are the same. As Luttrell points out, “[t]here is no difference between

⁵² Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 37.

⁵³ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 37.

⁵⁴ (1993–1994) 181 CLR 41.

⁵⁵ (2000) 201 CLR 488.

⁵⁶ *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85 at [63] and [65].

a ‘real danger’ and a ‘real possibility’; a ‘danger’ is just a possibility of a bad thing – both ratio[ne]s contain the imperative word ‘real’”.⁵⁷

18 However, the Second Arms in *Gough* and *Porter v Magill* on the one hand (real possibility/real danger), and *Sussex Justices* on the other (reasonable apprehension), were expressed rather differently. There are conflicting opinions on whether these two tests produce different results.

19 Superior courts in common law states that have rejected *Gough* in favour of *Sussex Justices* (and Luttrell) are of the view that the Second Arms of the two tests “diverge considerably”.⁵⁸ In *Webb*, the High Court of Australia expressed the opinion that applying the “real danger” and “real possibility” standards may come dangerously close to replacing the doctrine of disqualification for *apparent* bias with that of *actual* bias, as those standards are focused on the *possibility (rather than the appearance) of bias*. The *Sussex Justices* test of “reasonable apprehension” (or reasonable suspicion) avoids this pitfall as it connotes a stronger focus on perception (as opposed to the possibility) of bias. Similar opinions were shared by South African and Singaporean courts.⁵⁹

20 For our purposes, the more important distinction between the real possibility/real danger standard, and the reasonable apprehension/suspicion standard, is the standard of proof. Luttrell explains this well:

While a suspicion (or apprehension) may be *reasonably* founded insofar as it has been formed in the mind of a person as a result of his or her exercise of the faculty of reason, the facts upon which the suspicion is based may not necessarily interact to produce the result that the apprehended outcome is a real possibility[danger] ... the word ‘real’ is an adjective that draws on a parent concept of ‘reality’, a term we use to describe a state of affairs arising out of the observable interplay of material elements that are *actual* and *true*. Without the word ‘real’, there is harmony between ‘possibility’

⁵⁷ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 38.

⁵⁸ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at pp 37–38.

⁵⁹ See *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85 at [71]–[75].

[/'danger'] and 'reasonable apprehension'. This is because the coming into fruition of a state of affairs that has been suspected or apprehended by a person as a result of his or her use of logic and reason will necessarily be *possible* – if it were not possible, then no logical suspicion or apprehension of it could have been formed *ab initio*. However, the [Gough]Porter v Magill attachment of the word 'real' to the word 'possibility'/'danger' renders this interaction imperfect because the possibility/'danger' must then satisfy the requirements of reality, which exceed those of logic and reason, and include external component circumstances. The evidentiary burden imposed by the 'real possibility' test is, therefore, markedly higher than that which an applicant must discharge to make out a reasonable apprehension under *Sussex Justices*. [emphasis in original]

21 Accordingly, the reasonable suspicion standard is a lower standard of proof than that of the real possibility/real danger standard. As held by various judicial authorities, the latter standard is itself lower than a standard of proof on a balance of probabilities.⁶⁰

F. The challenge procedure and test for bias under the ICSID

22 Whilst the Stockholm Chamber of Commerce, International Chamber of Commerce ("ICC"), and UNCITRAL arbitration rules⁶¹ are frequently used in investment arbitration,⁶² these instances are set aside

⁶⁰ See *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85 ("*Re Shankar Alan*"), citing *Webb v The Queen* (1993–1994) 181 CLR 41 approvingly at [74]. See also *Re Shankar Alan* at [49]–[51].

⁶¹ Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (entry into force 1 January 2010); International Chamber of Commerce Arbitration Rules (entry into force 1 January 2012).

⁶² See Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a "Real Danger" Test* (Kluwer Law International, 2009) at pp 221–222:

In ICSID arbitration, the parties are afforded considerable autonomy in the selection of procedural rules – the Washington Convention allows the parties to use rules other than the ICSID Rules (the most common alternative being the UNCITRAL Rules). It is important to note, therefore,

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to focus this paper on ICSID Convention arbitration under the ICSID Arbitration Rules, as they are the most important governing rules in investment arbitration.

(1) *ICSID Convention and Arbitration Rules*⁶³

23 ICSID proceedings are a “special case” because, “when an ICSID tribunal is convened, it does not take a municipal seat”.⁶⁴ The specific result of the exclusion of the procedural law of the seat is that the fundamental rules of procedural fairness that apply to ICSID proceedings are not derived from municipal law, but rather from non-national sources.⁶⁵ These sources are the following (in order of priority):

- (a) the ICSID Convention;
- (b) the ICSID Arbitration Rules; and
- (c) ICSID jurisprudence.⁶⁶

that ICSID Rules do not necessarily apply to proceedings conducted at ICSID. The UNCITRAL Rules, for example, are often selected in arbitration provisions within BITs, with the outcome that the Article 10(1) ‘justifiable doubts’ standard for challenge applies in resulting ICSID proceedings. Similarly, the ICSID Arbitration Rules do not apply to NAFTA Chapter 11 claims arbitrated at ICSID under the Additional Facility. When the UNCITRAL Rules/Model Law standard is applicable, an ICSID tribunal may consider the doctrine and case law of Model Law states.

⁶³ See generally Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at pp 214–215, 218, 220–221 and 224.

⁶⁴ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 214. See Arts 52 and 53 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into force 14 October 1966).

⁶⁵ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 215.

⁶⁶ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 218.

24 Article 57 of the ICSID Convention (read with Rule 9(1) ICSID Arbitration Rules) governs the substantive grounds for challenging an arbitrator. It provides that a party may propose disqualification of an arbitrator on the basis “of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14”. Article 14(1) in turn requires that appointed arbitrators be “persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, *who may be relied upon to exercise independent judgment*” [emphasis added]. Thus, “[t]he inter-operation of Articles 14(1) and 57 produces a rule that an ICSID arbitrator may only be challenged for bias where he or she manifestly lacks the capacity to exercise independent judgment”.⁶⁷ The key word is *manifest*, which appears to set an “extremely high bar for challenging an arbitrator”⁶⁸. No other arbitral institution or law uses the same test (they usually merely require an applicant to show that there are “justifiable doubts” as to the arbitrator’s impartiality and independence).⁶⁹

25 The procedure for challenge is as follows.⁷⁰ Article 58 of the ICSID Convention provides that the co-arbitrators, in the first instance, shall

⁶⁷ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 224.

⁶⁸ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 220. This will be discussed further below at paras 28–33 and 66–71.

⁶⁹ See, for instance, Art 12 of the UNCITRAL Arbitration Rules GA Res 65/22, UN GAOR 65th Sess (2010); Art 15 of The Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (entry into force 1 January 2010); and Art 180(1)(c) of the Swiss Private International Law Act (18 December 1987). See generally Audley Sheppard, “Arbitrator Independence in ICSID Arbitration” in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) at p 131.

⁷⁰ See further r 9 of the ICSID Rules of Procedure for Arbitration Proceedings (amended 10 April 2006); Lars Markert, “Challenging Arbitrators in Investment Arbitration: The Challenging Search for Relevant Standards and Ethical Guidelines” (2010) 3(2) *Contemp Asia Arb J* 237 at 246–250; and Sam
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decide on the proposal to challenge an arbitrator. Where the challenge is made to a member of an annulment committee, the same rule applies. However, where a challenge relates to a sole arbitrator or to a majority of the tribunal, or where two unchallenged co-arbitrators cannot agree, the chairman of the ICSID administrative council will decide on the proposal. *Generation Ukraine v Ukraine* (2003)⁷¹ suggests that, if the chairman himself is disqualified, the matter will be referred to the Secretary-General of the Permanent Court of Arbitration (“PCA”) for final determination.⁷²

(2) *ICSID jurisprudence on the test for bias under ICSID*

26 As will be mentioned below⁷³, there is a *de facto* doctrine of precedent whereby ICSID decisions often cite judgments of previous ICSID panels as persuasive authorities for the conclusions reached.⁷⁴ The same would apply to ICSID challenge decisions,⁷⁵ hence the relevance of examining ICSID jurisprudence on the matter.

Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at pp 218–223.

⁷¹ [Award] ICSID Case No ARB/00/9 (16 September 2003).

⁷² Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 221.

⁷³ See para 65.

⁷⁴ Campbell McLachlan QC, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 1st Ed, 2007) at paras 1.48–1.52 and 3.83–3.103.

⁷⁵ Most of the International Centre for Settlement of Investment Disputes (“ICSID”) challenge decisions discussed in this paper cite and rely heavily upon earlier ICSID challenge decisions as authority for the conclusions reached. Even those decisions that refuse to follow earlier authorities either distinguish such authorities from the case at hand, or provide detailed reasoning for regarding the earlier authorities’ analysis to be lacking. See, for instance, *Saint-Gobian Performance Plastics Europe v Bolivarian Republic of Venezuela* [Decision on Claimants’ Proposal to Disqualify Mr Gabriel Bottini from the Tribunal under Article 57 of the ICISD Convention] ICSID Case No ARB/12/13 (27 February 2013) at [83]–[85],

(continued on next page)

27 When examining the relevant case law, a central question to keep in mind is this: “[W]hich test for bias does Article 14/57 of the ICSID Convention most closely resemble: *Sussex Justices, Porter v Magill*, or *Gough?*”⁷⁶ Unfortunately, the *travaux préparatoires* to the ICSID Convention do not define or elucidate the meaning of “manifest” in Article 57. The vantage point to be adopted is also not clarified in

which distinguished the case of *Republic of Ghana v Telekom Malaysia Berhad* [Decision of the District Court of the Hague] (18 October 2004) on the ground that Gabriel Bottini was not simultaneously advocating for or advising Argentina in any way; *OPIC Karimum Corp v Bolivarian Republic of Venezuela* [Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator] ICSID Case No ARB/10/14 (5 May 2011) at [47], which departs from part of the holding in the earlier challenge decision in *Tidewater v Venezuela* [Decision on Claimants’ Proposal to Disqualify Professor Brigitte Stern, Arbitrator] ICSID Case No ARB/10/5 (23 December 2010) (on the issue as to whether an arbitrator’s prior multiple appointments as arbitrator (in unrelated disputes) by one of the parties in dispute may give rise to the perception that the arbitrator lacks independence *vis-à-vis* his or her appointing party). This implies that ICSID tribunals recognise a *prima facie* presumption that earlier ICSID challenge decisions have persuasive value. In this regard, see also Stephan Schill, “Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator” (2010) 23 LJIL 401 at 417, who similarly notes that:

... inconsistent [investment treaty arbitration] decisions ... deal, often extensively, with conflicting prior decisions, either by distinguishing cases on the basis of facts or by reading down a holding on a point of law from a rule to a principle or from a principle to an exception ... Cases of dissent therefore show that, despite the disagreement about the interpretation of specific issues, investment tribunals have a deeply rooted perception ... of the need for consistency ...

See further Stephan Schill, “Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator” (2010) 23 LJIL 401 at 426–427.

⁷⁶ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 225.

Article 57; it makes no reference to the perspective of either the court or the reasonable observer.

28 Luttrell argues that the test created by the ICSID Convention is, “in its black letters, closest to *Gough*”.⁷⁷ Schreuer is of the view that “manifest” operates as an evidentiary condition that “imposes a relatively heavy burden of proof on the party making the proposal [to disqualify]”⁷⁸ and Luttrell notes that “similar opinions were expressed by certain state courts with respect to the *Gough* ‘real danger’ test”.⁷⁹ However, Luttrell observes that, even though *Amco Asia Corp v Republic of Indonesia*⁸⁰ (“*Amco*”) interpreted Article 57 as imposing a strict evidential burden in line with the *Gough* test, “the current trend is away from ‘real danger’ and towards the *Sussex Justices* test [*ie*, ‘reasonable apprehension’ of bias from the viewpoint of the ‘fair minded and informed observer’]”.⁸¹ A general examination of ICSID challenge decisions is useful at this point to illustrate Luttrell’s view, before a final evaluation of this issue is made.⁸²

29 *Amco*:

In stressing the significance of the Article 57 expression ‘manifest’, the tribunal held that, under the Washington Convention the challenger must prove not only the facts that indicate a lack of

⁷⁷ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 225. See also Sam Luttrell, “Bias Challenges in Investor-state Arbitration: Lessons from International Commercial Arbitration” in *Evolution in Investment Treaty Law and Arbitration* (Chester Brown & Kate Miles eds) (Cambridge University Press, 2012) at p 459. More on this below at paras 35–38 and 66–71.

⁷⁸ Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd Ed, 2009) at p 1202.

⁷⁹ See, for instance, *Webb v The Queen* (1993–1994) 181 CLR 41 at 71.

⁸⁰ [Decision on Proposal to Disqualify an Arbitrator] ICSID Case No ARB/81/1, unreported (24 June 1982).

⁸¹ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 225.

⁸² Below at paras 66–71.

independence, but also that the lack is 'highly probable', not just 'possible' or 'quasi-certain'.⁸³

The authors' view is that the test laid down in *Amco* may approximate the *Gough* test, but is set at a still higher threshold of probability than "real danger".⁸⁴

30 *Compañía de Aguas del Aconquija SA v Argentine Republic*⁸⁵ ("Vivendi"): The test applied by the deciding tribunal members was: "whether a *real risk* of lack of impartiality based upon those facts (and not on any mere speculation or inference) could *reasonably be apprehended* by either party"⁸⁶ [emphasis added]. This formulation of the Article 14/57 ICSID Convention test is a combination of the Second Arms of *Gough* and *Sussex Justices* – "it merges 'real risk' with 'reasonable apprehension'".⁸⁷ As explained above,⁸⁸ these two expressions cannot co-exist. This formulation of the Article 14/57 test is therefore of limited practical value. However, it does mark the transition towards the less onerous *Sussex Justices* test from the high watermark in *Gough*.⁸⁹

31 *Suez* (No 1): The tribunal observed *obiter* that the terms of Article 57 (in particular, the word "manifest") implied a requirement that the challenger lead "evidence that a reasonable person would accept as

⁸³ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a "Real Danger" Test* (Kluwer Law International, 2009) at p 226.

⁸⁴ See further discussion at paras 37–38 and 66–71 below.

⁸⁵ ICSID Case No ARB/97/3 [Decision on the Challenge to the President of the Committee] (3 October 2001).

⁸⁶ *Compañía de Aguas del Aconquija SA v Argentine Republic* [Decision on the Challenge to the President of the Committee] ICSID Case No ARB/97/3 (3 October 2001) at [25].

⁸⁷ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a "Real Danger" Test* (Kluwer Law International, 2009) at pp 227–229.

⁸⁸ See paras 17–21 above.

⁸⁹ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a "Real Danger" Test* (Kluwer Law International, 2009) at p 229.

establishing the absence of the qualities required by Article 14”.⁹⁰ This is an approximation of the First Arm of the *Sussex Justices* test, which departs from the *Gough* “reasonable court” vantage point.

32 *Urbaser*: The tribunal did say at [40] of its decision that “the crux of the analysis is whether the opinions expressed by Professor McLachlan qualify as indicating a *manifest* lack of the qualities required to provide independent and impartial judgment” [emphasis added]. Nonetheless, the tribunal formulated the test as follows:⁹¹

... an appearance of such bias from a *reasonable and informed third person's point of view* is *sufficient to justify doubts* about an arbitrator's independence or impartiality ... what matters is whether ... a reasonable and informed third party would find that the arbitrator will rely on such opinions without giving proper consideration to the ... arguments presented by the Parties ... [emphasis added]

This seemingly equates the word “manifest” with the threshold of “reasonable apprehension” and emphasises the reasonable observer’s view as the applicable vantage point, in line with both arms of the *Sussex Justices* test.

33 On the basis of the case law referred to above, one may be tempted to agree with Luttrell’s hypothesis that the current trend is “away from ‘real danger’ and towards the *Sussex Justices* test [*ie*, ‘reasonable apprehension’ of bias from the viewpoint of the ‘fair minded and informed observer’]”.⁹² *Urbaser* in particular appears to provide support for Luttrell’s view. Nonetheless, it should be noted that Luttrell did not have the opportunity to consider the recent decisions of

⁹⁰ *Suez v Argentine Republic* [Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal] ICSID Case No ARB/03/17 (22 October 2007) at [40].

⁹¹ *Urbaser SA v Argentine Republic* [Decision on Claimant’s Proposal to Disqualify Professor Campbell McLachlan, Arbitrator] ICSID Case No ARB/07/26 (12 August 2010) at [43]–[44].

⁹² Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 225.

*Tidewater Inc v Bolivarian Republic of Venezuela*⁹³ (“*Tidewater*”) and *Universal Compression International Holdings, SLU v Bolivarian Republic of Venezuela*⁹⁴ (“*Universal Compression*”),⁹⁵ which may mark a return to the *Amco* interpretation of “manifest” that contradicts the Second Arm of *Sussex Justices*. In *Tidewater*, the tribunal held that the challenger must “establish facts that make it obvious and *highly probable, not just possible*, that [the arbitrator] is a person who may not be relied upon to exercise independent and impartial judgment”⁹⁶ [emphasis added]. Similarly, in *Universal Compression* and *ConocoPhillips*, the tribunals held

⁹³ [Decision on Claimants’ Proposal to Disqualify Professor Brigitte Stern, Arbitrator] ICSID Case No ARB/10/5 (23 December 2010).

⁹⁴ ICSID Case No ARB/10/9 [Decision on the Proposal to Disqualify Prof Brigitte Stern and Prof Guido Santiago Tawil, Arbitrators] (20 May 2011).

⁹⁵ Additional cases which Luttrell did not have the opportunity to include are *Abaclat v Argentine Republic* [Recommendation Pursuant to the Request by ICSID dated November 18 2011 on the Respondent’s Proposal for the Disqualification of Professor Pierre Tercier and Professor Albert Jan van den Berg dated September 15 2011] PCA Case No IR 2011/1, ICSID Case No ARB/07/5 (19 December 2011); *ConocoPhillips Co v Bolivarian Republic of Venezuela* [Decision on the Proposal to Disqualify L Yves Fortier QC] ICSID Case No ARB/07/30 (27 February 2012); and *Getma International v Republic of Guinea* [Décision sur la demande en récusation de Monsieur Bernardo M Cremades, Arbitre] ICSID Case No ARB/11/29 (28 June 2012).

⁹⁶ *Tidewater Inc v Bolivarian Republic of Venezuela* [Decision on Claimants’ Proposal to Disqualify Professor Brigitte Stern, Arbitrator] ICSID Case No ARB/10/5 (23 December 2010) at [39]. See also *Suez v Argentine Republic* [Decision on Second Proposal for Disqualification] ICSID Case No ARB/03/17 (12 May 2008) at [29]; *Amco Asia Corp v Republic of Indonesia* [Decision on Proposal to Disqualify an Arbitrator] ICSID Case No ARB/81/1, unreported (24 June 1982); *OPIC Karimum Corp v Bolivarian Republic of Venezuela* [Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator] ICSID Case No ARB/10/14 (5 May 2011) at [45]; and *Abaclat v Argentine Republic* [Recommendation Pursuant to the Request by ICSID dated November 18 2011 on the Respondent’s Proposal for the Disqualification of Professor Pierre Tercier and Professor Albert Jan van den Berg dated September 15 2011] PCA Case No IR 2011/1, ICSID Case No ARB/07/5 (19 December 2011) at [50].

that “[i]t is generally acknowledged that the term ‘manifest’ means ‘obvious’ or ‘evident’, and that it imposes a ‘relatively heavy burden of proof on the party making the proposal’”.⁹⁷ The *Universal Compression* tribunal cited Schreuer’s commentary on the ICSID Convention⁹⁸ and *Suez* (No 1)⁹⁹ as authority for this proposition (Luttrell referred to *Suez* (No 1) as supporting *Sussex Justices’* First Arm, but it is important to note, as *Universal Compression* points out, that *Suez* (No 1) also contradicts *Sussex Justices’* Second Arm).¹⁰⁰ That party must prove the fact of “manifest lack” by objective evidence, and not merely on the basis of speculation, presumption, belief, opinion or its interpretation.¹⁰¹ It will be argued below¹⁰² that this is the correct interpretation of the term “manifest” in Article 57 of the ICSID Convention.

⁹⁷ *Universal Compression International Holdings, SLU v Bolivarian Republic of Venezuela* [Decision on the Proposal to Disqualify Prof Brigitte Stern and Prof Guido Santiago Tawil, Arbitrators] ICSID Case No ARB/10/9 (20 May 2011) at [71]; *ConocoPhillips Co v Bolivarian Republic of Venezuela* [Decision on the Proposal to Disqualify L Yves Fortier QC] ICSID Case No ARB/07/30 (27 February 2012) at [56].

⁹⁸ Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd Ed, 2009) at p 1202.

⁹⁹ *Suez v Argentine Republic* [Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal] ICSID Case No ARB/03/17 (22 October 2007) at [34].

¹⁰⁰ Finally, in *Getma International v Republic of Guinea* [Décision sur la demande en récusation de Monsieur Bernardo M Cremades, Arbitre] ICSID Case No ARB/11/29 (28 June 2012), the tribunal held that the concept of “manifest lack” refers to a “clear” or “certain” lack, which imposes a relatively high onus on the party seeking to have the arbitrator disqualified.

¹⁰¹ *Getma International v Republic of Guinea* [Décision sur la demande en récusation de Monsieur Bernardo M Cremades, Arbitre] ICSID Case No ARB/11/29 (28 June 2012) at [60].

¹⁰² See paras 35–38 and 66–71.

(3) *The relevance of the IBA Guidelines on conflicts of interest to the challenge regime under ICSID*

34 As noted above,¹⁰³ the ICSID Convention and Arbitration Rules do not provide guidance on the circumstances that may give rise to a “manifest” lack of the capacity for “independent judgment”. The IBA Guidelines on Conflicts of Interest in International Arbitration¹⁰⁴ (“IBA Guidelines”) may usefully serve to fill this gap. They *adopt* “a traffic light approach to situations that may create conflicts of interest”:¹⁰⁵ green, orange, and red lists respectively describe relationships that do not create a conflict, may create a conflict, and certainly create a conflict.¹⁰⁶ Multiple tribunals applying the ICSID Convention have recognised the persuasive authority of the IBA Guidelines in assessing arbitrator bias.¹⁰⁷ The 2010 International Arbitration Report by Fulbright & Jaworski LLP (“Fulbright Report”) further notes that the frequent reliance by investment tribunals on the IBA Guidelines may indicate a “hardening of these soft-law norms”

¹⁰³ See para 27.

¹⁰⁴ 22 May 2004.

¹⁰⁵ “Recent Challenges to Arbitrators in Investment Treaty Cases – Is There an Emerging Trend?” in *2010 International Arbitration Report* Issue 2 (Fulbright & Jaworski LLP, 2010) at p 6.

¹⁰⁶ “Recent Challenges to Arbitrators in Investment Treaty Cases – Is There an Emerging Trend?” in *2010 International Arbitration Report* Issue 2 (Fulbright & Jaworski LLP, 2010) at p 6.

¹⁰⁷ See, for instance, *Alpha Projektholding GMBH v Ukraine* [Decision on Respondent’s Proposal to Disqualify Arbitrator Dr Yoram Turbowicz] ICSID Case No ARB/07/16 (19 March 2010) at [56]; *Tidewater Inc v Bolivarian Republic of Venezuela* [Decision on Claimants’ Proposal to Disqualify Professor Brigitte Stern, Arbitrator] ICSID Case No ARB/10/5 (23 December 2010); *Participaciones Inversiones Portuarias SARL v Gabonese Republic* [Decision on the Proposal to Disqualify an Arbitrator] ICSID Case No ARB/08/17 (12 November 2009); and *Hrvatska Elektroprivreda v Slovenia* [Decision on Disqualification] ICSID Case No ARB/05/24 (6 May 2008).

into what might in the future become “part of a *corpus* of international law of arbitration”.¹⁰⁸

35 However, a note of caution should be sounded in respect of the Fulbright Report’s portrayal of the IBA Guidelines’ status, specifically in respect of arbitrations held under the ICSID Convention and Arbitration Rules. First, certain recent cases (cited in the Fulbright Report) which relied heavily upon the IBA Guidelines do not support the general proposition that the Guidelines have such great persuasive force *in the context of ICSID arbitrations*. Some of these cases were *ad hoc* investment arbitrations applying the UNCITRAL Arbitration Rules (*ICS Inspection and Control Services Ltd v Republic of Argentina*¹⁰⁹ and *Vito G Gallo v Government of Canada*¹¹⁰). The challenge regime under the UNCITRAL Arbitration Rules is not analogous to that under the ICSID Convention, since the former only requires that there be “justifiable doubts” as to the arbitrator’s impartiality or independence (which is *in pari materia* with General Standard 2(c) of the IBA Guidelines¹¹¹), as opposed to the “manifest” lack thereof required under Article 57 of the ICSID Convention, which is a more stringent requirement than the justifiable doubts standard.¹¹² ICSID tribunals have noted such differences.¹¹³ In

¹⁰⁸ “Recent Challenges to Arbitrators in Investment Treaty Cases – Is There an Emerging Trend?” in *2010 International Arbitration Report* Issue 2 (Fulbright & Jaworski LLP, 2010) at p 6.

¹⁰⁹ [Decision on Challenge to Arbitrator] PCA Case No 2010-9 (17 December 2009); UNCITRAL Arbitration Rules, IIC 406 (2009).

¹¹⁰ [Decision on the Challenge to an Arbitrator] (14 October 2009) UNCITRAL Arbitration Rules, IIC 404 (2009).

¹¹¹ General Standard 2(c) of the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (22 May 2004) (“IBA Guidelines”) is itself *in pari materia* with Art 12(2) of the UNCITRAL Model Law International Commercial Arbitration 1985 (UN Doc A/40/17 annex I; UN Doc A/61/17, annex I) (21 June 1985; 7 July 2006), as stated in Explanation (b) of General Standard 2 of the IBA Guidelines.

¹¹² See nn 103 and 112 and its accompanying text, and paras 66–71 below.

¹¹³ See nn 103 and 112 and its accompanying text, and paras 66–71 below.

the same vein, the ICSID case of *Perenco Ecuador Ltd v Ecuador*¹¹⁴ (“*Perenco*”) (cited in the Fulbright Report), which relied heavily on the IBA Guidelines, is not indicative of their persuasive value in most ICSID proceedings, since the parties had expressly (and unusually) agreed that arbitrator challenges would be resolved by application of the IBA Guidelines.¹¹⁵ As was noted by the ICSID tribunal in *ConocoPhillips*, “the conflict of interest text incorporated in General Standard 2(b) [of the IBA Guidelines] is significantly different from that in Article 57 of the [ICSID] Convention and is easier to satisfy”.¹¹⁶

36 Second, the other ICSID decisions cited in the Fulbright Report, as well as more recent decisions (including *Tidewater*), took great pains to clarify that the IBA Guidelines are merely “guidelines and not a binding instrument”, which at best only “furnish a useful indication” of the circumstances giving rise to apparent bias.¹¹⁷ This is because the IBA

¹¹⁴ [In the Matter of a Challenge to be Decided by the Secretary General of the Permanent Court of Arbitration Pursuant to an Agreement] ICSID Case No ARB/08/6; PCA Case No IR-2009/1 (8 December 2009).

¹¹⁵ It should be noted that it is doubtful whether parties may derogate from the International Centre for Settlement of Investment Disputes challenge regime by contrary agreement. As pointed out by Lars Markert, “Challenging Arbitrators in Investment Arbitration: The Challenging Search for Relevant Standards and Ethical Guidelines” (2010) 3(2) *Contemp Asia Arb J* 237 at 252, the language of Arts 14 and 57 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into force 14 October 1966) (“ICSID Convention”) does not indicate that these provisions are subject to contrary agreement by the parties, in contrast with, for instance, Arts 42, 46 and 47 of the ICSID Convention, which provide that the parties may “agree otherwise”.

¹¹⁶ *ConocoPhillips Co v Bolivarian Republic of Venezuela* [Decision on the Proposal to Disqualify L Yves Fortier QC] ICSID Case No ARB/07/30 (27 February 2012) at [59].

¹¹⁷ *Tidewater Inc v Bolivarian Republic of Venezuela* [Decision on Claimants’ Proposal to Disqualify Professor Brigitte Stern, Arbitrator] ICSID Case No ARB/10/5 (23 December 2010) at [41]–[42]; *Urbaser SA v Argentine Republic* [Decision on Claimant’s Proposal to Disqualify Professor Campbell
(continued on next page)]

Guidelines “do not override any applicable national law or arbitral rules chosen by the parties”¹¹⁸: tribunals “must ultimately apply the legal standard laid down in the [ICSID] Convention itself”, which “mandates a general standard for disqualification which differs from the ‘justifiable doubts’ test in the IBA Guidelines”.¹¹⁹ This was most likely why the

McLachlan, Arbitrator] ICSID Case No ARB/07/26 (12 August 2010) at [37]; *ConocoPhillips Co v Bolivarian Republic of Venezuela* [Decision on the Proposal to Disqualify L Yves Fortier QC] ICSID Case No ARB/07/30 (27 February 2012) at [59] and *Getma International v Republic of Guinea* [Décision sur la demande en récusation de Monsieur Bernardo M Cremades, Arbitre] ICSID Case No ARB/11/29 (28 June 2012) at [62]. See also *Universal Compression International Holdings, SLU v Bolivarian Republic of Venezuela* [Decision on the Proposal to Disqualify Prof Brigitte Stern and Prof Guido Santiago Tawil, Arbitrators] ICSID Case No ARB/10/9 (20 May 2011) at [74]:

It is important to note that this decision is taken within the framework of the [ICSID] Convention and is made *in light of the standards that it sets forth*. The IBA Guidelines are widely recognized in international arbitration as the preeminent set of guidelines for assessing arbitrator conflicts. It is also universally recognized that the IBA Guidelines are *indicative only* – this is the case both in the context of international commercial and international investment arbitration. [emphasis added] See also *OPIC Karimum Corp v Venezuela* [Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator] ICSID Case No ARB/10/14 (5 May 2011) at [48]:

We accept that the IBA Guidelines are *not conclusive* for the purposes of the decision that we are required to make on this challenge, and that the examples contained in the IBA Guidelines are both non-exhaustive and *not in themselves decisive* of whether or not the standards set out in the guidelines for impartiality and independence of arbitrators have been met. The IBA Guidelines do, however, indicate that multiple appointments represent an issue relevant to impartiality and independence and, in our opinion, are correct in so doing. [emphasis added]

¹¹⁸ International Bar Association Guidelines on Conflicts of Interest in International Arbitration (22 May 2004) Introduction at para 6.

¹¹⁹ *Tidewater Inc v Bolivarian Republic of Venezuela* [Decision on Claimants’ Proposal to Disqualify Professor Brigitte Stern, Arbitrator] ICSID Case No ARB/10/5 (23 December 2010) at [43]; and *Urbaser SA v Argentine* (continued on next page)

tribunal in *EDF International SA v Argentine Republic*¹²⁰ (“EDF”) expressed some doubts as to whether the IBA Guidelines were applicable to the Article 57 of the ICSID Convention challenge before it,¹²¹ and discussed the Guidelines *only to the extent that* the tribunal felt they did not, on their own terms, support the challenging party’s contentions based on them.¹²² The tribunal in *Urbaser* even found that certain provisions of

Republic [Decision on Claimant’s Proposal to Disqualify Professor Campbell McLachlan, Arbitrator] ICSID Case No ARB/07/26 (12 August 2010) at [37]. See also Audley Sheppard, “Arbitrator Independence in ICSID Arbitration” in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) at pp 132–138.

¹²⁰ [Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler] ICSID Case No ARB/03/23 (25 June 2008). This case was cited in “Recent Challenges to Arbitrators in Investment Treaty Cases – Is There an Emerging Trend?” in *2010 International Arbitration Report Issue 2* (Fulbright & Jaworski LLP, 2010) at p 7 as a case where the tribunal “decided to take [the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (22 May 2004)] into account although it did not base its decision on them”.

¹²¹ Matter which was disputed by the parties: the respondent in making the challenge relied heavily on the International Bar Association Guidelines in International Arbitration (22 May 2004) in its submissions, whilst the claimant denied their applicability to International Centre for Settlement of Investment Disputes arbitrations. The tribunal in *EDF International SA v Argentine Republic* [Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler] ICSID Case No ARB/03/23 (25 June 2008) at [100] held that the:

... Respondent’s argument with respect to the duty to investigate is equally misplaced. The provisions of IBA General Standard 7(c) (*were they applicable*) speak to ‘reasonable’ enquiries of ‘potential’ conflicts and ‘facts ... that may cause ... independence to be questioned.’ No evidence has been presented that Professor Kaufmann-Kohler had reason to suspect any potential conflict or fact that would call into question her independence. [emphasis added]

¹²² *EDF International SA v Argentine Republic* [Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler] ICSID Case No ARB/03/23 (25 June 2008) at [100], [107] and [111]–[115].

the IBA Guidelines cited by the challenging party (which claimed the existence of issue conflict arising from the challenged arbitrator's previously expressed academic opinions)¹²³ were not helpful, as they were "unclear or totally ambiguous".¹²⁴ In addition, *Urbaser* observed that the distinction drawn in the IBA Guidelines between "general" and "specific" academic views in the Guidelines (which were placed on the green and orange lists respectively) did not "make much sense".¹²⁵

37 In the final analysis, *Alpha Projektholding GmbH v Ukraine*¹²⁶ ("Alpha") perhaps best illustrates the extent to which the IBA Guidelines should apply to ICSID proceedings. In *Alpha*, the respondent challenged the claimant-appointed arbitrator, Yoram Turbowicz, on the basis of, *inter alia*, the following grounds: (a) 20 years before, Turbowicz had been classmates with the claimant's counsel at Harvard Law School (although there had been no contact between the two since then); and (b) Turbowicz failed to disclose this fact to the parties. Ground (a) was rejected applying Articles 14 and 57 of the ICSID Convention and the "manifest" standard, notably without reference to the IBA Guidelines.¹²⁷ Ground (b) required discussion of rule 6(2) of the ICSID Arbitration Rules, which was recently amended (in 2006) to add to the pre-existing clause (a) (which provided that the arbitrator should disclose "past and present professional, business and other relationships (if any) with the parties") a new clause (b) requiring disclosure of "any other circumstances that might cause [the arbitrator's] reliability for independent judgment to

¹²³ This is discussed below at paras 52–54.

¹²⁴ *Urbaser SA v Argentine Republic* [Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator] ICSID Case No ARB/07/26 (12 August 2010) at [42].

¹²⁵ *Urbaser SA v Argentine Republic* [Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator] ICSID Case No ARB/07/26 (12 August 2010) at [52].

¹²⁶ [Decision on Respondent's Proposal to Disqualify Arbitrator Dr Yoram Turbowicz] ICSID Case No ARB/07/16 (19 March 2010).

¹²⁷ *Alpha Projektholding GmbH v Ukraine* [Decision on Respondent's Proposal to Disqualify Arbitrator Dr Yoram Turbowicz] ICSID Case No ARB/07/16 (19 March 2010) at [42]–[45].

be questioned by a party". After extensive consideration of the relevant drafting history, the tribunal in *Alpha* concluded that the disclosure parameters in rule 6(2)(b) of the ICSID Arbitration Rules were meant to adopt a "justifiable doubts" standard, such as that encapsulated in Article 9 of the UNCITRAL Arbitration Rules, rather than to follow the "much higher 'manifest'" threshold required to sustain a challenge under the ICSID Convention.¹²⁸ Thus, the IBA Guidelines were "instructive" in interpreting rule 6(2)(b), as they also adopted the "justifiable doubts" standard incorporated in rule 6(2)(b).¹²⁹ To this extent, the IBA Guidelines were given weight and applied to determine whether Turbowicz should have disclosed his historical association with the claimant's counsel (the tribunal found there was no need for disclosure of such fact).¹³⁰ Crucially, the tribunal went on to reject the respondent's contention that one could simply impute the "justifiable doubts" standard in rule 6(2) of the ICSID Arbitration Rules into Articles 14(1) and 57 of the ICSID Convention. This was because there exists a "clear distinction between the parameters of the duty to disclose and the standard required to uphold the merits of a particular challenge".¹³¹ Applying the "manifest" threshold, the tribunal rejected ground (b) as a basis for challenging Turbowicz.

38 In light of the ICSID jurisprudence referred to above, the authors come to the following conclusions on the applicability of the IBA Guidelines to the ICSID challenge regime. The IBA Guidelines are more directly applicable to the disclosure requirements under the ICSID Arbitration

¹²⁸ *Alpha Projektholding GMBH v Ukraine* [Decision on Respondent's Proposal to Disqualify Arbitrator Dr Yoram Turbowicz] ICSID Case No ARB/07/16 (19 March 2010) at [55].

¹²⁹ *Alpha Projektholding GMBH v Ukraine* [Decision on Respondent's Proposal to Disqualify Arbitrator Dr Yoram Turbowicz] ICSID Case No ARB/07/16 (19 March 2010) at [56].

¹³⁰ *Alpha Projektholding GMBH v Ukraine* [Decision on Respondent's Proposal to Disqualify Arbitrator Dr Yoram Turbowicz] ICSID Case No ARB/07/16 (19 March 2010) at [60]–[63].

¹³¹ *Alpha Projektholding GMBH v Ukraine* [Decision on Respondent's Proposal to Disqualify Arbitrator Dr Yoram Turbowicz] ICSID Case No ARB/07/16 (19 March 2010) at [64].

Rules (rule 6(2)(b)), as opposed to the challenge of arbitrators under Articles 14 and 57 (*Alpha*). The Guidelines are only at best illustrations of conflicts of interest which an ICSID tribunal *may* take into account in determining whether a challenge ought to be sustained (*Tidewater* and *Urbaser*).¹³² They may not in fact assist in assessing certain circumstances of conflicts of interest (*EDF* and *Urbaser*)¹³³ and, even where they do provide some useful indication, it remains crucial that the tribunal must go on to critically examine the facts of each case in order to determine whether the requisite “manifest” threshold has been satisfied under Article 57 (*Alpha*). It is therefore probably too optimistic, given the absence of stronger textual support of the Guidelines’ principles in the ICSID Convention and Arbitration Rules, to agree with the authors’ opinion in the Fulbright Report that the IBA Guidelines could in the future attain the status of customary international law *in the context of the challenge regime under the ICSID*.

III. Issue conflict

39 As already mentioned, issue conflict refers to a form of bias arising from the arbitrator’s relationship with the subject matter of the dispute (rather than the parties). Three types of situations may give rise to issue conflict: (a) where the arbitrator is concurrently acting, or has previously acted, as counsel in another case raising the same or similar issues as the one before him (“Type A”); (b) where the arbitrator is to act as counsel in a subsequent case raising similar issues (“Type B”); and (c) where the arbitrator had rendered prior awards as arbitrator dealing with (or had expressed a personal opinion on) a disputed issue in the case before him

¹³² See also *ConocoPhillips Co v Bolivarian Republic of Venezuela* [Decision on the Proposal to Disqualify L Yves Fortier QC] ICSID Case No ARB/07/30 (27 February 2012) and *Getma International v Republic of Guinea* [Décision sur la demande en récusation de Monsieur Bernardo M Cremades, Arbitre] ICSID Case No ARB/11/29 (28 June 2012).

¹³³ See also *Getma International v Republic of Guinea* [Décision sur la demande en récusation de Monsieur Bernardo M Cremades, Arbitre] ICSID Case No ARB/11/29 (28 June 2012).

("Type C"). The case law examined below illustrates these various situations. While some of these cases applied institutional rules or municipal law on arbitrator challenges, which differ from the ICSID challenge rules, they nevertheless serve the purpose of illustrating the various types of issue conflict that may arise in ICSID arbitrations.

A. Arbitrator is concurrently acting, or has previously acted, as counsel in another case raising analogous issues (Type A)¹³⁴

40 An arbitrator may act concurrently as counsel in a different case raising the same or similar legal issues. On such facts, Emmanuel Gaillard was challenged as an arbitrator in the UNCITRAL arbitration proceedings of *Telekom Malaysia Berhad v Republic of Ghana*¹³⁵ ("*Telekom Malaysia*"). Ghana argued that Gaillard could not discharge his role as arbitrator with impartiality because, as counsel in another case (*Consortium RFCC v Kingdom of Morocco*¹³⁶), he was arguing for the annulment of an award that Ghana was relying on in *Telekom Malaysia*. After the challenge was dismissed by both the tribunal and the PCA (the institution administering *Telekom Malaysia*), Ghana further challenged Gaillard in the District Court of The Hague. Under the *lex arbitri*, "the District Court considered that advocating the annulment of an ICSID award while assessing its merit as an arbitrator in the UNCITRAL proceeding required incompatible attitudes".¹³⁷ The court held as follows:¹³⁸

¹³⁴ See *Challenge and Disqualification of Arbitrators in International Arbitration* (Karel Daele ed) (International Arbitration Law Library vol 24) (Kluwer Law International, 2012) at pp 367–377 for cases other than those mentioned in this section.

¹³⁵ Challenge No 13/2004, Petition No HA/RK 2004.667 (18 October 2004); Challenge No 17/2004, Petition No HA/RK 2004.788 (5 November 2004).

¹³⁶ [Award] ICSID Case No ARB/00/6 (22 December 2003).

¹³⁷ Nassib Ziade, "How Many Hats can a Player Wear: Arbitrator, Counsel and Expert?" (2009) 24(1) ICSID Rev-FILJ 49 at 56.

¹³⁸ Challenge No 13/2004, Petition No HA/RK 2004.667 (18 October 2004) at p 6.

... account should be taken of the fact that the arbitrator in the capacity of attorney will regard it as his duty to put forward all possibly conceivable objections against the RFCC/Moroccan award. This attitude is incompatible with the attitude Prof. Gaillard has to adopt as an arbitrator in the present case, i.e. to be unbiased and open to all the merits of the RFCC/Moroccan award and to be unbiased when examining these in the present case and consulting thereon in chambers with his fellow arbitrators. Even if this arbitrator were able to sufficiently distance himself in chambers from his role as attorney in the reversal proceedings against the RFCC/Moroccan award, account should in any event be taken of the appearance of his not being able to observe said distance. Since he has to play these two parts, it is in any case impossible for him to avoid the appearance of not being able to keep these two parts strictly separated.

41 The court instructed Gaillard to resign as counsel within ten days if he wanted to remain as arbitrator in the Ghana case, which he proceeded to do. Ghana was still dissatisfied, and repeated its challenge to Gaillard. A different District Court judge at The Hague rejected the challenge. The court “determined that a position previously advocated by an arbitrator when acting as counsel was not to be attributed to him or her as a personal belief”.¹³⁹ It specifically held as follows:¹⁴⁰

¹³⁹ Nassib Ziade, “How Many Hats can a Player Wear: Arbitrator, Counsel and Expert?” (2009) 24(1) ICSID Rev-FILJ 49 at 51.

¹⁴⁰ Challenge No 17/2004, Petition No HA/RK 2004.788 (5 November 2004) at para 11. Though not relevant for present purposes, it is interesting to note that the court rejected the additional argument mounted by Ghana that Emmanuel Gaillard should be removed from the tribunal because he had taken part in the tribunal’s decisions before he had ceased acting as counsel in *Consortium RFCC v Kingdom of Morocco* [Award] ICSID Case No ARB/00/6 (22 December 2003). The court held that there was no risk of an appearance of bias relating to any material aspect in dispute between the parties because of the “mere procedural and logical character” of the decisions taken and “[t]he fact that there [had been] no adverse consequences” for Ghana.

... it could easily happen in arbitrations that an arbitrator has to decide on a question pertaining to which he has previously, in another case, defended a point of view. Save in exceptional circumstances, there is no reason to assume however that such an arbitrator would decide such a question less open-minded than if he had not defended such a point of view before.

42 In principle, the second decision appears to be correct. As Nassib Ziade points out, “[t]o argue a point does not mean that one necessarily believes in its soundness”.¹⁴¹ “[A] counsel’s role is one of advocacy and not necessarily one of personal conviction, and arguments put forward by a counsel in presenting a case do not necessarily reflect his or her personal beliefs.”¹⁴²

¹⁴¹ Nassib Ziade, “How Many Hats can a Player Wear: Arbitrator, Counsel and Expert?” (2009) 24(1) ICSID Rev-FILJ 49 at 51.

¹⁴² Nassib Ziade, “How Many Hats can a Player Wear: Arbitrator, Counsel and Expert?” (2009) 24(1) ICSID Rev-FILJ 49 at 51; Natasha Peter & Clotilde Lemarié, “Is there a Different Yardstick for Arbitrator Bias in Investment Treaty Arbitrations?” (2008) 5(4) TDM at 6. The International Centre for Settlement of Investment Disputes tribunal in the recent case of *Saint-Gobian Performance Plastics Europe v The Bolivarian Republic of Venezuela* [Decision on Claimants’ Proposal to Disqualify Mr Gabriel Bottini from the Tribunal under Article 57 of the ICISD Convention] ICSID Case No ARB/12/13 (27 February 2013) adopted similar reasoning. In response to the Claimant’s allegations of a danger that the challenged arbitrator, Gabriel Bottini, would decide certain issues in favour of the respondent-State because he had argued the same, or similar issues in favour of Argentina in the past as the National Director of International Matters and Disputes for the Office of the Attorney General of Argentina, the tribunal noted at [80]–[81] that:

[it] cannot see why Mr Bottini would be locked in to the views he presented at the time. *It is at the core of the job description of legal counsel*— whether acting in private practice, in-house for a company, or in government — *that they present the views which are favorable to their instructor and highlight the advantageous facts of their instructor’s case. The fact that a lawyer has taken a certain stance in the past does not necessarily mean that he will take the same stance in a future case. ...*

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43 However, our view is that the same arguments should also apply in the situation where the arbitrator is acting concurrently as counsel (the scenario dealt with in the first District Court decision). Just because an arbitrator is concurrently advocating a position on an issue before him in another case as counsel does not, on the sole basis of the simultaneity of the advocacy, mean that such advocacy represents the arbitrator's personal beliefs.

B. Arbitrator is to act as counsel in a subsequent case raising analogous issues (Type B)

44 In *Eureko v Poland*¹⁴³ (“*Eureko*”), the three-member tribunal handed down its partial award on liability in August 2005, finding by a majority that Poland was in breach of the bilateral investment treaty between the Netherlands and Poland.¹⁴⁴ In October, Poland served a notice of recusal on Arbitrator Judge Stephen Schwebel. Poland failed at first instance on certain grounds of bias. On appeal, Poland advanced the additional objection that Judge Schwebel was co-counsel in an unrelated ICSID arbitration (*Vivendi*), in which Judge Schwebel had cited the *Eureko* award as authority for certain propositions he was making on behalf of his clients in that matter. The issue was whether Judge Schwebel's impartiality as arbitrator (in *Eureko*) was cast into doubt because he may have been tempted to render an award that would aid his arguments as counsel in *Vivendi*. The Belgian Court of Appeal declined to

... Absent any specific facts which indicate that Mr Bottini is not able to distance himself in a professional manner from the cases in which he was acting as counsel, *Mr Bottini has the assumption in his favor that he is a legal professional with the ability to keep a professional distance. The same assumption is granted in favor of many arbitrators who today sit as arbitrators in ICSID cases but who started their career as counsel or who still act as counsel in such cases.*

[emphasis added]

¹⁴³ UNCITRAL Arbitration Rules [Partial Award] IIC 98 (2005).

¹⁴⁴ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at pp 92–93.

rule on Poland's additional objection due to Poland's failure to adhere to Belgian procedural rules in making its challenge.

45 Despite the absence of a decision on the matter, *Eureko* usefully illustrates a problem of issue conflict bias which is unique to investment arbitration – the problem of a small pool of practitioners who are “involved in substantive rule-making as arbitrators and substantive rule-using as counsel”.¹⁴⁵

C. Arbitrator has rendered prior award(s) dealing with, or expressed a personal opinion on, a disputed issue in the case before him (Type C)¹⁴⁶

46 Where the arbitrator has previously rendered an award deciding similar issues raised in another case before him, a party in the second arbitration may raise concerns that the arbitrator has already prejudged the recurring legal issues. However, case law has firmly and consistently indicated that such circumstances alone are insufficient to raise issue conflict concerns over the arbitrator's impartiality.¹⁴⁷

¹⁴⁵ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 93. See para 65 below for further discussion.

¹⁴⁶ See *Challenge and Disqualification of Arbitrators in International Arbitration* (Karel Daele ed) (International Arbitration Law Library vol 24) (Kluwer Law International 2012) at pp 383–407 for cases other than those mentioned in this section.

¹⁴⁷ An unreported International Chamber of Commerce (“ICC”) arbitration involving the first author demonstrates the opposite view. The first author was appointed as the chairperson of a London Court of International Arbitration (“LCIA”) arbitration between an international bank and a Ruritanian customer arising from a dispute over a series of foreign exchange transactions governed by English law, but relating to Ruritanian transactions and subject to the ISDA master swap agreement. The international bank was represented by Law Firm A and the Ruritanian party by Law Firm B. The defence was breach of certain Ruritanian foreign exchange laws, which in turn violated Art VIII2(b) of the Bretton Woods Agreement and invalidated

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47 In *Participaciones Inversiones Portuarias SARL v Gabonese Republic*,¹⁴⁸ Gabon challenged the claimant's appointed arbitrator, Ibrahim Fadlallah, on the ground that he was the president of another tribunal which had recently issued an award against Gabon dealing with the same issue of expropriation of concession agreements.¹⁴⁹ The chairman of the administrative council dismissed the challenge, holding that Fadlallah's exposure in the previous case to legal questions similar to those raised in the present did not constitute a ground for disqualification, and sustaining the challenge on such basis "would

the transactions under English law. The tribunal decided (as a preliminary issue) that this defence would succeed. The case then settled. Shortly thereafter, the first author was nominated by the same Law Firm B which had acted for the Ruritanian customer in the LCIA arbitration as its party appointed arbitrator in an ICC arbitration between a second international bank and another Ruritanian party. The dispute in the ICC arbitration also involved a foreign exchange derivative transaction which was based on the International Swaps and Derivatives Association master swap agreement and governed by English law. This second international bank was represented by the same Law Firm A which had acted for the first international bank in the LCIA arbitration. The skeletal request for arbitration and the response indicated that the Ruritanian party was invoking the same Bretton Woods defence as in the LCIA arbitration, but without describing what those breaches were. When accepting his nomination, the first author disclosed to the parties his previous participation in the LCIA arbitration, even though it was not apparent at the time that the issues in the two cases were similar (other than the common Bretton Woods defence). Law Firm A objected to the first author's appointment on, *inter alia*, the grounds that he was predisposed to a particular outcome and/or might have a closed mind in relation to a key question of legal principle that was in dispute. Without giving any reasons (as is customary) the ICC declined to confirm his appointment.

¹⁴⁸ [Decision on the Proposal to Disqualify an Arbitrator] ICSID Case No ARB/08/17 (12 November 2009).

¹⁴⁹ "Recent Challenges to Arbitrators in Investment Treaty Cases – Is There an Emerging Trend?" in *2010 International Arbitration Report* Issue 2 (Fulbright & Jaworski LLP, 2010) at p 8.

hamper the proper functioning of every judicial system where judges frequently find themselves in similar positions”.¹⁵⁰

48 Similarly, in *Suez* (No1), the tribunal rejected Argentina’s Article 57 challenge to Gabrielle Kaufmann-Kohler, holding *obiter* that it was without merit since participation in an unanimous award against Argentina six years earlier (*Vivendi*) was not “in and of itself obvious evidence” that she lacked independence or impartiality.¹⁵¹ It observed that:¹⁵²

[a] finding of an arbitrator’s or a judge’s lack of impartiality requires far stronger evidence than that such arbitrator participated in a unanimous decision with two other arbitrators in a case in which a party in that case is currently a party in a case now being heard by that arbitrator or judge. To hold otherwise would have serious negative consequences for any adjudicatory system.

49 Moreover, as Audley Sheppard points out, the tribunal emphasised that there were material differences between the *Suez* (No 1) and *Vivendi* cases:¹⁵³

[T]he claim in the *Suez* case related to measures and actions taken by the Argentine government during the financial crisis of 2001 while the *Vivendi* case arose out of the privatization of water and sewage systems some five years prior to the 2001 crisis – the cases involved different BITs with different States; and the different factual circumstances required different applications of the ‘general international legal principles’ and a different ‘determination of damages’.

¹⁵⁰ “Recent Challenges to Arbitrators in Investment Treaty Cases – Is There an Emerging Trend?” in *2010 International Arbitration Report* Issue 2 (Fulbright & Jaworski LLP, 2010) at p 8.

¹⁵¹ *Suez v Argentine Republic* [Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal] ICSID Case No ARB/03/17 (22 October 2007) at [34].

¹⁵² *Suez v Argentine Republic* [Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal] ICSID Case No ARB/03/17 (22 October 2007) at [36].

¹⁵³ Audley Sheppard, “Arbitrator Independence in ICSID Arbitration” in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) at pp 153–154.

50 A more recent decision on Type C issue conflict is *Tidewater*.¹⁵⁴ The tribunal addressed the argument by *Tidewater* that one of Brigitte Stern's other pending arbitrations would decide an identical issue expected to arise in the *Tidewater* case and amount to a prejudging of that issue. The challenge was rejected.¹⁵⁵ First, the co-arbitrators nodded approvingly to a passage in an unreported case:¹⁵⁶

Investment and even commercial arbitration would become unworkable if an arbitrator were automatically disqualified on the ground only that he or she was exposed to similar legal or factual issues in concurrent or consecutive arbitrations.

Second:¹⁵⁷

Neither Professor Stern, still less the present Tribunal as a whole, will be bound in the present case by any finding which the Brandes

¹⁵⁴ See para 33 above.

¹⁵⁵ Luke Eric Peterson, "Challenge to Popular Arbitrator is Rejected; Colleagues See No Grounds for Disqualification Due to Multiple Appointments by Venezuela and Non-disclosure" *International Arbitration Reporter* (4 January 2011).

¹⁵⁶ *Tidewater Inc v Bolivarian Republic of Venezuela* [Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator] ICSID Case No ARB/10/5 (23 December 2010) ("*Tidewater*") at [68]. The unreported case cited in *Tidewater* goes on to state that the deciding arbitrators did not consider it possible to "outlaw widespread practices so long accepted by users and practitioners generally, particularly when such practices have helped to establish a growing body of specialist and experienced international arbitrators, so long desired by users". See Nassib Ziade, "How Many Hats can a Player Wear: Arbitrator, Counsel and Expert?" (2009) 24(1) ICSID Rev-FILJ 49 at 55–56.

¹⁵⁷ *Tidewater Inc v Bolivarian Republic of Venezuela* [Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator] ICSID Case No ARB/10/5 (23 December 2010) at [69]. See also *Universal Compression International Holdings, SLU v Bolivarian Republic of Venezuela* [Decision on the Proposal to Disqualify Prof Brigitte Stern and Prof Guido Santiago Tawil, Arbitrators] ICSID Case No ARB/10/9 (20 May 2011) at [83], which dismissed another Type C issue conflict challenge to Prof Brigitte Stern in similar fashion.

Tribunal [the tribunal in Professor Stern's other pending Venezuelan arbitration] may arrive at as to the issue of Venezuelan law referred to.

Finally, the tribunal had no reason to doubt Stern's statement that "the fact of whether I am convinced or not convinced by a pleading depends upon the intrinsic value of the legal arguments and not on the number of times I hear the pleading".¹⁵⁸

51 The 1989 *Vakauta v Kelly*¹⁵⁹ High Court of Australia case illustrates when *dicta* in a judgment may give rise to actionable issue conflict. In this case, a judge was removed for expressing preconceived and unfavourable views about defence experts in the body of his judgment. The court considered that, "by characterising one particular expert's opinion as 'negative as it always seems to be', the judge had failed to set aside his prejudices in consideration of the evidence".¹⁶⁰

52 A similar issue conflict might arise if the arbitrator, through scholarly writings or speeches and interviews, took positions on issues disputed in a case before him or her. As the Fulbright Report notes:¹⁶¹

In investment treaty arbitration, practice and academia are often intertwined. Arbitrators and counsel are frequently prolific writers, commenting on various legal issues ... A recurring question is whether academic views expressed through writings and teachings could be used to challenge an arbitrator's impartiality ...

¹⁵⁸ *Tidewater Inc v Bolivarian Republic of Venezuela* [Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator] ICSID Case No ARB/10/5 (23 December 2010) at [71]. See also *Universal Compression International Holdings, SLU v Bolivarian Republic of Venezuela* [Decision on the Proposal to Disqualify Prof Brigitte Stern and Prof Guido Santiago Tawil, Arbitrators] ICSID Case No ARB/10/9 (20 May 2011) at [84], which dismissed another Type C issue conflict challenge to Prof Brigitte Stern in similar fashion.

¹⁵⁹ (1989) 167 CLR 568.

¹⁶⁰ Anthony Sinclair & Matthew Gearing, "Partiality and Issue Conflicts" (2008) 5(4) TDM at 1.

¹⁶¹ "Recent Challenges to Arbitrators in Investment Treaty Cases – Is There an Emerging Trend?" in *2010 International Arbitration Report* Issue 2 (Fulbright & Jaworski LLP, 2010) at p 9.

53 It is the general view that general doctrinal affinities or disinclinations, even if controversial, are not disqualifying *per se*.¹⁶² In one ICSID case (unpublished), a challenge on the basis of an arbitrator's doctrinal writings was dismissed because:¹⁶³

... an arbitrator's doctrinal opinions expressed in the abstract without reference to any particular case do not affect that arbitrator's impartiality and independence, even though he has expressed certain general and abstract opinions that he or she will not consider the specificities of a given case and may not on such basis, form an opinion different from the one previously expressed.

54 In the same vein, the ICSID Convention Article 57 challenge to Campbell McLachlan was dismissed in *Urbaser*. The decision is instructive and merits more extensive examination. In *Urbaser*, the claimants argued that McLachlan's views on two legal issues relevant to the case (interpretation of the most-favoured-nation clause and the necessity defense), which were expressed in a book that he co-authored, favoured the respondents' position and therefore showed that he had already prejudged the issue, casting doubt on his impartiality. The claimants argued that he "cannot issue an opinion contrary to that which he published and thus face criticism that he was inconsistent or possibly 'heretical' himself".¹⁶⁴ In dismissing the challenge, the tribunal held that:¹⁶⁵

... the mere showing of an opinion, even if relevant in a particular arbitration, is not sufficient to sustain a challenge for lack of independence or impartiality of an arbitration ... a [contrary] position ... would [be] ... incompatible with the proper functioning

¹⁶² Nassib Ziade, "How Many Hats can a Player Wear: Arbitrator, Counsel and Expert?" (2009) 24(1) ICSID Rev-FILJ 49 at 51.

¹⁶³ Nassib Ziade, "How Many Hats can a Player Wear: Arbitrator, Counsel and Expert?" (2009) 24(1) ICSID Rev-FILJ 49 at 51.

¹⁶⁴ *Urbaser SA v Argentine Republic* [Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator] ICSID Case No ARB/07/26 (12 August 2010) at [41].

¹⁶⁵ *Urbaser SA v Argentine Republic* [Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator] ICSID Case No ARB/07/26 (12 August 2010) at [45]–[46], [48] and [54].

of the arbitral system under the ICSID Convention ... the consequence would be that no potential arbitrator of an ICSID Tribunal would ever express views on any such matter ... The wide spreading of ICSID awards ... has greatly contributed to dense exchanges of views throughout the world on matters of international investment law. This is very largely considered as a positive contribution to the development of the law and policies in this segment of the world's economy. It goes without saying that such a debate would be fruitless if it did not include an exchange of opinions given by those who are actually involved in the ICSID arbitration process ... Such an approach would lead to the disqualification of many arbitrators, including in particular those who have acquired the greatest experience, thus leading to the paralysis of the ICSID arbitral process.

55 In the tribunal's view:¹⁶⁶

... what matters is whether the opinions expressed ... are specific and clear enough that a reasonable and informed third party would find that the arbitrator will rely on such opinions without giving proper consideration to the facts, circumstances, and arguments presented by the Parties.

This would not be made out where the arbitrator merely expressed a view on "the interpretation of legal concepts in isolation from the facts and circumstances of a particular case"¹⁶⁷ which is at a "more general level of legal interpretation ... leav[ing] open a more in-depth analysis of

¹⁶⁶ *Urbaser SA v Argentine Republic* [Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator] ICSID Case No ARB/07/26 (12 August 2010) at [44].

¹⁶⁷ *Urbaser SA v Argentine Republic* [Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator] ICSID Case No ARB/07/26 (12 August 2010) at [42].

each ... issue in a particular arbitral dispute".¹⁶⁸ Finally, the tribunal noted that McLachlan's opinions were expressed:¹⁶⁹

... in his capacity as a scholar and not in a decision that could have some kind of a binding effect upon him. One of the main qualities of an academic is the ability to change his/her opinion as required in light of the current state of academic knowledge. The Two Members have no doubt that Professor McLachlan reaches such high standard of science and conscience.

56 McLachlan's defence is also worth mentioning. He expressed the view that:¹⁷⁰

... It is important to distinguish the tasks of the legal scholar from that of the arbitrator. When writing a book or article, the scholar must express views on numerous general issues of law, based on the legal authorities and other material then available to him. A scholar of any standing should always be prepared to reconsider his views in light of subsequent developments in the law or further arguments.

However, and in any event, the task of the arbitrator is completely different. It is to judge the case before him fairly as between the parties and according to the applicable law. This can only be done in the light of the specific evidence, the specific applicable law and the submissions of counsel for both parties ...

57 However, as Ziade points out, "[v]iews previously expressed by an arbitrator may ... give rise to a successful challenge if they *relate to the*

¹⁶⁸ *Urbaser SA v Argentine Republic* [Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator] ICSID Case No ARB/07/26 (12 August 2010) at [56].

¹⁶⁹ *Urbaser SA v Argentine Republic* [Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator] ICSID Case No ARB/07/26 (12 August 2010) at [51].

¹⁷⁰ *Urbaser SA v Argentine Republic* [Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator] ICSID Case No ARB/07/26 (12 August 2010) at [31].

merits, or deal with the particular facts, of the dispute at hand"¹⁷¹ [emphasis added].

58 In *Perenco*, the remarks of Judge Charles N Brower (who was acting as arbitrator in that case) made in an interview after commencement of proceedings resulted in his recusal as arbitrator. Therein, in reference to Ecuador's resistance to compliance with interim measures ordered by two ICSID tribunals, Judge Brower said:¹⁷²

... but when recalcitrant host countries find out that claimants are going to act like those who were expropriated in Libya, start bringing hot oil litigation and chasing cargos, doing detective work looking for people who will invoked cross-default clauses in loan agreements, etc., the politics may change. After a certain point, no one will invest without having something to rely on.

Ecuador's challenge was sustained by the PCA Secretary General, who noted that:¹⁷³

The combination of the words chosen ... and the context in which he used them have the overall effect of painting an unfavourable view of Ecuador in such a way as to give a reasonable and informed third party justifiable doubts as to [the arbitrator's] impartiality.

(Interestingly, in a separate case, *Tanzania Electric Supply Co Ltd v Independent Power Tanzania Ltd*,¹⁷⁴ Judge Brower was even challenged because of the views expressed by his law clerk on legal issues relating to the case in an online blog, and resigned from his position as arbitrator

¹⁷¹ Nassib Ziade, "How Many Hats can a Player Wear: Arbitrator, Counsel and Expert?" (2009) 24(1) ICSID Rev-FILJ 49 at 51.

¹⁷² "Recent Challenges to Arbitrators in Investment Treaty Cases – Is There an Emerging Trend?" in *2010 International Arbitration Report* Issue 2 (Fulbright & Jaworski LLP, 2010) at p 9.

¹⁷³ "Recent Challenges to Arbitrators in Investment Treaty Cases – Is There an Emerging Trend?" in *2010 International Arbitration Report* Issue 2 (Fulbright & Jaworski LLP, 2010) at p 9.

¹⁷⁴ [Award] ICSID Case No ARB/98/8 (22 June 2001).

after his co-arbitrators were unable to agree on the challenge.¹⁷⁵) Similarly, in *Canfor Corp v United States*,¹⁷⁶ a North American Free Trade Agreement (“NAFTA”) arbitration, the US successfully induced withdrawal of the claimant-appointed arbitrator, who, with reference to US measures related to the import of Canadian softwood lumber, which were the subject of the claimant’s complaint in the arbitration, stated that:¹⁷⁷

This will be the fourth time we have been challenged. We have won every single challenge on softwood lumber, and yet they continue to challenge us with respect to those issues. Because they know the harassment is just as bad as the process.

59 The case law therefore shows that the central question to keep in mind is this (as held by the English Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd*):¹⁷⁸ Is it the case that “on any question ... the

¹⁷⁵ See Lars Markert, “Challenging Arbitrators in Investment Arbitration: The Challenging Search for Relevant Standards and Ethical Guidelines” (2010) 3(2) *Contemp Asia Arb J* 237 at 264–265.

¹⁷⁶ North American Free Trade Agreement arbitration, available at <<http://www.state.gov/s/l/c7424.htm>> (accessed 10 May 2013).

¹⁷⁷ See Anthony Sinclair & Matthew Gearing, “Partiality and Issue Conflicts” (2008) 5(4) *TDM* at 2.

¹⁷⁸ *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 2 *WLR* 870 was summarised by Anthony Sinclair & Matthew Gearing, “Partiality and Issue Conflicts” (2008) 5(4) *TDM* at 1 as follows:

In *Locabail*, the first-instance judge – who sat only part-time – had, as counsel, previously published a series of articles demonstrating himself to be very sympathetic to the position of claimants in personal injury cases [and unsympathetic to insurance companies who were the real defendants in such cases]. On appeal against his judgment in a personal injury case, the Court of Appeal held that the judge’s publicly stated views had opened himself to a reasonable suspicion that he might not have decided the case on the merits of the parties’ arguments alone: ‘Not without misgivings ... a person holding the pronounced pro-claimant anti-insurer views might unconsciously have leaned in favour of the claimant and against the defendant in resolving the factual issues between them’. The appeal was upheld, even though nothing

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judge had expressed views [...] in such extreme and unbalanced terms as to throw doubt on his ability to try the issue". With the public interest attached to the arbitration of high-profile investment treaty disputes, all arbitration practitioners "should avoid expressing themselves in terms that indicate a preconceived view, such that others may reasonably perceive them as being incapable of deciding an issue with an open mind".¹⁷⁹ However, this by no means suggests that arbitrators should remain silent outside the hearing room. It has been correctly observed that:¹⁸⁰

... advocat[ing] absolute extrajudicial silence ... would silence our most experienced practitioners, our most learned professor-arbitrators, and our up-and-coming younger lawyers, leaving ourselves unable to share the benefits of our collective research, contemplation or experience.

Surely, arbitrators should not be disqualified merely because of their extensive expertise in the area, "which they cannot simply jettison in order to decide the case".¹⁸¹ As *Urbaser* and McLachlan point out, an arbitrator is not bound by his or her previous writings, and is always free to change his or her mind, in light of the parties' submissions and the specific facts of the case.¹⁸²

from the judgment itself had revealed any lack of impartiality on the part of the judge.

¹⁷⁹ Anthony Sinclair & Matthew Gearing, "Partiality and Issue Conflicts" (2008) 5(4) TDM at 4.

¹⁸⁰ Anthony Sinclair & Matthew Gearing, "Partiality and Issue Conflicts" (2008) 5(4) TDM at 4.

¹⁸¹ Natasha Peter & Clotilde Lemarié, "Is there a Different Yardstick for Arbitrator Bias in Investment Treaty Arbitrations?" (2008) 5(4) TDM at 6; R Doak Bishop & Lucy Reed, "Practical Guidelines for Interviewing, Selecting and Challenging Party-appointed Arbitrators in International Commercial Arbitration" (1998) 14(4) Arb Int'l 395 at 412.

¹⁸² However, a cynical observer may question whether, to a reasonable and informed observer, how likely it is that an eminent scholar might be disposed to change a view which he or she had previously publicly espoused.

D. Why issue conflicts are prevalent in international investment arbitration¹⁸³

60 While issue conflicts can arise in any type of arbitration, the problem has been particularly acute in investment arbitration. This is due to a number of characteristics peculiar to investment arbitration which distinguish it from commercial arbitration.

61 First, investment arbitration awards are usually published and therefore exposed to careful public scrutiny. This is a phenomenon largely absent from commercial arbitration, in which awards remain confidential, or are anonymised if published. The publication of investment arbitration awards has enabled the current trend of parties challenging an arbitrator on the basis of arguments which he has made or upheld in previous cases.

62 Second, weighty matters of public interest are often at stake in investment arbitrations. This renders them more vulnerable to public criticism where there exist circumstances creating the perception that arbitrators may be biased. Stephan Schill explains that:¹⁸⁴

... unlike a commercial dispute, investment treaty arbitrations often involve questions about the scope and limits of the host state's regulatory powers in view of its investment treaty obligations, including, for example, disputes concerning limits of emergency powers, regulatory oversight over public utility companies and the tariffs they charge, control and banning of harmful substances, protection of cultural property, or implementation of non-discrimination policies. As regards subject matter, investment treaty disputes thus involve public law rather than private law issues ... For example, an investment dispute preventing a state

¹⁸³ See generally Judith Levine, "Dealing with Arbitrator 'Issue Conflicts' in International Arbitration" (2008) 5(4) TDM; "Recent Challenges to Arbitrators in Investment Treaty Cases – Is There an Emerging Trend?" in *2010 International Arbitration Report* Issue 2 (Fulbright & Jaworski LLP, 2010) at p 6; and Dennis Hranitzky & Eduardo Silva Romero, "The 'Double Hat' Debate in International Arbitration" *New York Law Journal* (14 June 2010).

¹⁸⁴ Stephan Schill, "Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator" (2010) 23 LJIL 401 at 410–412.

from lowering water or electricity tariffs because of promises made to the investor could have the effect of cutting off parts of the host state's population from access to that fundamental utility... Decisions by arbitral tribunals on these matters may directly affect the social fabric in the host state and are thus of public interest.

63 Third, most of the arbitrations between foreign investors and states are complex and call for highly experienced arbitrators. However, the pool of such arbitrators is not large, and the arbitrators are often practitioners who also serve as counsel in similar cases. It is therefore “not unusual in the investment arbitration world for an individual to be called upon to rule on an issue as an arbitrator on which he or she has taken or will later take a position as counsel to a party in another case”.¹⁸⁵

64 Fourth, investment arbitrations frequently turn on the interpretation of investment treaties containing similar provisions and may repeatedly involve the same state parties. For this reason, a narrow range of recurring legal issues are often raised in investment arbitrations. As explained by Ziade:¹⁸⁶

These [recurring legal issues] include jurisdictional questions, such as the definition of ‘investment’, and the use of a most-favored nation clause. They also comprise substantive questions, such as the requirements for direct or indirect expropriation, the minimum standards of treatment in international law that include the notions of fair and equitable treatment and full protection and security, and the concept of discriminatory acts. The status of BITs as

¹⁸⁵ Dennis Hranitzky & Eduardo Silva Romero, “The ‘Double Hat’ Debate in International Arbitration” *New York Law Journal* (14 June 2010). See also *Challenge and Disqualification of Arbitrators in International Arbitration* (Karel Daele ed) (International Arbitration Law Library vol 24) (Kluwer Law International, 2012) at p 367.

¹⁸⁶ Nassib Ziade, “How Many Hats can a Player Wear: Arbitrator, Counsel and Expert?” (2009) 24(1) *ICSID Rev-FILJ* 49 at 50. See also *Challenge and Disqualification of Arbitrators in International Arbitration* (Karel Daele ed) (International Arbitration Law Library vol 24) (Kluwer Law International 2012) at p 367.

international treaties also attract application of similar treaty interpretation rules.

65 Fifth, unlike in commercial arbitration, arbitrators in investment arbitrations perform a more significant law-making role. Private arbitration proceedings generally involve the application of domestic law tied to a municipal legal system, which the arbitrator has little or no opportunity to shape. On the other hand, investment arbitrations involve the application of an evolving body of international law, which arbitrators are in a position to influence through their awards. This is a result of the application by tribunals of what academics describe as a *de facto* doctrine of precedent.¹⁸⁷ It is *de facto* rather than *de jure*, because there is no system of binding precedent in international law (the Statute of the International Court of Justice¹⁸⁸ and ICSID Convention¹⁸⁹ specifically excludes any such doctrine), yet tribunals

¹⁸⁷ Campbell McLachlan QC, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 1st Ed, 2007). See also Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at pp 239–241, who observes that:

Leading investment arbitration practitioners have confirmed the trend towards precedent: according to Philippe Fouchard, Emmanuel Gaillard, and Berthold Goldman, ICSID awards ‘naturally serve as precedents’; Albert Jan van den Berg has observed that ‘there is a tendency to create a true arbitral case law’ in the field of investment disputes; in 2005, Pierre Duprey noted the similarity between investment arbitration awards and judicial case law.

¹⁸⁸ Article 59 of the Statute of the International Court of Justice (TS 993) (26 June 1945; entry into force 24 October 1945) provides: “The decision of the Court has no binding force except between the parties and in respect of that particular case.”

¹⁸⁹ As observed by Campbell McLachlan QC, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 1st Ed, 2007) at para 3.85:

Article 53(1) of the ICSID Convention provides that: ‘The award shall be binding on the parties ...’ Schreuer interprets this to exclude a doctrine of precedent within the ICSID system, that is to say, the award is

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regularly cite and follow earlier awards when they determine the same legal issues.¹⁹⁰ Hence, in arbitration, the rule makers are also the rule users; “counsel one day, arbitrator the next”.¹⁹¹ It follows that, if an arbitral award has weight as a precedent, the award “may assume a commercial value when an arbitrator ‘changes hats’ to counsel: he or she may get the benefit of a rule that he or she made”.¹⁹² There is thus the risk of arbitrators (perhaps unconsciously) “generating case law for their

binding on the parties and on no-one else. This point has also been made by treaty tribunals.

¹⁹⁰ As observed by Stephan Schill, “Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator” (2010) 23 LJIL 401 at 414–416:

Arbitral tribunals, in turn, actively engage in building a system of treaty-overarching precedent in investment treaty arbitration, partly reacting to the parties’ expectations, partly driven by their own sense of direction in the interpretation of international treaties based on past experience and practice ... Although no system of binding precedent exists in investment treaty arbitration, references to earlier investment treaty jurisprudence can be found in virtually every recent investment treaty decision or award ... While arbitral tribunals emphasize the lack of *de jure stare decisis*, they nevertheless systematically turn to earlier decisions for guidance, in particular when it comes to interpreting and applying the standard substantive investor’s rights that are contained in virtually all BITs... The reliance on precedent is also shared by the parties to investment treaty arbitration and partly a reaction to their expectations. The Tribunal in *El Paso v Argentina*, for example, stated that it would ‘follow the same line [as earlier awards], especially since both parties, in their written pleadings and oral arguments, have heavily relied on precedent’. The way the parties to the disputes rely on precedent therefore suggests the emergence of expectations that tribunals will decide cases not by abstractly interpreting the governing BIT, but by embedding their interpretation within the discursive framework created by earlier investment treaty awards.

¹⁹¹ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 240.

¹⁹² Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 240.

clients' benefit" in a later case.¹⁹³ This specifically gives rise to Issue Conflict Type B.¹⁹⁴

IV. What should be the test for bias in assessing issue conflict under the ICSID?

66 Having examined the nature of issue conflict in the preceding section, we discuss in this section what should be the test for actionable issue conflict bias under the ICSID Convention. The central issue is this: Where does mere intellectual predilection, which typically would be non-censurable, cross the line "into a censurable appearance of an inability to decide a case solely on the basis of its facts and law"?¹⁹⁵ It is a difficult question, as it requires: (a) striking the right balance between the demands of procedural fairness on the one hand, and procedural efficacy and efficiency on the other; (b) adhering to textual limitations imposed by the ICSID Convention, particularly the requirement that a sustainable challenge requires demonstration of the arbitrator's "manifest" lack of independent judgment (bearing in mind that its provisions are to be interpreted "in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and in the light of its *object and purpose*"¹⁹⁶ (emphasis added)); and (c) giving due regard to the persuasive value of ICSID case law. Recalling the two arms of the *Gough*, *Sussex Justices* and *Porter v Magill* tests, one is prompted to consider in formulating a suitable test for actionable issue conflict: first, what vantage point should be used (First Arm); and second, what the evidentiary threshold (Second Arm) should be.

¹⁹³ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a "Real Danger" Test* (Kluwer Law International, 2009) at p 240.

¹⁹⁴ Referred to above at paras 44–45.

¹⁹⁵ Nassib Ziade, "How Many Hats can a Player Wear: Arbitrator, Counsel and Expert?" (2009) 24(1) ICSID Rev-FILJ 49 at 49–50.

¹⁹⁶ As is required by Art 31(1) of the Vienna Convention of the Law of Treaties (UN Doc A/Conf.39/27, 1155 UNTS 331) (23 May 1969; entry into force 27 January 1980).

67 Luttrell advocates the *Gough* test for assessing arbitrator bias under the ICSID Convention.¹⁹⁷ Accordingly, he proposes that assessment of the impugned arbitrator be based on the facts available to the tribunal and its analysis of such facts (First Arm). This sets a higher bar for a bias challenge, as a judicial inquiry of the likelihood of bias presents a more stringent analysis than that of the reasonable, well-informed member of the public, who may be “sensitive to the possibility of judicial bias”.¹⁹⁸ After all, one cannot “attribute to the lay observer judicial qualities of discernment, detachment and objectivity which judges take for granted in each other”.¹⁹⁹ Luttrell also favours the evidentiary threshold set in *Gough* (Second Arm), that of real danger/possibility of bias, which imposes a more onerous burden on the challenger than the *Sussex Justices* test of reasonable apprehension. Luttrell’s support for the *Gough* test is motivated by his concern over what he sees as “an emerging ‘Black Art’ of bias challenge”.²⁰⁰ Other commentators add that a lower bar for arbitrator challenges may limit the pool of qualified arbitrators available for any given case, and deter practitioners from making controversial contributions to matters of academic debate.²⁰¹ As a matter of interpretation of the ICSID Convention, Luttrell further argues that the *Gough* test best approximates the test for actionable bias created

¹⁹⁷ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at pp 225 and 242–247. See also Sam Luttrell, “Bias Challenges in Investor-state Arbitration: Lessons from International Commercial Arbitration” in *Evolution in Investment Treaty Law and Arbitration* (Chester Brown & Kate Miles eds) (Cambridge University Press, 2012) at p 459.

¹⁹⁸ *Dicta* of the High Court of Australia in *Johnson v Johnson* (2000) 201 CLR 488, which was cited approvingly by *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85.

¹⁹⁹ *Sengupta v Holmes* [2002] EWCA Civ 1104 at [10], cited in *Re P (a barrister)* [2005] 1 WLR 3019 at [46].

²⁰⁰ Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at pp 246 and 279.

²⁰¹ Natasha Peter & Clotilde Lemarié, “Is there a Different Yardstick for Arbitrator Bias in Investment Treaty Arbitrations?” (2008) 5(4) TDM at 6.

by the ICSID Convention, since (a) neither Article 14 nor Article 57 establishes a third person reasonable observer vantage point; (b) the term “manifest” is a usage of administrative law that implies court vantage; and (c) the use of the word “manifest” to preface the word “lack” in Article 57 elevates the ICSID standard above that of a simple lack of capacity for independent judgment into the realm of evidentiary probability.²⁰²

68 We disagree with Luttrell’s view that assessment of bias under the ICSID challenge regime should be conducted from the tribunal’s perspective (as required by the First Arm of the *Gough* test), and would argue for the application of the reasonable observer’s vantage point instead. First, the literal terms of Articles 14 and 57 of the ICSID Convention cannot be read as supporting the application of the tribunal’s vantage point. Articles 14 and 57 are in fact *silent* on the matter of the applicable vantage point – in themselves, they neither support nor reject the application of either the tribunal’s or the reasonable observer’s vantage point. Mere usage of the word “manifest” in Article 57 is in our view an unlikely indication (contrary to Luttrell’s suggestion) that the ICSID Convention drafters intended to import a usage of *municipal* administrative law with its implications of court vantage into an *international* treaty, when it was most likely only intended to refer to the requisite evidentiary threshold for sustaining an arbitrator challenge, as its plain meaning provides. Second, even though the literal terms of Articles 14 and 57 are of no assistance in determining the applicable vantage point, the object and purpose of the ICSID Convention strongly suggest that it is the public’s perception of the impugned arbitrator which should govern the assessment of bias under Articles 14 and 57. The preamble and the drafters of the ICSID Convention indicate that its *raison d’être* is to encourage investment arbitration as a means of fostering “international cooperation for economic development”,²⁰³ through the “creation of an

²⁰² Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 225.

²⁰³ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into force 14 October 1966) Preamble.

institution designed to facilitate the settlement of confidence”.²⁰⁴ Ignoring the public perception of ICSID arbitrators’ probity in the evaluation of actionable bias under the ICSID Convention may give rise to suspicions of procedural unfairness, erode host states’ confidence in the resolution of their investment disputes through ICSID arbitration, and possibly encourage further denunciation of the Convention.²⁰⁵ As Lord Denning

²⁰⁴ International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (18 March 1965) at [9].

²⁰⁵ As observed in *OPIC Karimum Corp v Venezuela* [Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator] ICSID Case No ARB/10/14 (5 May 2011) at [47]:

In our opinion, multiple appointments of an arbitrator by a party or its counsel constitute a consideration that must be carefully considered in the context of a challenge. In an environment where parties have the capacity to choose arbitrators, *damage to the confidence that investors and States have in the institution of investor-State dispute resolution may be adversely affected by a perception* that multiple appointments of the same arbitrator by a party or its counsel arise from a relationship of familiarity and confidence inimical to the requirement of independence established by the [ICSID] Convention. [emphasis added]

While this observation was made in the context of an arbitrator’s lack of independence (as opposed to non-impartiality arising from issue conflict), it is generally applicable as an indication of the importance of public perception in the assessment of actionable bias (both non-impartiality and lack of independence) under the ICSID challenge regime. The need to safeguard the procedural legitimacy of ICSID proceedings *in the eyes of the public* is even more pressing in present times, given the likelihood that “investment law and arbitration may already be, or may soon come to be, in a veritable ‘legitimacy crisis’”. (See Stephan Schill, “Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator” (2010) 23 LJIL 401 at 402–403, noting in this regard the “withdrawal of some Latin American states from their investment treaties and the ICSID Convention, and in the re-crafting of the substance of investment treaties ... in a way that reflects concerns about jurisprudential trends in arbitration”.)

once said (whose view is equally applicable to ICSID arbitrations which are subject to intense public scrutiny):²⁰⁶

The court looks at the impression which would be given to other people ... The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'

Third, many of the ICSID challenge decisions reviewed above expressly adopted a third party observer's perspective in assessing whether the impugned arbitrator's alleged appearance of bias justified his or her removal,²⁰⁷ and there has been no other decision (of which the authors are aware) which disapproves of this approach. Finally, Luttrell's policy reasons for advocating the tribunal's vantage point (which imposes a higher bar for challenging parties) are unconvincing. A higher bar for arbitrator challenges will not necessarily reduce unmeritorious challenges, since unscrupulous parties seeking to delay proceedings will still challenge arbitrators on tenuous or manufactured grounds regardless of the stringency of the applicable test for bias. Moreover, even with the application of a reasonable observer vantage point (which lowers the bar for bias challenges), recent challenge decisions appear to be "managing

²⁰⁶ *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at 599.

²⁰⁷ See, for instance, *Tidewater Inc v Bolivarian Republic of Venezuela* [Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator] ICSID Case No ARB/10/5 (23 December 2010) at [58]; *Urbaser SA v Argentine Republic* [Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator] ICSID Case No ARB/07/26 (12 August 2010) at [43]–[44]; *Suez v Argentine Republic* [Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal] ICSID Case No ARB/03/17 (22 October 2007) at [40]; and *Compañía de Aguas del Aconquija SA v Argentine Republic* ICSID Case No ARB/97/3 [Decision on the Challenge to the President of the Committee] (3 October 2001) at [25]. See also n 205.

the issue conflicts ‘problem’” as unmeritorious challenges are rejected²⁰⁸ – *Urbaser*²⁰⁹ and *Tidewater*²¹⁰ amply demonstrate this.

69 We now turn to the Second Arm (evidentiary threshold) of the test for bias under the ICSID challenge regime. We agree with Luttrell that the ICSID Convention’s “manifest” standard is “closest to *Gough*[’s]” real danger/possibility test,²¹¹ as compared to the *Sussex Justices* reasonable apprehension test. Put another way, the *Sussex Justices* reasonable apprehension test is *even further removed* from the “manifest” standard than the *Gough* test. However, it is important to realise that there is nevertheless a huge gap between the Second Arm of the *Gough* test and the ICSID Convention’s “manifest” test. A “manifest” standard of proof is arguably higher than a balance of probabilities standard, which is in turn higher than the real danger/possibility test in *Gough*.²¹² It will be recalled²¹³ that ICSID jurisprudence on arbitrator challenges (including the most recent cases of *Tidewater* and *Universal Compression*) has interpreted “manifest” to mean “obvious or evident”²¹⁴ and requires the

²⁰⁸ See Dennis Hranitzky & Eduardo Silva Romero, “The ‘Double Hat’ Debate in International Arbitration” *New York Law Journal* (14 June 2010).

²⁰⁹ *Urbaser SA v Argentine Republic* [Decision on Claimant’s Proposal to Disqualify Professor Campbell McLachlan, Arbitrator] ICSID Case No ARB/07/26 (12 August 2010) at [50] and [54] refers to the perception of a “third party” as the vantage point for testing the appearance of bias. *Urbaser* is discussed at paras 54–56 above.

²¹⁰ *Tidewater Inc v Bolivarian Republic of Venezuela* [Decision on Claimants’ Proposal to Disqualify Professor Brigitte Stern, Arbitrator] ICSID Case No ARB/10/5 (23 December 2010) at [58] refers to the perception of an “observer” as the vantage point for testing the appearance of bias. *Tidewater* is discussed at para 50 above.

²¹¹ See para 28 above.

²¹² See para 21 above and *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85 at [49]–[51] and [74].

²¹³ See paras 26–33 above.

²¹⁴ *Suez v Argentine Republic* [Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal] ICSID Case No ARB/03/17 (22 October 2007) at [34]; *Universal Compression International Holdings, SLU v Bolivarian Republic of Venezuela* [Decision on the Proposal to

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challenger to “establish facts that make it *obvious and highly probable, not just possible*, that [the arbitrator] is a person who may not be relied upon to exercise independent and impartial judgment”.²¹⁵ [emphasis added]²¹⁶ These interpretations of the term “manifest” imply that the challenging party bears an extremely heavy evidentiary burden to discharge, which surpasses even the balance of probabilities standard (*a fortiori*, satisfaction of the *Gough* test’s real danger/possibility threshold, which is pegged at an even lower threshold than the balance of probabilities standard, will not meet the “manifest” standard of proof). Indeed, Schreuer observes that such understanding of the word “manifest” corresponds to its ordinary dictionary meaning, which tribunals have favoured in their interpretation of the same word in Article 52(1)(b)²¹⁷ (an interpretation which Schreuer notes can be applied to Article 57 as well²¹⁸):²¹⁹

Disqualify Prof Brigitte Stern and Prof Guido Santiago Tawil, Arbitrators] ICSID Case No ARB/10/9 (20 May 2011) at [71].

²¹⁵ *Suez v Argentine Republic* [Decision on Second Proposal for Disqualification] ICSID Case No ARB/03/17 (12 May 2008) at [29]; *Tidewater Inc v Bolivarian Republic of Venezuela* [Decision on Claimants’ Proposal to Disqualify Professor Brigitte Stern, Arbitrator] ICSID Case No ARB/10/5 (23 December 2010) at [39]; and *Amco Asia Corp v Republic of Indonesia* [Decision on Proposal to Disqualify an Arbitrator] ICSID Case No ARB/81/1, unreported (24 June 1982).

²¹⁶ It should be noted that it naturally follows from these interpretations of “manifest” lack of independence (or impartiality) that such lack “[must] be proven by objective evidence and ... the mere belief by the challenge[r] of the contest[ed] arbitrator’s lack of independence or impartiality is not sufficient to disqualify the contested arbitrator”: *Suez v Argentine Republic* [Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal] ICSID Case No ARB/03/17 (22 October 2007) at [40]. See also *Universal Compression International Holdings, SLU v Bolivarian Republic of Venezuela* [Decision on the Proposal to Disqualify Prof Brigitte Stern and Prof Guido Santiago Tawil, Arbitrators] ICSID Case No ARB/10/9 (20 May 2011) at [71].

²¹⁷ Article 52(1)(b) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into force 14 October 1966) provides that: “Either party may
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In accordance with its dictionary meaning, 'manifest' may mean 'plain', 'clear', 'obvious', 'evident' and easily understood or recognized by the mind... it relates to the ease with which it is perceived. On this view, the word relates... to the cognitive process that makes it apparent. An excess of powers is manifest if it can be discerned with little effort and without deeper analysis.

70 This heavy evidentiary burden of proof of apparent bias (even coupled with the "reasonable observer" vantage point suggested above²²⁰) should quell fears of the "Black Art" of bias challenges infecting ICSID arbitrations. However, even with this merit of the manifest

request annulment of the award [on the ground] ... (b) that the Tribunal has *manifestly* exceeded its powers" [emphasis added].

²¹⁸ Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd Ed, 2009) at p 1202 states: "The requirement that the lack of qualities must be 'manifest' imposes a relatively heavy burden of proof on the party making the proposal [to disqualify] (*see also Art 52 ...*)" [emphasis added].

²¹⁹ Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd Ed, 2009) at pp 938–939. Schreuer notes in the context of Art 52(1)(b) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into force 14 October 1966) that "[o]n another view, the word 'manifest' is a qualitative matter concerned not with the clarity of any excess [of powers] but its extent [*ie*, the seriousness of the tribunal's excess of powers]" (emphasis added). While such an interpretation of Art 52(1)(b) is arguable (*see* Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd Ed, 2009) at pp 938–943), it would clearly be untenable in the context of Art 57. Requiring a party to establish not only that an arbitrator lacks independence or impartiality *per se*, but that he or she is *seriously* or *egregiously* (applying the alternative view under Art 52(1)(b) that manifest means the *extent* or *seriousness* of an excess of powers) non-independent or non-impartial, would wholly contradict the requirement in Art 14 that: "Persons designated to serve on the Panels shall be persons of *high moral character* and recognized competence in the fields of law, commerce, industry or finance, *who may be relied upon to exercise independent judgment*" [emphasis added].

²²⁰ See para 68.

standard, we are unconvinced for policy reasons that the bar should be set so high. The manifest standard of proof was also propounded in *Amco* (in the context of a challenge against an arbitrator for lack of independence), which became subject to strong criticism by commentators, as it: “imposed a standard that would tolerate virtually all prior business or professional relationship”.²²¹ Applied to challenges on grounds of impartiality and issue conflict in particular, the “manifest” standard would similarly tolerate almost all such conflict, barring those cases where the arbitrator had made or makes particularly extreme or unbalanced comments on the parties or the merits of the dispute in pending or ongoing arbitrations (Type C issue conflict). For instance, it is difficult to see how the appearance of an arbitrator’s issue conflict bias can be *manifest* (even from the viewpoint of a third party observer) where the circumstances in question are those in which Gaillard (Type A issue conflict – arbitrator acting as counsel in another case raising analogous issues) or Judge Schwebel (Type B issue conflict – arbitrator to act as counsel in another case raising analogous issues) found themselves in when they were challenged in *Telekom Malaysia* and *Eureko* respectively.²²² It would surely have been an almost impossible task for Poland’s counsel to establish that the reasonable observer would have thought it *obvious* or *highly* probable that Judge Schwebel would decide *Eureko* in such a matter as would support his subsequent submissions as counsel in *Vivendi*, an argument which has a somewhat speculative ring to it (coincidentally, the *Vivendi* tribunal’s decision on the challenge to Yves Fortier QC interpreted “manifest” in Article 57 to “exclude reliance on

²²¹ The *Amco* award has been criticised as it:

imposed a standard that would tolerate virtually all prior business or professional relationship. Such a standard has no precedent in the municipal law of any country, and it is quite astonishing that it should have been applied in ICSID, with its unique and delicate balance of the rights of host states and foreign private investors.

See W Michael Tupman, “Challenge and Disqualification of Arbitrators in International Commercial Arbitration” (1989) 38(1) ICLQ 26 and Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at p 226.

²²² See paras 40–45 above.

speculative assumptions or arguments"²²³). Similarly, in Gaillard's case, it would have been extremely difficult, if not impossible, for Ghana's counsel to establish that Gaillard's alleged lack of impartiality (arising from the fact that as counsel in a separate case he was arguing for annulment of an arbitral decision that the challenging party was relying on before Gaillard as arbitrator) was either *obvious* or *highly* probable from the viewpoint of a reasonable and well-informed observer, especially if one considers that the *reasonable and well-informed* observer should be able to distinguish between a lawyer's personal convictions and his duty as counsel to put forward his client's best case.²²⁴ It may have been possible for the challenging party to make a reasonably persuasive argument in these cases that the reasonable observer would have had *justifiable* or *reasonable doubts*, or thought that there was a *real danger* of, arbitrator bias. The argument could even have been made that the reasonable observer would have thought it to be *more likely than not* that the arbitrator was biased (though, being a higher evidentiary standard, this would be necessarily more difficult to prove). Indeed, while the first Dutch District Court applied the *justifiable doubts* standard and upheld the challenge to Gaillard,²²⁵ its judgment suggests that even if the applicable standard for disqualification was the more stringent balance of

²²³ *Compañía de Aguas del Aconquija SA v Argentine Republic* [Decision on the Challenge to the President of the Committee] ICSID Case No ARB/97/3 (3 October 2001) at [25].

²²⁴ See para 42 above.

²²⁵ The court held in Challenge No 17/2004, Petition No HA/RK 2004.778 (5 November 2004) that:

In examining a plea of absence of impartiality or independence on the part of an arbitrator within the meaning of article 1033 of the Code of Civil Procedure, *it has to be assumed that an arbitrator may be challenged if* from an objective point of view – *ie* as a result of facts and circumstances – *justified doubts exist with respect to his impartiality or independence ... there will be justified doubts about his impartiality if Prof Gaillard does not resign as attorney in the RFCC/Moroccan case.* [emphasis added]

probabilities test, it would still have upheld the challenge to Gaillard.²²⁶ However, the very high threshold of certainty required by the “manifest” standard is extremely unlikely to be satisfied in almost every case. The empirical evidence certainly supports this view. As a recent survey of ICSID jurisprudence points out,²²⁷ there has only been one case (*Victor Pey Casado v Republic of Chile*²²⁸) which has sustained a challenge based on the arbitrator’s manifest lack of impartiality. The “manifest” evidentiary standard is clearly slanted too heavily in favour of promoting expeditious proceedings, which comes at the expense of endangering the procedural fairness and legitimacy of the ICSID arbitral process. It should

²²⁶ The court held in Challenge No 17/2004, Petition No HA/RK 2004.778 (5 November 2004) that:

... account should be taken of the fact that the arbitrator in the capacity of attorney will regard it as his duty to put forward all possibly conceivable objections against the RFCC/Moroccan award. *This attitude is incompatible with the attitude Prof Gaillard has to adopt as an arbitrator in the present case, ie to be unbiased and open to all the merits of the RFCC/Moroccan award and to be unbiased when examining these in the present case and consulting thereon in chambers with his fellow arbitrators. Even if this arbitrator were able to sufficiently distance himself in chambers from his role as attorney in the reversal proceedings against the RFCC/Moroccan award, account should in any event be taken of the appearance of his not being able to observe said distance.* [emphasis added]

²²⁷ Lars Markert, “Challenging Arbitrators in Investment Arbitration: The Challenging Search for Relevant Standards and Ethical Guidelines” (2010) 3(2) *Contemp Asia Arb J* 237 at 268.

²²⁸ [Award] ICSID Case No ARB/98/2 (8 May 2008). Lars Markert, “Challenging Arbitrators in Investment Arbitration: The Challenging Search for Relevant Standards and Ethical Guidelines” (2010) 3(2) *Contemp Asia Arb J* 237 at 244 notes that in this case:

... the Chairman of the ICSID Administrative Council upheld the application for disqualification of one of the arbitrators based on the recommendation of the Secretary General of the PCA. However, the decision remains unpublished and the award of the arbitral tribunal does not contain enough information to get an idea of the application of the ‘manifest lack of qualities’ threshold.

not be forgotten that ICSID arbitrators wield extensive powers of review over host states' regulatory policies, and their decisions can thus have a significant impact on matters of intense public importance to entire populations.²²⁹ The impartiality and independence of ICSID arbitrators (as a matter of fact and perception) should therefore not be any less important than the probity of municipal court judges. However, as was pointed out by those who criticised the "manifest" standard in *Amco*:²³⁰

²²⁹ As Stephan Schill, "Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator" (2010) 23 LJIL 401 at 412 notes:

Since one of the disputing parties in an investor-state dispute is not a private commercial actor but a state, investment treaty awards may directly affect the host state's population, in that the state, in order to be in compliance with its international law obligations, needs to adapt its behaviour according to what its treaty obligations entail. For example, an investment dispute preventing a state from lowering water or electricity tariffs because of promises made to the investor could have the effect of cutting off parts of the host state's population from access to that fundamental utility. Similarly, investment treaty arbitrations increasingly involve complaints by foreign investors about general regulatory policies concerning, for example, the protection of the environment, labour standards, anti-discrimination policies, and so on. The disputes submitted relate to subject matters that are concerned more often with questions of public law and judicial review of sovereign acts than with questions of the contracting behaviour of the state in its private capacity. Decisions by arbitral tribunals on these matters may directly affect the social fabric in the host state and are thus of public interest.

See also para 63 above, and generally, Stephan Schill, "Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator" (2010) 23 LJIL 401 and Benedict Kingsbury & Stephan Schill, *Investor-state Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law* (IILJ Working Paper, 2009).

²³⁰ See W Michael Tupman, "Challenge and Disqualification of Arbitrators in International Commercial Arbitration" (1989) 38(1) ICLQ 26 and Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a "Real Danger" Test* (Kluwer Law International, 2009) at p 226.

Such a standard has no precedent in the municipal law of any country, and it is quite astonishing that it should have been applied in ICSID, with its unique and delicate balance of the rights of host states and foreign private investors. [emphasis added]

The fact that recusal of court judges may (generally speaking²³¹) be procured on establishment of a relatively low evidentiary probability of bias falling *far* short of the ICSID challenge regime's "manifest" threshold amply demonstrates that the ICSID challenge regime does not attach sufficient importance to the procedural fairness of the ICSID arbitral process.

71 Unfortunately, the hard truth of the matter remains that, short of an amendment to Article 57 of the ICSID Convention (which is, needless to say, a very unlikely prospect), its use of the word "manifest" leaves tribunals with no choice but to impose this onerous standard on parties applying to challenge an arbitrator. The case law and commentary assessed above²³² certainly does not permit one to mount the argument that "manifest" should be understood as referring to any standard lower than that provided by its unambiguous literal meaning. The reasonable observer vantage point which we have argued for does mitigate the high bar imposed by the "manifest" evidentiary threshold, but only to a limited extent, since the likelihood of bias must still be "obvious" or "highly probable" from the reasonable observer's perspective.

V. Mitigating the problem of issue conflict

72 How can the problem of issue conflict in ICSID arbitration be mitigated, given that the ICSID challenge regime appears to be rather ill-designed to ensure procedural propriety? One of the solutions that have been suggested is to implement new rules prohibiting the practice of

²³¹ Note however the German courts' test of "grave and obvious partiality or dependence" for establishing actionable bias. See para 14 above.

²³² See paras 26–33 and 69.

arbitrators serving as counsel.²³³ This is not unprecedented. The Court of Arbitration for Sport amended its regulations in 2009 to prohibit the “double hat” arbitrator/counsel role. Should the same rules be adopted for investment arbitrations? Philippe Sands QC is in favour of implementing such rules because, in his view, issue conflicts are “imperilling the entire system of investment arbitration”.²³⁴ His proposal has sparked a spirited debate in the international arbitration community.

73 There are arguments supporting both points of view. Advocates of separating the pool of arbitrators from the pool of advocates argue that such a separation would alleviate the problem of issue conflicts and restore lost confidence in international arbitration.²³⁵ Thomas Buergenthal also notes that separation would mitigate the concern illustrated by Type B issue conflict^{236,237}

I have long believed that the practice of allowing arbitrators to serve as counsel, and counsel to serve as arbitrators, raises due process of law issues. In my view, arbitrators and counsel should be required to decide to be one or the other, and be held to the choice they have made, at least for a specific period of time. That is necessary, in my opinion, in order *to ensure that an arbitrator will not be tempted, consciously or unconsciously, to seek to obtain a result in an arbitral decision that might advance the interests of a client in a case he or she is handling as counsel.* ICSID is particularly vulnerable to this problem because the interpretation and application of the same or similar legal instruments – the Bilateral Investment Treaties, for

²³³ See Dennis Hranitzky & Eduardo Silva Romero, “The ‘Double Hat’ Debate in International Arbitration” *New York Law Journal* (14 June 2010).

²³⁴ Sands’s proposal was made at the annual conference of the International Bar Association held in Madrid in October 2009. See Dennis Hranitzky & Eduardo Silva Romero, “The ‘Double Hat’ Debate in International Arbitration” *New York Law Journal* (14 June 2010).

²³⁵ See Dennis Hranitzky & Eduardo Silva Romero, “The ‘Double Hat’ Debate in International Arbitration” *New York Law Journal* (14 June 2010).

²³⁶ See paras 44–45 above.

²³⁷ Thomas Buergenthal, “The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law” (2006) 21(1) ICSID Rev-FILJ 126 at 129.

example – are regularly at issue in different cases before it.
[emphasis added]

Furthermore, rules requiring lawyers to choose between roles would create more opportunities for promising but less experienced practitioners to be retained to represent parties in international arbitrations, or to be appointed as arbitrators.²³⁸

74 Critics of “separate bars” rules counter with the following arguments.²³⁹ First, barring counsel who represent parties in arbitration from serving as arbitrators may “deprive the international arbitration community of some of its best talents who, when forced to choose, may opt for the more lucrative role of counsel”.²⁴⁰ Second, “in the investment arbitration sphere, it is far from clear that issue conflicts, as opposed to other factors, contributed significantly to the decisions of a handful of countries to withdraw from ... the system”.²⁴¹ Third, it is arguably the case that existing rules and institutions are “managing the issue conflicts ‘problem’” by rejecting unmeritorious challenges²⁴² but sustaining challenges where there are sufficient doubts regarding the arbitrator’s impartiality. Without sufficient evidence to the contrary, “it is difficult to justify such a radical departure from a time-honoured practice”.²⁴³ The

²³⁸ See Dennis Hranitzky & Eduardo Silva Romero, “The ‘Double Hat’ Debate in International Arbitration” *New York Law Journal* (14 June 2010).

²³⁹ See Dennis Hranitzky & Eduardo Silva Romero, “The ‘Double Hat’ Debate in International Arbitration” *New York Law Journal* (14 June 2010); and Nassib Ziade, “How Many Hats can a Player Wear: Arbitrator, Counsel and Expert?” (2009) 24(1) ICSID Rev-FILJ 49 at 57–58.

²⁴⁰ Nassib Ziade, “How Many Hats can a Player Wear: Arbitrator, Counsel and Expert?” (2009) 24(1) ICSID Rev-FILJ 49 at 57–58. This has already happened to some extent amongst Court of Arbitration for Sport arbitrators.

²⁴¹ Dennis Hranitzky & Eduardo Silva Romero, “The ‘Double Hat’ Debate in International Arbitration” *New York Law Journal* (14 June 2010).

²⁴² See Dennis Hranitzky & Eduardo Silva Romero, “The ‘Double Hat’ Debate in International Arbitration” *New York Law Journal* (14 June 2010).

²⁴³ Dennis Hranitzky & Eduardo Silva Romero, “The ‘Double Hat’ Debate in International Arbitration” *New York Law Journal* (14 June 2010).

authors generally agree with these criticisms of “separate bars” rules, but we also reiterate our objections to the ICSID challenge regime’s overly onerous “manifest” standard, which certainly would not tolerate unmeritorious challenges, but is pitched at too high an evidentiary threshold to ensure that arbitrators who reasonably appear to be infected by issue conflict bias are disqualified from sitting on ICSID tribunals. While in our opinion, there has not yet been any egregious case of a challenge against an ICSID arbitrator failing to satisfy the “manifest” requirement even though there was a substantial risk of the arbitrator having an issue conflict, there is a distinct possibility of such a case arising in the future and having severe negative repercussions on the legitimacy of ICSID. Nonetheless, we believe that “separate bars” rules may be premature and an overly drastic response to the problem of issue conflict. As the critics of “separate bars” rules point out, the detriments of such rules may outweigh their benefits as they would deplete an already limited supply of competent arbitrators even further, and there is also insufficient evidence that the absence of such rules will contribute to further withdrawals from the ICSID Convention. In any event, the implementation of “separate bars” rules is unlikely to be a feasible option at this point in time, since there appears to be insufficient consensus and political will (as yet) to effect the necessary changes to the ICSID Convention or Arbitration Rules.

75 If separation of arbitrator and counsel is not feasible, a second option would be to adopt more precise rules identifying the circumstances in which ICSID arbitrators may be disqualified on the grounds of issue conflict, and to have clearer, more comprehensive, and better adapted disclosure requirements.²⁴⁴ Clearer conflict rules can encourage arbitrators to disclose potential issue conflicts in good time, which not only helps to safeguard the procedural fairness of arbitral proceedings, but also prevents them from becoming bogged down by bias challenges at the critical advanced stages and reduces the risk of having to conduct

²⁴⁴ Nassib Ziade, “How Many Hats can a Player Wear: Arbitrator, Counsel and Expert?” (2009) 24(1) ICSID Rev-FILJ 49 at 64; Judith Levine, “Dealing with Arbitrator ‘Issue Conflicts’ in International Arbitration” (2008) 5(4) TDM.

rehearings should the challenged arbitrator be replaced. Disclosure rules that are better adapted to the ICSID challenge regime can also help ease the (overly) onerous burden imposed on the challenging party. For instance, if an arbitrator fails to disclose circumstances that may give rise to an issue conflict, even though accepted disclosure guidelines (which have been adapted to the “manifest” requirement in Article 57) mandate disclosure, the challenging party could rely on such breach of the disclosure guidelines to make out the arbitrator’s “manifest” lack of impartiality.²⁴⁵ In this regard, given the rising number of arbitrator

²⁴⁵ See the discussion of *Alpha Projektholding GmbH v Ukraine* [Decision on Respondent’s Proposal to Disqualify Arbitrator Dr Yoram Turbowicz] ICSID Case No ARB/07/16 (19 March 2010) above at para 37. Some of the factors to consider in determining whether non-disclosure of circumstances that may give rise to conflicts of interest amounts to actionable bias under the ICSID challenge regime were set out in *Suez v Argentine Republic* [Decision on Second Proposal for Disqualification] ICSID Case No ARB/03/17 (12 May 2008) at [44]:

... the failure to disclose was inadvertent or intentional, whether it was the result of an honest exercise of discretion, whether the facts that were not disclosed raised obvious questions about impartiality and independence, and whether the non-disclosure is an aberration on the part of the conscientious arbitrator or part of a pattern of circumstances raising doubts as to impartiality. The balancing is for the deciding authority ... in each case.

It is interesting to note that in *Universal Compression International Holdings, SLU v Bolivarian Republic of Venezuela* [Decision on the Proposal to Disqualify Prof Brigitte Stern and Prof Guido Santiago Tawil, Arbitrators] ICSID Case No ARB/10/9 (20 May 2011) at [93]–[94] (“*Universal Compression*”), it was held that Brigitte Stern’s non-disclosure of her previous appointments by the respondent (Venezuela) was the product of “an honest exercise of discretion” by Stern, as “it was her understanding at that time that only facts that are ... unknown, and not publicly available information [such as the fact of her prior appointments by the respondent], must be disclosed”, *notwithstanding* the fact that r 6(2) of the International Centre for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings (amended 10 April 2006) required disclosure of “past and present professional, business and other relationships

(continued on next page)

challenges in investment arbitrations and the recent spate of issue conflict challenges (which show no signs of abating),²⁴⁶ it is suggested that the time may be ripe for ICSID or the IBA to consider adapting the IBA

(if any) with the parties” and “any other circumstance that might cause [the arbitrator’s] reliability for independence judgment to be questioned by a party”, without making any distinction between publicly available and non-publicly available information. Indeed, it was observed that “Rule 6(2) declaration should include ... information about publicly available cases”: *Universal Compression* at [92]. The chairman of the administrative council’s ultimate finding that Stern’s non-disclosure nevertheless did not “evidence a manifest lack on her part of independence or impartiality” (*Universal Compression* at [95]) indicates how *even a breach of disclosure rules* does not satisfy the high threshold of the manifest requirement under the ICSID challenge regime. However, it is submitted that failure to adhere to more specific disclosure requirements (adapted to the manifest requirement as suggested in this paragraph) may not be looked upon so leniently, and could demonstrate the arbitrator’s “manifest” lack of independence or impartiality, thus assisting parties to discharge their burden of proof and mount a successful challenge (which would otherwise have been impossible in the circumstances). On the importance of formulating and enforcing clear and specific disclosure obligations in general, see Catherine Rogers, “Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct” (2005) 41 *Stan J Int’l L* 53 at 117–119.

²⁴⁶ As pointed out by Lars Markert, “Challenging Arbitrators in Investment Arbitration: The Challenging Search for Relevant Standards and Ethical Guidelines” (2010) 3(2) *Contemp Asia Arb J* 237 at 239:

... there exists a shared sense in the investment arbitration community that arbitrator challenges are on the rise... more than half of the challenges brought in arbitral proceedings under the ICSID Convention and its Arbitration Rules have been brought within the last four years.

See also Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a “Real Danger” Test* (Kluwer Law International, 2009) at pp 3–4. The most recent International Centre for Settlement of Investment Disputes challenge decision on issue conflict (of which the authors are aware) is *Universal Compression International Holdings, SLU v Bolivarian Republic of Venezuela* [Decision on the Proposal to Disqualify Prof Brigitte Stern and Prof Guido Santiago Tawil, Arbitrators] ICSID Case No ARB/10/9 (20 May 2011), which was decided as recently as 20 May 2011.

Guidelines to the challenge regime under the ICSID Convention (in light of the “manifest” requirement in Article 57 and the special characteristics of ICSID arbitrations which distinguish it from commercial arbitration²⁴⁷), in order to provide better and more relevant guidance for ICSID arbitration practitioners on the rules governing issue conflicts and conflicts of interest in general.

²⁴⁷ See the discussion above at paras 34–38 (in particular, the comments made by the tribunal in *Urbaser SA v Argentine Republic* [Decision on Claimant’s Proposal to Disqualify Professor Campbell McLachlan, Arbitrator] ICSID Case No ARB/07/26 (12 August 2010) on the applicability of the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (22 May 2004)) and 60–71.

Background to Essay 14

In 2010 I was invited to make a contribution to the *Liber Amicorum* for Ulf Franke. Ulf was the Secretary-General of the Arbitration Institute of the Stockholm Chamber of Commerce and a major figure in the international arbitration world, so I was honoured to be considered worthy of making this contribution. I chose this topic as I had just decided a case in Dubai on the question of the seat and felt it worthy of discussion. I chose Darius as my co-author because I knew that with his intellect he would make a great difference to the article.

I wish to extend my thanks to JurisNet for kindly granting me permission to republish this paper in this book.

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DETERMINING THE PARTIES' TRUE CHOICE OF THE SEAT OF ARBITRATION AND *LEX ARBITRI*

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Contents

I.	Introduction	546
II.	When there is ambiguity in the choice of the seat designated by the parties	546
III.	When the parties have designated a seat but have also chosen a <i>lex arbitri</i> different from that of the seat	553
IV.	When there is ambiguity in whether the domestic or the international arbitration regime within the designated seat should apply.....	558
V.	Conclusion.....	563

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I. Introduction

1 The selection of a seat of arbitration or the place of arbitration is sometimes not as straightforward as it seems. Because the seat of arbitration *prima facie* determines the law governing the conduct of the arbitration (also known as the “*lex arbitri*” or the “curial law”), thereby affecting the rights and liabilities of the parties, potential room for argument arises when that selection is not made with due care and precision. Three types (at least) of ambiguities may arise:

- (a) when there is ambiguity in the choice of the seat designated by the parties;
- (b) when the parties have designated a seat but have also chosen a *lex arbitri* different from that of the seat; and
- (c) when there is ambiguity in whether the domestic or the international arbitration regime within the designated seat should apply.

2 The significance for counsel and clients is that the *lex arbitri* may turn out to be not what they had intended. The profound legal and practical implications attached to the seat of arbitration calls for practitioners to be aware of these pitfalls in designating a seat of arbitration. This article discusses the case law to illustrate different courts’ approach in resolving the three types of ambiguities outlined above.

II. When there is ambiguity in the choice of the seat designated by the parties

3 In Dubai, there exists an autonomous zone known as the Dubai International Financial Centre (“DIFC”), overseen by the Courts of the Dubai International Financial Centre (“the DIFC Court”), which has an independent judicial system. The DIFC has its own legislation on arbitration, separate from that of Dubai.¹ In *Amarjeet Singh Dhir v*

¹ Dubai Law No 12 of 2004 established the Judicial Authority at the Dubai International Financial Centre (“DIFC”) sets out the jurisdiction of the courts and allows for the independent administration of justice in the DIFC. DIFC Law No 10 of 2004 sets out the powers, procedures, functions and administration of the DIFC Courts. The DIFC also has an arbitration centre

*Waterfront Property Investment Ltd*² (“*Amarjeet Singh Dhir*”), a decision of the Court of First Instance of the DIFC, there was a Memorandum of Agreement (“MOA”), the relevant excerpts of which read as follows:

10.1 This Agreement shall in all respect be governed by and be construed, interpreted, and will take effect in accordance with the Laws of the Emirate of Dubai.

10.2 In the event of a dispute on the terms, interpretation, performance or termination of this Agreement, the Buyer and the Seller shall first seek to settle such dispute amicably prior to arbitration however, failing such resolution shall be resolved by the appointment of a single Arbitrator conducted in accordance with the DIFC-LCIA rules of arbitration applicable to the Dubai International Financial Centre.

10.3 The arbitration shall take place in the *Emirate of Dubai*.

[emphasis added]

4 One of the issues that arose for the DIFC Court’s consideration was the seat of the arbitration. That was significant because the DIFC Court had granted a freezing order in aid of an arbitration commenced at the Dubai International Financial Centre-London Centre of International Arbitration (“DIFC-LCIA”) Arbitration Centre and it would have had no jurisdiction to do so if the Dubai national court was the true curial court.³

5 The applicant contended that parties had failed to agree on the seat of the arbitration because clause 10.3 of the MOA had only stipulated the *geographical location* of the arbitration. Accordingly, the applicant argued that the DIFC was the default seat under Article 16.1 of the DIFC-LCIA Arbitration Rules (“DLA Rules”). Article 16.1 of the DLA Rules provided that the seat of the arbitration would be the DIFC if the parties failed to agree in writing on the seat. Further, the applicant submitted that Article 27 of the DIFC Law No 1 of 2008 (“DIFC Arbitration Law”) was applicable. Article 27 reads as follows:

known as the Dubai International Financial Centre-London Centre of International Arbitration Arbitration Centre, with its own rules of arbitration.

² CFI 011/2009 (8 July 2009).

³ Article 24(3) read with Art 7 of the DIFC Arbitration Law of 2008.

27. Seat of the Arbitration

- (1) The parties are free to agree on the Seat of the Arbitration. In the absence of such agreement, where any dispute is governed by DIFC law, the Seat of the Arbitration shall be the DIFC.
- (2) Notwithstanding the provisions of paragraph (1) of this Article, the Arbitral Tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

The respondents argued that the “place” of an arbitration was a reference to its seat.

6 In deciding whether the DIFC was the seat of arbitration, the DIFC Court approached the matter as a question of contractual interpretation to determine what the parties objectively intended by the arbitration agreement they had entered into. The DIFC Court held that the parties intended Dubai to be the seat and gave the following reasons.

- (a) The DIFC Court agreed with the respondents that in a contract, when the parties state that “the place of an arbitration shall be [X]”, the word “place” means “legal place” and usually refers to the seat of the arbitration. The DIFC Court further noted that there was a close connection with Dubai in the instant case (the subject matter of the dispute being a piece of land in Dubai, the governing law being Dubai law and the agreement having been executed in Dubai). In contrast, there was no significant connection with the DIFC because the DIFC-LCIA Arbitration Centre could administer an arbitration with a seat outside of the DIFC.
- (b) Additionally, the remainder of the MOA referred to Dubai in several places but made specific reference to the DIFC in only one place, namely, within clause 10.2 of the MOA in selecting “the DIFC-LCIA rules of arbitration applicable to the Dubai International Financial Centre”. It was therefore difficult to accept the applicant’s argument that “Dubai” in clause 10.3 of the MOA was intended by the parties to mean the DIFC.
- (c) Furthermore, if the parties had wanted to stipulate the seat as the DIFC, they could have said so expressly. The DIFC was within the

Emirate of Dubai but the two terms were not synonymous or interchangeable.

- (d) The DIFC Court also rejected a contention of the applicant that one should first determine the procedural law, then determine the seat. Counsel for the applicant had contended that the selection of the DLA Rules by the parties was to be construed as a selection of the applicable procedural law. The DIFC Court's response was that the DLA Rules are no different from the rules of other major arbitration institutions, which determine the manner of administration of an institutional arbitration, but leave the parties free to select the seat of arbitration, which may well be different from the place where the institution is located, the International Chamber of Commerce being the most famous example.⁴

7 Moving from the Middle East to the Orient, a similar problem may arise when one considers the unique position of Hong Kong. Notwithstanding Hong Kong's reversion to Chinese sovereignty, under the region's mini-constitution (known as the Basic Law), Hong Kong retains its English common law-based legal system, separate from that of the mainland.⁵ Arbitration procedures in Hong Kong remain governed by a separate Arbitration Ordinance 1963⁶ ("Arbitration Ordinance"), which incorporates in large part the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration⁷ ("Model Law") and was amended to include

⁴ Following this decision, the parties consented to the Dubai International Financial Centre Court of Appeal's order to dismiss the appellant's appeal with no costs payable by either party to the other: *Amarjeet Singh Dhir v Waterfront Property Investment Ltd* [Consent Order] CA 001/2009 (14 December 2009).

⁵ Nadia Darwazah & Friven Yeoh, "China: Developments and Trends" in *The Asia Pacific Arbitration Review 2007*.

⁶ Cap 341. Hong Kong passed a new Arbitration Ordinance (Cap 609) which came into effect on 1 June 2011, replacing the existing Arbitration Ordinance (Cap 341).

⁷ UN Doc A/40/17, annex I; UN Doc A/61/17, annex I (21 June 1985; amended 7 July 2006).

provision for the court to grant interim measures in accordance with the 2006 amendments to the Model Law.⁸

8 If parties designate an arbitration with its seat in “China”, does the Arbitration Ordinance of Hong Kong apply as the *lex arbitri*, or would the People’s Republic of China (“PRC”) Arbitration Law⁹ apply? One could envisage a situation where one party would contend that the reference to China actually meant “Hong Kong”. This would give rise to an issue akin to that in *Amarjeet Singh Dhir*. Presumably the court or tribunal resolving this issue would undertake an exercise in the construction of the agreement as in *Amarjeet Singh Dhir*, where the court would examine the various connecting factors of the parties to Hong Kong and China respectively to decide what objectively the parties’ true intentions were.

9 What would complicate (or assist) matters is if the parties had further stated that the arbitration with its seat in “China” would be an *ad hoc* arbitration governed by the UNCITRAL Arbitration Rules 1976¹⁰ (“UNCITRAL Arbitration Rules”). According to Articles 16 and 18 of the PRC Arbitration Law, *ad hoc* arbitration is not recognised in the PRC, *ie*, an *ad hoc* arbitration award will not be enforced by the competent PRC People’s Court. Further, an arbitration clause providing for *ad hoc* arbitration will not prevent a PRC People’s Court from accepting jurisdiction to hear the dispute. There is currently a debate in the PRC as to whether an arbitration clause which specifies arbitration in China under the ICC or UNCITRAL Arbitration Rules but is “managed” by the China International Economic and Trade Arbitration Commission (“CIETAC”) constitutes a lawful arbitration in China.¹¹

⁸ Robert Merkin & Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* (London: Informa, 2009) at p 5.

⁹ Promulgated on 31 August 1994; effective as of 1 September 1995.

¹⁰ GA Res 31/98, UN GAOR, 31st Sess (15 December 1976).

¹¹ The new International Chamber of Commerce (“ICC”) Arbitration Rules (entry into force 1 January 2012) (“ICC Rules”) include Art 1(2), which states that “[t]he [ICC] Court is the only body authorized to administer arbitrations under the Rules, including the scrutiny and approval of awards rendered in accordance with the Rules”; and Art 6(2), which states that

(continued on next page)

10 One way in which the arbitration can still proceed in such a situation is for the court or tribunal to find that the parties had intended “Hong Kong” to be the seat of the arbitration. Hong Kong does not have a similar prohibition against *ad hoc* arbitrations.¹² The arbitration agreement

“[b]y agreeing to arbitration under the [ICC] Rules, the parties have accepted that the arbitration shall be administered by the Court”. It is unclear if the Supreme People’s Court will interpret this to mean that parties who choose the ICC Rules also choose the arbitration to be administered by the ICC Court. An arbitration clause that specifies the ICC Rules but is managed by China International Economic and Trade Arbitration Commission (“CIETAC”) may thus be deemed invalid. In this regard, the Singapore High Court in *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 5 considered whether an arbitration clause which provided for disputes to be settled by a non-existent institution under the ICC Rules was operable. The High Court found that although the clause was uncertain as to the arbitral institution, it was open to the parties to approach any arbitral institution in Singapore to administer the arbitration in accordance with the ICC Rules. The High Court specifically mentioned *Insignia Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936, in which the Court of Appeal noted that the Singapore International Arbitration Centre (“SIAC”) “was able and willing, for that particular case, to conduct a hybrid arbitration, applying the ICC rules”: at [28]. The High Court therefore stayed the court proceedings in favour of arbitration but imposed (at [37]):

... the condition that parties obtain the agreement of the SIAC or any other arbitral institution in Singapore to conduct a hybrid arbitration applying the ICC rules, with liberty to apply should they fail to secure any such agreement.

However, there was no discussion of Art 6(2) of the ICC Rules. It is therefore unclear whether CIETAC or any other arbitral institution will agree to administer an arbitration under the ICC Rules given the express provision in Art 1(2) that the ICC Court is the only body authorised to administer arbitrations under the ICC Rules.

¹² On 30 December 2009, the Supreme People’s Court of the PRC issued a Notice Regarding the Enforcement of Hong Kong Arbitral Award in Mainland China (Fa [2009] No 415) (“Notice”). This Notice clarifies that *ad hoc* and institutional awards made in Hong Kong are enforceable in mainland China. The Notice states that:

(continued on next page)

can therefore be saved, and this construction may commend itself well to courts that have a pro-arbitration stance.

11 Alternatively, the court or tribunal can hold that the parties had intended the arbitration to be conducted under the auspices of the CIETAC.¹³ The CIETAC Rules 2005¹⁴ allow the CIETAC to administer arbitrations seated outside of China; therefore, the court or tribunal has the flexibility of further stipulating that the parties had intended “Hong Kong” to be the seat of the arbitration. The new CIETAC Rules 2012¹⁵ allow parties to agree on the place of the arbitration. Where parties have not agreed on the place of the arbitration, the place of arbitration may be the domicile of the CIETAC, its sub-commission or centre administering the case, or another location, depending on the circumstances of the case.¹⁶ Furthermore, parties are allowed to amend the CIETAC Rules 2005 and can even adopt a different set of arbitration rules altogether.¹⁷ The new CIETAC Rules 2012 retained this provision but also allowed parties to choose arbitration rules other than the CIETAC Rules when opting for the arbitration to be administered by the CIETAC.¹⁸ Accordingly, it is possible for CIETAC to administer an arbitration governed by the UNCITRAL Arbitration Rules.

... *ad hoc* arbitral awards made in Hong Kong and arbitral awards made in Hong Kong by the ICC and other foreign arbitration institutions are enforceable in the PRC in accordance with the Arrangement concerning *Mutual Enforcement of Arbitral Awards between Mainland China and Hong Kong* signed in 1999, except where grounds of refusal of enforcement under Article 7 of the Arrangement exist.

¹³ Court of Arbitration of the China Chamber of International Commerce.

¹⁴ Effective 1 May 2005.

¹⁵ Effective 1 May 2012.

¹⁶ China International Economic and Trade Arbitration Commission Rules 2012 (effective 1 May 2012) Art 7.

¹⁷ Nadia Darwazeh & Friven Yeoh, “China: Developments and Trends” in *The Asia Pacific Arbitration Review 2007* (Global Arbitration Review, 2007).

¹⁸ China International Economic and Trade Arbitration Commission Rules 2012 (effective 1 May 2012) Art 4(3).

12 Despite the ambiguities described above, there has been empirical evidence suggesting that it has become increasingly popular for arbitrations between two domestic PRC parties to conduct an arbitration with its seat in Hong Kong because arbitration awards rendered in Hong Kong are enforceable in the PRC with as much ease as foreign-related awards that were made in the PRC, by way of an Arrangement between the Mainland and Hong Kong Special Administrative Region on the Mutual Enforcement of Arbitration Awards.¹⁹ The terms for enforcement, as well as for non-enforcement, of awards under this Arrangement are almost identical to those under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.²⁰

13 We turn next to the related question where the parties have designated a seat but have also chosen a *lex arbitri* different from that of the seat.

III. When the parties have designated a seat but have also chosen a *lex arbitri* different from that of the seat

14 The English case of *Braes of Doune Windfarm (Scotland) v Alfred McAlpine Business Services* (“*Braes*”)²¹ is one such example. The arbitration clause in *Braes* read as follows:

- (c) This arbitration agreement is subject to English Law and the seat of the arbitration shall be Glasgow, Scotland. Any such reference to arbitration shall be deemed to be a reference to arbitration within the meaning of the Arbitration Act 1996 or any statutory re-enactment.

15 Clause 1.4.1 of the relevant contract in that case gave the courts of England and Wales “exclusive jurisdiction” to settle disputes.

¹⁹ Mark Beeley & James Loftis, “International commercial arbitration in the PRC, further steps in the right direction” in *The Asia Pacific Arbitration Review 2007* (Global Arbitration Review, 2007).

²⁰ 330 UNTS 3 (10 June 1958; entry into force 7 June 1959).

²¹ [2008] EWHC 426. This decision has not been overruled.

16 An arbitration had been conducted in accordance with the arbitration clause and an award was given in favour of one party. The losing party applied before the English court for leave to appeal on a point of law. The winning party in the arbitration applied for, in effect, a declaration that the English court had no jurisdiction to hear the appeal, on the basis that the seat of the arbitration was Scotland (which has its own arbitration law independent of the English Arbitration Act 1996).²²

17 Akenhead J held that where in substance the parties had agreed that the laws of one country would govern the arbitration, the place where the arbitration was to be heard would not dictate what the governing or controlling law would be. By virtue of the parties' agreement that the English courts had "exclusive jurisdiction" to settle disputes, an appeal could be brought before the English courts. This decision was undoubtedly influenced by the fact that clause 1.4.1 would be otherwise rendered otiose. Meaning had to be given to the express agreement that the English courts had exclusive jurisdiction to settle disputes. If the seat of arbitration were Scotland, the English courts would have no jurisdiction to entertain an appeal for leave to appeal the award, which would then render clause 1.4.1 meaningless.

18 Akenhead J therefore held that the parties had actually intended Glasgow, Scotland to be the venue of hearing for the arbitration, and not the seat of the arbitration. The parties' expression selection of the English Arbitration Act 1996 meant that they intended the curial law of the arbitration to be English law. The court ruled as follows:²³

Although authorities establish that, *prima facie* and in the absence of agreement otherwise, the selection of a place or seat of an arbitration will determine what the curial law or '*lex fori*' or '*lex arbitri*' will be, I consider that, where in substance the parties agree that the laws of one country will govern and control a given arbitration, the place where the arbitration is to be heard will not dictate what the governing or controlling law will be.

²² c 23 (UK).

²³ *Braes of Doune Windfarm (Scotland) v Alfred McAlpine Business Services* [2008] EWHC 426 at [17(e)].

19 Another case in point is *Naviera Amazonica Peruana SA v Compania Internacional De Seguros del Peru* (“*Naviera*”),²⁴ which involved a hull insurance policy. In the policy, Article 1 of the General Conditions provided that in the event of conflict between the printed and typed stipulations, the latter were to prevail. Article 31 provided that the city of Lima was to have jurisdiction over all disputes. The typed indorsement contained an arbitration clause which provided “*Arbitraje bajo las Condiciones y Leyes de Londres*”, the working translation being “Arbitration under the conditions and laws of London”.

20 The issue before Kerr LJ in that case was whether the seat of the arbitration was Lima or London. The judge below had held that any arbitration under the policy was to be governed by English law in every respect, but nevertheless concluded that any arbitration under the policy was to be held in Lima. Whilst Kerr LJ recognised that there was a theoretical possibility that that was a possible construction of the policy, he did not think that the parties could have intended such a highly complex and possibly unworkable result because it meant that the Lima courts would have had to apply English law as the *lex arbitri*.

21 Kerr LJ held that the seat of arbitration was London and the *lex arbitri* was English law. He gave three reasons for such a construction of the policy:²⁵

- (a) Article 1 of the General Conditions stipulated that a typed indorsement would prevail over a printed condition.

²⁴ [1988] 1 Lloyd’s Rep 116. This decision was distinguished by the Singapore Court of Appeal in *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR(R) 401. The claimant relied on *Naviera Amazonica Peruana SA v Compania Internacional De Seguros del Peru* [1988] 1 Lloyd’s Rep 116 (“*Naviera*”) to show that there was an implied agreement to change the place of the arbitration, and thus the *lex fori*. The Court of Appeal distinguished *Naviera* on the basis that it did not involve an agreement to change the place of arbitration.

²⁵ *Naviera Amazonica Peruana SA v Compania Internacional De Seguros del Peru* [1988] 1 Lloyd’s Rep 116 at 116.

- (b) The ordinary commercial meaning of the phrase 'arbitration according to the conditions and laws of London' obviously meant that the arbitration was to be held in London.
- (c) This was a marine policy between insurers and shipowners who operate internationally. The policy covered four deep-sea vessels classed in other countries. The premiums were stated in US dollars and had evidently been agreed with reference to reinsurance rates, probably abroad. General average or claims under the policy were to be settled in London. In such circumstances there is nothing surprising in concluding that these parties intended that any dispute under this policy should be arbitrated in London.

22 The third case under this category is *Halpern v Halpern* ("*Halpern*"),²⁶ where the parties agreed to submit their dispute to arbitration by the Beth Din (a council of Jewish rabbis). Before any award was made by the Beth Din, the dispute was compromised. The first defendant subsequently gave notice to the claimants that he considered the compromise agreement to be null and void. The claimants issued proceedings primarily for damages for repudiation of the compromise agreement. They applied for summary judgment on the basis that the defendants had no real prospect of defending the claim or alternatively to strike out certain parts of the pleadings. An issue arose as to the proper law of the compromise agreement, which in turn raised issues about the law applicable to the arbitration.

23 The problem in *Halpern* was that parties chose Jewish law to govern their dispute. However, Jewish law was not recognised by the English Court as a municipal law capable of governing the arbitration agreement. Christopher Clarke J in the English High Court commented that the choice of law applicable to the arbitration agreement and curial law was between Switzerland (where the arbitration was held and the tribunal itself considered that the seat was Swiss) and England (as one of the deeds of arbitration made reference to the English Arbitration Act 1996). The court stated it was not necessary to decide between the two

²⁶ [2006] 2 All ER (Comm) 251. This decision has not been overruled.

in *Halpern* as there was no indication that Swiss law was different from English law. However, Clarke J commented that:

- (a) For the law applicable to the arbitration agreement, the Court preferred English law over Swiss law the applicable law as either the implied choice of parties or country having the closest connection to the agreement.²⁷
- (b) For the law applicable to the arbitration, the seat of arbitration and law of arbitration appeared to be Switzerland and the court acknowledged the difficulties (complexity, inconvenience, if not impossibility) of an English Court exercising jurisdiction over an arbitration conducted in Switzerland. These difficulties had been echoed earlier in *Union of India v McDonnell Douglas Corp*²⁸ ("*Union of India*"). If Swiss law was the curial law, most of Part 1 of the English Arbitration Act 1996 which describes the conduct of the arbitration would not apply.²⁹

24 The net result in *Halpern* was that three vastly different legal systems (Jewish, English and Swiss) potentially governed different aspects of a single dispute. The unnecessary complications in *Halpern* amply illustrate the danger of not clearly stipulating in the arbitration agreement the seat, curial law and law applicable to the arbitration agreement.

25 The last case in this series is *Kempinski Hotels SA v PT Prima International Development*,³⁰ where the arbitration clause provided that:

... any dispute ... shall be referred to and determined by the arbitration under the Rules of the Singapore International Arbitration Centre. The arbitration shall be governed by the laws of Indonesia ... The place of arbitration shall be Singapore.

26 In determining what the *lex arbitri* was, the arbitrator held that he should adopt the safe course in the situation by conforming to the mandatory laws for procedure for arbitration in Singapore and the

²⁷ *Halpern v Halpern* [2006] 2 All ER (Comm) 251 at [56].

²⁸ [1993] 2 Lloyd's Rep 48.

²⁹ *Halpern v Halpern* [2006] 2 All ER (Comm) 251 at [62]–[63].

³⁰ SIAC Arbitration No 37 of 2002.

Singapore International Arbitration Centre (“SIAC”) Rules,³¹ while the relevance of Indonesian law would be limited to areas unoccupied by the mandatory rules of Singapore law and the SIAC Rules. This was a neat way of overcoming the difficulties echoed in *Naviera* and *Union of India*. Arguably, there could be other ways to interpret such an ambiguous and possibly contradictory clause and another court or tribunal might have resolved the contradiction differently.

IV. When there is ambiguity in whether the domestic or the international arbitration regime within the designated seat should apply

27 In this section, we examine a different facet of the same problem; when there are two competing *lex arbitri* operating within the chosen seat, *viz*, the domestic arbitral regime and the international arbitration regime.

28 In Australia, domestic arbitrations are regulated by the uniform state Commercial Arbitration Acts which are to be construed consistently in each State.³² International arbitrations are governed by the International Arbitration Act 1974 (Cth), which incorporates the Model Law.³³ In *American Diagnostica Inc v Gradipore Ltd*,³⁴ an arbitration clause in a distribution agreement between American Diagnostica Inc, a Connecticut company, and Gradipore Ltd, an Australian company, required disputes to be determined by arbitration in accordance with arbitral rules that were non-existent, with the seat of the arbitration in New South Wales, Australia. A subsequent agreement between the parties provided for arbitration under the UNCITRAL Arbitration Rules. The arbitrator made interim awards in favour of Gradipore. American Diagnostica Inc sought leave to appeal against that award under the Commercial Arbitration Act.

³¹ 2nd Ed, 22 October 1997.

³² Robert Merkin & Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* (London: Informa, 2009).

³³ This Act No 136 of 1974 has been amended by Act No 5 of 2011.

³⁴ (1998) 44 NSWLR 312. This decision has been legislatively overruled. See n 46 below.

29 Giles CJ of the Supreme Court of New South Wales held that the parties' adoption of the UNCITRAL Arbitration Rules amounted to an *implied opting out* of the Model Law (and of the International Arbitration Act 1974 (Cth)), with the consequent result that the Commercial Arbitration Act applied to the arbitration at hand. This decision has led to severe difficulties and was commented upon by the Hon Justice RV Gyles AO in the following manner in a paper presented to a conference of the New Zealand Bar Association:³⁵

It seems to have been assumed that [the various State and Territory uniform commercial arbitration legislation] apply to international commercial arbitrations conducted in Australia, at least those with the seat of the arbitration being in Australia. In my opinion, that is debatable in view of the operation of section 109 of the Australian Constitution, which provides that Commonwealth law prevails in the event of an inconsistency between Commonwealth law and State law ... The decision in *American Diagnostica Inc v Gradipore Limited* (1998) 44 NSWLR 312 found that the [State legislation] applied, but the section 109 point was not argued.

30 On 21 November 2008, the Australian Attorney-General released a discussion paper on potential reforms to the International Arbitration Act 1974 (Cth) and one of the questions asked was as follows:³⁶

Should the International Arbitration Act be amended to provide expressly that the Act governs exclusively an international commercial arbitration in Australia to which the UNCITRAL Model Law applies?

The discussion paper explained the rationale for the potential amendment as follows:³⁷

³⁵ See New South Wales Bar Association, *Review of International Arbitration Act 1974: Comments and Submissions by the New South Wales Bar Association* (14 January 2009) at para C.5.

³⁶ Attorney-General's Department, *Review of International Arbitration Act 1974* (November 2008), Question C.

³⁷ Attorney-General's Department, *Review of International Arbitration Act 1974* (November 2008), Question C.

The International Arbitration Act 1974 (Cth) could be clarified to provide expressly that it governs exclusively an international commercial arbitration in Australia to which the UNCITRAL Model Law applies. This would exclude any potential application of the State and Territory Commercial Arbitration Acts to international commercial arbitrations subject to the Model Law.

31 The Chartered Institute of Arbitrators (Australia), in its submission to the Attorney-General,³⁸ referred to how Singapore has plugged this gap by foreclosing any argument that there had been an *implied* opting out of Singapore's International Arbitration Act³⁹. The Singapore High Court in *Coop International Pte Ltd v Ebel SA*⁴⁰ and *John Holland Pty Ltd v Toyo Engineering Corp (Japan)*⁴¹ had previously found that the selection of an incompatible set of rules like the UNCITRAL Rules constituted an implied opting out of the International Arbitration Act.

32 The position in case law was reversed by legislation and section 15 of Singapore's International Arbitration Act was amended to provide as follows:

Law of arbitration other than Model Law

15.—(1) If the parties to an arbitration agreement (whether made before or after 1st November 2001*) have expressly agreed either —

- (a) that the Model Law or this Part shall not apply to the arbitration; or
- (b) that the Arbitration Act (Cap 10) or the repealed Arbitration Act (Cap 10, 1985 Ed) shall apply to the arbitration,

then, both the Model Law and this Part shall not apply to that arbitration but the Arbitration Act or the repealed Arbitration Act (if applicable) shall apply to that arbitration.

(2) For the avoidance of doubt, a provision in an arbitration agreement referring to or adopting any rules of arbitration

³⁸ See The Chartered Institute of Arbitrators (Australia), *Submission upon a Review of International Arbitration Act, 1974* (23 January 2009) at pp 6–7.

³⁹ Cap 143A, 2002 Rev Ed.

⁴⁰ [1998] 3 SLR(R) 615.

⁴¹ [2001] 2 SLR(R) 443.

shall not of itself be sufficient to exclude the application of the Model Law or this Part to the arbitration concerned.

33 In similar vein, the Chartered Institute of Arbitrators (Australia) recommended that section 21 of the International Arbitration Act 1974 (Cth) could be amended to provide that the Model Law would apply unless the parties *expressly* opted-out of the application of the Model Law in relation to the settlement of the dispute. Section 21 in its present form reads as follows:

Settlement of dispute otherwise than in accordance with Model Law

If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute.

34 Unless and until the Australian legislature amends section 21 set out above, parties to an international commercial arbitration in Australia must be careful not to be seen to have *impliedly* opted out of the International Arbitration Act 1974 (Cth) if they do not wish to be subject to the provisions of a state's arbitration legislation.

35 This need to amend the Australian arbitration legislation is further underscored upon a comparison with other Model Law jurisdictions which have a dual legislative scheme, *viz*, where there is one specific set of rules governing domestic arbitrations and another governing international arbitrations. In Singapore, Hong Kong and Canada,⁴² the rules governing domestic arbitration all include a provision stipulating that those rules apply *only if* the rules governing international arbitration are inapplicable to the arbitration. For example, section 3 of Singapore's Arbitration Act,⁴³ which governs domestic arbitrations, provides as follows:

⁴² In all provinces and territories with the exception of Quebec. See generally *International Commercial Dispute Resolution* (Jonathan Warne ed) (England: Tottel Publishing, 2009) at para 4.70; and *Arbitration World* (J William Rowley QC ed) (England: European Lawyer, 2006) at p 33.

⁴³ Cap 10, 2002 Rev Ed.

Application of this Act

3. This Act shall apply to any arbitration where the place of arbitration is Singapore and where Part II of the International Arbitration Act (Cap 143A) does not apply to that arbitration.

The effect of such a provision neatly demarcates the boundaries of the two sets of rules governing domestic and international arbitration respectively.

36 In the US, via the doctrine of pre-emption, the Federal Arbitration Act (“FAA”) applies to any arbitration agreement “evidencing a transaction involving [interstate or international] commerce” where the court has subject matter jurisdiction, for example, on diversity or federal question grounds.⁴⁴ Where arbitration does not involve interstate or international commerce, state law rather than the FAA would apply.⁴⁵ One can envisage a situation where parties stipulated the “United States” as the seat of arbitration, but fail to specify which state. If the FAA is inapplicable, this may give rise to difficult issues over the applicable *lex arbitri* because a minority of American states adopt the Model Law. Currently, California, Connecticut, Illinois, Louisiana, Oregon and Texas have adopted the Model Law. The court or tribunal, in deciding which state would be the seat of arbitration, would presumably have regard to the connecting factors to the various states in question.

37 In comparison, the Commercial Arbitration Acts adopted by Australian states and territories to govern domestic arbitrations do not contain a provision that stipulates that the Commercial Arbitration Act would apply only if the International Arbitration Act 1974 (Cth) was inapplicable. This renders the dividing line between the applicability of those two acts fuzzy, and has therefore prompted calls for the reforms outlined above.⁴⁶

⁴⁴ Federal Arbitration Act 9 USC (US) §2.

⁴⁵ *International Commercial Dispute Resolution* (Jonathan Warne ed) (England: Tottel Publishing, 2009) at para 24.79.

⁴⁶ In July 2010, the International Arbitration Amendment Act 2010 (Cth) (Amendment Act) (No 97 of 2010) repealed the former s 21 of the International Arbitration Act 1974 (Act No 136 of 1974), which allowed the parties to agree to resolve their dispute under an arbitral law “other than in

(continued on next page)

V. Conclusion

38 This paper has sought to illustrate, drawing examples from case law, how courts have resolved ambiguities in the parties' choice of seat and *lex arbitri*. To avoid being caught in a situation where parties find themselves unwittingly subject to a seat or *lex arbitri* that they did not intend, counsel and clients ought to draw from these lessons and state with precision what their choices are.

accordance with the Model Law". The Amended Act now expressly provides that the UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) "covers the field" with respect to international commercial arbitration. In addition to repealing the former s 21, a new s 21 was inserted which provides that if the Model Law applies to an arbitration, the law of a State or Territory relating to arbitration does not apply to that arbitration. Consequently, the arbitration law of a State or Territory will not apply with respect to an international commercial arbitration but any state or territory laws that apply to the substance of the dispute will continue to have application. The primary reason for this amendment was to create certainty with respect to the exclusive application of the Act to international commercial arbitration in Australia. Accordingly, the decision of *American Diagnostica Inc v Gradipore Ltd* (1998) 44 NSWLR 312 and other like decisions have been legislatively overruled by the new s 21 of the Act. The new s 21 is complemented by the amendments in sub-s 8(3), before sub-s 8(4), and sub-s 35(2) of the Act:

... which remove any role for State and Territory law in enforcing and recognising foreign arbitral awards under the New York convention and awards under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

See the Parliament of the Commonwealth of Australia, *International Arbitration Amendment Bill 2010, Revised Explanatory Memorandum* (2010).

Background to Essay 15

This was another major challenge, to deliver the Second Herbert Smith-Singapore Management University Arbitration Lecture in 2011. Kevin did a mammoth amount of research and we spent many hours mulling over the materials. The lecture was very well received, but an interesting problem then developed. The subject matter of the lecture was highly relevant to the problem set for the 2012 Vis Moots, and Kevin and I thought that it would be of help to all the teams preparing their presentations to have access to this article. However, the arrangement we had made with the eventual publishers of this lecture meant that it would not be published until the middle of 2012, which would be too late for the Vis Moots. Eventually, we decided that the best way to bring this lecture into the public domain (apart from giving copies to whoever asked for it, which might make for selective dissemination and would not be fair to teams who were unaware of its existence or that they could get a copy from me) was for me to post it on the website of the International Council for Commercial Arbitration (“ICCA”), so that it became a public document, and the jungle drums would enable students around the world to access and download that paper. A further footnote of interest is that Kevin did so much research that he was able to write a supplementary paper to my lecture entitled “Upholding Corrupt Investors’ Claims against Complicit or Compliant Host States – Where Angels Should Not Fear to Tread” which I helped him to get published in the 2011/2012 *Yearbook on International Investment Law and Policy*.

I wish to extend my thanks to the *Asian International Arbitration Journal* for kindly granting me permission to republish this paper in this book.

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This lecture was short-listed for the *Global Arbitration Review* “Best Lecture of the Year 2012”.

CORRUPTION IN ARBITRATION LAW AND REALITY*

Michael HWANG SC[†] and Kevin LIM[‡]

Contents

I.	Introduction: Context, definitions and issues considered.....	566
II.	The tribunal's right and obligation to inquire into corruption <i>sua sponte</i>	584
III.	The burden of proving corruption and the requisite standard of proof	597
IV.	Determining the law governing the elements and legal consequences of corruption: Conflict of laws analysis in relation to intermediary agreements	621

* This article is an expanded version of a paper of the same title which was co-written by the authors and presented at the Herbert Smith-SMU Asian Arbitration Lecture on 4 August 2011 in Singapore. The Lecture was delivered by the first author and was subsequently nominated in the category of "Best Lecture or Speech Award" at the Second Annual Global Arbitration Review Awards. An earlier draft of this article was uploaded on the International Council for Commercial Arbitration website on 10 January 2012, with the kind permission of the Asian International Arbitration Journal; it is available at <<http://www.arbitration-icca.org/articles.html>> (accessed 23 March 2012). The authors express their appreciation to Constantine Partasides, Dr Richard Kreindler, Dr Stephan Wilske, Hansel Pham, Carolyn Lamm, Dr Pierre Karrer, Dr Mohamed Abdel Raouf and Thong Chee Kim, for kindly extending to the authors copies of their previous works on the subject of corruption in arbitration and/or providing assistance on related questions of law, which were of immense value in the preparation of this article. The authors would also like to thank Professor Yeo Tiong Min, Dr Anne-Catherine Hahn and Professor Catherine Kessedjian for their invaluable comments on an earlier draft of this article. However, the views expressed herein, as well as any errors and omissions, are the authors' own.

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A.	The applicable conflict of laws rules in international arbitration	630
B.	Conflict of laws considerations determining whether the law of the place of performance or the seat of arbitration overrides the parties' chosen law	634
(1)	Law of the place of performance.....	634
(2)	Law of the arbitral seat.....	650
C.	Relevance of transnational public policy in conflict of laws analysis.....	654
V.	Legal consequences of a finding of corruption	657
A.	Tribunal's jurisdiction and arbitrability of issues of corruption	657
B.	Admissibility and merits of the claim.....	661
VI.	Whether arbitrators have a duty or the right to report their suspicions of parties' corrupt activities to the authorities.....	669
VII.	The judicial scrutiny of corruption-tainted arbitral awards at the setting aside and enforcement stages	675
A.	Competing considerations: Balancing the finality of arbitral awards and the forum's fundamental public policy concerns.....	677
B.	Competing judicial attitudes regarding the permissible extent of court review of tribunals' findings of fact and law.....	679
(1)	Minimal review	679
(2)	Maximal review.....	692
(3)	Contextual review	704
C.	The public policy ground for setting aside or refusal to enforce a corruption-tainted arbitral award.....	710
(1)	Two classes of public policy: Domestic public policy and international public policy.....	711
(2)	Whether corruption violates international public policy.....	715
(3)	Whether contracts for the sale of influence violate international public policy.....	718
D.	The appropriate standard of review.....	720
(1)	The weakness of the minimal standard of review	721
(2)	The superiority of the contextual standard of review	724
(3)	The standard of review applied by minimal review courts in reality: A hark back to contextual review?.....	729
VIII.	Conclusion.....	735

I. Introduction: Context, definitions and issues considered

1 Corruption in international business is rife and growing worse. On a scale from zero (highly corrupt) to ten (very clean), nearly three quarters

of the 178 countries assessed in Transparency International's¹ Corruption Perceptions Index 2010² scored below five. Corruption levels around the world are perceived to have increased over the past three years.³ The scale of bribery in business today is described as staggering and its consequences dramatic:⁴

The scale and scope of bribery in business is staggering. Nearly two in five polled business executives have been asked to pay a bribe when dealing with public institutions. Half estimated that corruption raised project costs by at least 10 per cent. One in five claimed to have lost business because of bribes by a competitor. More than a third felt that corruption is getting worse.

The consequences are dramatic. In developing and transition countries alone, corrupt politicians and government officials receive bribes believed to total between US\$20 and 40 billion annually – the equivalent of some 20 to 40 per cent of official development assistance. The cost is measurable in more than money. When corruption allows reckless companies to disregard the law, the consequences range from water shortages in Spain, exploitative work conditions in China or illegal logging in Indonesia to unsafe medicines

¹ A global civil society organisation concerned with combating corruption, raising awareness of its damaging effects and developing measures to tackle it.

² “The 2010 Corruption Perceptions Index measures the perceived levels of public sector corruption in 178 countries around the world” by “drawing on different assessments and business opinion surveys carried out by independent and reputable institutions”: see <http://www.transparency.org/cpi2010/in_detail> (accessed 4 March 2012) and the 2010 Corruption Perceptions Index Report. The 2012 Corruption Perceptions Index measured that two-thirds of the 176 countries ranked scored below 50 on a range from 0 (highly corrupt) to 100 (very clean).

³ The 2010 Global Corruption Barometer.

⁴ See also Bernardo Cremades & David Cairns, “Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud” in *Arbitration, Money Laundering, Corruption and Fraud* (Kristine Karsten & Andrew Berkeley eds) (Dossiers-ICC Institute of World Business Law, 2003) at pp 68–70 and 77.

in Nigeria and poorly constructed buildings in Turkey that collapse with deadly consequences.⁵

2 It should, therefore, come as little surprise to anyone that corruption is internationally abhorred and vigorously denounced.⁶ There is a global

⁵ Transparency International, *2009 Global Corruption Report* (2009) Executive Summary, p xxv.

⁶ See, for instance, the following national laws and international instruments prohibiting corrupt practices: Foreign Corrupt Practices Act (15 USC §78dd-1) (1977) (US); Inter-American Convention against Corruption (23 March 1996; entry into force 6 March 1997); Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (17 December 1997; entry into force 15 February 1999); European Union Convention on the Fight Against Corruption involving Officials of the European Communities or Officials of Member States of the European Union (Council Act of 26 May 1997); Council of Europe (“COE”) Criminal Law Convention on Corruption (Eur TS No 173) (27 January 1999; entry into force 1 July 2002); COE Civil Law Convention on Corruption (Eur TS No 174) (4 November 1999; entry into force 1 November 2003); European Union Council Framework Decision on Combating Corruption in the Private Sector, EU Council Framework Decision 2003/568/JHA (2003) OJ L 192/54; African Union Convention on Preventing and Combating Corruption (11 July 2003; entry into force 5 August 2006); United Nations Convention Against Corruption (UN Doc A/58/422) (31 October 2003; entry into force 14 December 2005); International Chamber of Commerce Rules of Conduct and Recommendations to Combat Extortion and Bribery (2005); and UK Bribery Act 2010 (c 23). The most recent example of a national law criminalising bribery is the UK Bribery Act 2010, which has significant extra territorial reach. Offences are committed when any act or omission which forms part of the offence takes place within the UK, or where any such act or omission by any person “closely connected” with the UK occurs outside the UK. Persons “closely connected” with the UK include British citizens, UK residents and bodies incorporated under the law of any part of the UK.

See further generally Carolyn Lamm, Hansel Pham & Rahim Moloo, “Fraud and Corruption in International Arbitration” in *Liber Amicorum Bernardo Cremades* (Miguel Àngel Fernandez-Ballesteros & David Arias eds) (La Ley grupo Wolters Kluwer, 2010) at pp 711–715; Bernardo Cremades &

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convergence of legal rules, authorities and opinions condemning corruption supporting the claim that there exists an international public policy,⁷ even a transnational public policy,⁸ against corruption.⁹ For this reason, issues of corruption may appear to be deceptively simple for tribunals and

David Cairns, “Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud” in *Arbitration, Money Laundering, Corruption and Fraud* (Kristine Karsten & Andrew Berkeley eds) (Dossiers-ICC Institute of World Business Law, 2003) at pp 68–70; and Richard Kreindler, “Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine” in *Between East and West: Essays in Honour of Ulf Franke* (Kaj Hobér, Annette Magnusson & Marie Öhrström eds) (Juris, 2010) at p 311, fn 13 (for arbitral case law) and p 312, fn 17 (for other national laws prohibiting corruption).

⁷ The International Law Association International Arbitration Committee’s Interim Report on *Public Policy as a Bar to Enforcement of International Arbitral Awards* (2000), reviewed the development of the concept of public policy and concluded that “it is arguable that there is an international consensus that corruption and bribery are contrary to international public policy”.

⁸ An oft-quoted decision is Judge Gunnar Lagergren’s award in ICC Case No 1110 (1963), (1994) 10(3) Arb Int’l 282, who observed at [20] that:

Whether one is taking the point of view of good governance or that of commercial ethics it is impossible to close one’s eyes to the probable destination of amounts of this magnitude, and to the destructive effect thereof on the business pattern with consequent impairment of industrial progress. *Such corruption is an international evil; it is contrary to good morals and to international public policy common to the community of nations.* [emphasis added]

See also *World Duty Free Co Ltd v Republic of Kenya* [Award] ICSID Case No ARB/00/7 (4 October 2006) at [157]:

In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, *this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy.* Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal. [emphasis added]

⁹ See n 6. The differences between “international public policy” and “transnational public policy” are discussed at paras 92–93 and 167–172 below.

national courts to dispose of. However, the truth of the matter is quite the opposite. Arbitrations involving allegations of corruption throw up difficult factual and legal issues at practically every stage of the arbitral process. It is imperative that international arbitration practitioners have a firm grasp of how to approach these issues, especially since sectors of major importance for international arbitration¹⁰ (such as the construction, oil and gas and mining industries¹¹) suffer from endemic corruption. This article seeks to clarify the “law” and, to the extent that they may differ, the “reality” in international arbitration relating to issues of corruption, and to propose possible theoretical and practical solutions to some of the existing controversies.

3 Before setting out a short introduction to these issues, it is necessary to clarify the meaning of “corruption” and “bribery”. “Corruption” is derived from the Latin word “*corruptus*”, meaning “to break”, and encompasses all situations where “agents and public officers break the confidence entrusted to them”.¹² It is defined in the *Oxford English Dictionary* as the “perversion or destruction of integrity in the discharge

¹⁰ Bernardo Cremades & David Cairns, “Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud” in *Arbitration, Money Laundering, Corruption and Fraud* (Kristine Karsten & Andrew Berkeley eds) (Dossiers-ICC Institute of World Business Law, 2003) at p 70.

¹¹ According to Transparency International’s 2011 Bribe Payers Index, which “evaluates the supply side of corruption – the likelihood of firms from the world’s industrialised countries to bribe abroad”, these are amongst the top five industry sectors in which foreign firms are likely to pay bribes to procure business. See also Peter Muchlinski, Federico Ortino & Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) at p 592:

By far the majority of [arbitral] cases [involving allegations of corruption] deal with infrastructure projects, like energy plants, telecommunication systems, or waste landfills ... The next group in size terms concerns the purchase of armaments and the construction of military training facilities, followed by the exploitation of natural resources.

¹² Colin Nicholls QC *et al*, *Corruption and Misuse of Public Office* (Oxford University Press, 2nd Ed, 2011) at para 1.01.

of public duties by bribery or favour; the use or existence of corrupt practices, esp. in a state, public corporation *etc*". The verb "bribe" is in turn defined as "to influence corruptly, by a reward or consideration, the action of (a person), to pervert the judgment or corrupt the conduct by a gift".¹³ Recent commentary confirms that "[t]hese definitions correctly emphasize the essence of corruption in its legal sense",¹⁴ and further notes that most modern states regard the definition of corruption as extending to include all persons who are induced to act corruptly in the discharge of their duties, whether in the public or private sectors.¹⁵

4 There are, however, in certain respects subtle and sometimes significant differences between the leading national and international legal regimes as to the type of conduct constituting "corruption" or

¹³ Colin Nicholls QC *et al*, *Corruption and Misuse of Public Office* (Oxford University Press, 2nd Ed, 2011) at para 1.02.

¹⁴ Colin Nicholls QC *et al*, *Corruption and Misuse of Public Office* (Oxford University Press, 2nd Ed, 2011) at para 1.03.

¹⁵ Colin Nicholls QC *et al*, *Corruption and Misuse of Public Office* (Oxford University Press, 2nd Ed, 2011). For rules and initiatives condemning and aimed at preventing private sector corruption, see, for instance, Colin Nicholls QC *et al*, *Corruption and Misuse of Public Office* (Oxford University Press, 2nd Ed, 2011) at paras 11.63 and 11.133 *et seq* (discussing Art 12 of the United Nations Convention Against Corruption (UN Doc A/58/422) (31 October 2003; entry into force 14 December 2005) ("UNCAC")); para 12.22 (discussing Art 21 of UNCAC); para 14.23 *et seq* (discussing Arts 7–8 of the Council of Europe Criminal Law Convention on Corruption (Eur TS No 173) (27 January 1999; entry into force 1 July 2002)); para 14.104 (discussing European Union Council Framework Decision on Combating Corruption in the Private Sector, EU Council Framework Decision 2003/568/JHA (2003) OJ L 192/54); para 15.61 *et seq* (discussing the Southern African Development Community Protocol against Corruption (signed 14 August 2001; entry into force 6 August 2003)); para 15.156 *et seq* (discussing Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption); para 17.129 (discussing Nigerian legislation); paras 17.140–17.146 (discussing Singapore legislation); para 17.28 (discussing Canadian legislation); and 18.111 (discussing South African legislation).

“bribery”. For instance, facilitation payments (otherwise known as “speed” or “grease” payments) to foreign public officials, which are “payment[s] made with the purpose of expediting or facilitating the provision of services or routine government action which an official is normally obliged to perform”,¹⁶ are condemned under the UK Bribery Act 2010¹⁷ and most other national laws,¹⁸ though they are not specifically prohibited under the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Convention”),¹⁹ which leaves State parties to decide whether such payments are unlawful, and are expressly permitted (subject to defined limits) in certain major jurisdictions, most notably in the US by virtue of the Foreign Corrupt Practices Act (“FCPA”), as well as in Australia, Canada, New Zealand and South Korea. National and international anti-corruption laws also inevitably differ as to the precise elements of corrupt conduct,²⁰ which are beyond the scope of

¹⁶ UK Law Commission. *Reforming Bribery: A Consultation Paper* (Consultation Paper No 185, 31 October 2007) App F at para F.5.

¹⁷ c 23 (UK).

¹⁸ See Colin Nicholls QC *et al*, *Corruption and Misuse of Public Office* (Oxford University Press, 2nd Ed, 2011) at paras 4.120–4.121.

¹⁹ The Commentaries on the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (17 December 1997; entry into force 15 February 1999) at para 9 states:

Small ‘facilitation’ payments do not constitute payments made ‘to obtain or retain business or other improper advantage’ within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalization by other countries does not seem a practical or effective complementary action.

²⁰ Countries like the US, Canada and Singapore, for instance, use the word “corruptly” in their anti-bribery legislation without statutory definition, and each jurisdiction has a different interpretation of the word: see Colin Nicholls QC *et al*, *Corruption and Misuse of Public Office* (Oxford University Press, 2nd Ed, 2011) at paras 4.120–4.121.
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this article to examine in detail; the reader is referred to other works for in-depth treatment of these laws.²¹

5 Putting aside the thorny issue of facilitation payments and other more subtle distinctions between the various anti-corruption regimes, international consensus on a broad definition of both public and private sector corruption²² can nevertheless be found in Articles 15,²³ 16²⁴

Press, 2nd Ed, 2011) at para 16.36 *et seq* (discussing the US Foreign Corrupt Practices Act (15 USC §78dd-1)) and at para 17.25 *et seq* (discussing Canadian legislation); and Tan Boon Gin, *The Law on Corruption in Singapore: Cases and Materials* (Academy Publishing, 2007) at pp 6–49 (discussing Singapore legislation). *Cf* the UK Bribery Act 2010 (c 23), which abandons the provision that to be guilty of an offence a person must act “corruptly” and replaces it with “a model based on an intention to induce a person to perform a function or activity improperly”; “[a] function is performed improperly if it is performed in breach of an expectation of good faith, impartiality, or is in breach of trust”: see ss 1–5 of the UK Bribery Act 2010 and *Corruption and Misuse of Public Office* (Oxford University Press, 2nd Ed, 2011) at para 4.05 *et seq*.

Jurisdictions are also likely to differ as to where the line should be drawn between bribery on the one hand and “reasonable” or “*bona fide*” expenditure on corporate hospitality on the other: see Colin Nicholls QC *et al*, *Corruption and Misuse of Public Office* (Oxford University Press, 2nd Ed, 2011) at para 4.132 *et seq* and at para 16.55. See further Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at p 261.

²¹ See, for instance, Colin Nicholls QC *et al*, *Corruption and Misuse of Public Office* (Oxford University Press, 2nd Ed, 2011) Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004); Tan Boon Gin, *The Law on Corruption in Singapore: Cases and Materials* (Academy Publishing, 2007); Monty Raphael, *Blackstone’s Guide to The Bribery Act 2010* (Oxford University Press, 2010); Jeffrey P Bialos & Gregory Husisian, *The Foreign Corrupt Practices Act: Coping with Corruption in Transitional Economies* (Oceana Publications, 1997).

²² Although *public* sector corruption has traditionally dominated countries’ anti-corruption law-making agenda for many years, the last century has seen the criminalisation of *private* sector bribery in most jurisdictions, and rightly so. Private sector corruption can be as deleterious as its public sector

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counterpart – “[t]he social harm of [private] commercial corruption is evident when it involves an inducement of a breach of the civil law duty of loyalty owed by employees, agents or fiduciaries”, it undermines the economic interest of preserving free and fair competition between companies in national and international markets and creates a “a climate of illicit business behaviour that may undermine the rule of law”. Moreover, due to market liberalisation and the privatisation of governmental functions, the private sector is larger than the public sector in many countries, which makes any distinction between the treatment of public and private sector bribery even more untenable in this day and age. See David Chaikin, “Commercial Corruption and Money Laundering: A Preliminary Analysis” (2008) 15(3) JFC 269 at 271–273. See further n 6 for examples of various national and international rules and initiatives condemning and aimed at preventing private sector corruption; and Transparency International’s *Global Corruption Report 2009* which, having comprehensively reviewed anti-corruption measures in the private sector of 46 countries “representing all regions and levels of economic development”, concludes at p 165 that: “There is evidence of a swathe of new legislation in all regions aimed at tackling private sector corruption, from the establishment of new anti-corruption agencies to the provision of whistleblower protection.”

²³ Article 15 of the United Nations Convention Against Corruption (UN Doc A/58/422) (31 October 2003; entry into force 14 December 2005) states as follows:

Bribery of national public officials

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

- (a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;
- (b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

²⁴ Article 16 of the United Nations Convention against Corruption (UN Doc A/58/422) (31 October 2003; entry into force 14 December 2005) states as follows:

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and 21²⁵ of the United Nations Convention against Corruption (“UNCAC”). There are 158 state parties to the UNCAC,²⁶ and its

Bribery of foreign public officials and officials of public international organizations

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.
2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

²⁵ Article 21 of the United Nations Convention against Corruption (UN Doc A/58/422) (31 October 2003; entry into force 14 December 2005) states as follows:

Bribery in the private sector

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:

- (a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

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Articles 15, 16 and 21 are similar to the corresponding provisions of major international and national anti-corruption regimes, such as the Council of Europe Criminal Law Convention on Corruption²⁷ (“COE Criminal Law Convention”) (43 states have ratified or acceded to this convention²⁸), the OECD Convention²⁹ (38 countries have adopted this

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- (b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.

²⁶ As of 25 November 2011.

²⁷ Eur TS No 173 (27 January 1999; entry into force 1 July 2002). Compare Arts 15, 16 and 21 of the United Nations Convention against Corruption (UN Doc A/58/422) (31 October 2003; entry into force 14 December 2005) with Arts 2, 3, 5, 7 and 8 of the Council of Europe Criminal Law Convention on Corruption (Eur TS No 173) (27 January 1999; entry into force 1 July 2002). For commentary, see Colin Nicholls QC *et al*, *Corruption and Misuse of Public Office* (Oxford University Press, 2nd Ed, 2011) at paras 14.11–14.24.

²⁸ As of 1 May 2011.

²⁹ Compare Art 16 of the United Nations Convention against Corruption (UN Doc A/58/422) (31 October 2003; entry into force 14 December 2005) with Art 1 of the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (17 December 1997; entry into force 15 February 1999), which states:

Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

For commentary, see Colin Nicholls QC *et al*, *Corruption and Misuse of Public Office* (Oxford University Press, 2nd Ed, 2011) at para 13.25 *et seq*.

convention³⁰) and the FCPA.³¹ This article thus adopts Articles 15, 16 and 21 of the UNCAC as part of its working definition of corruption.

6 Article 15(a) of the UNCAC (which applies to the bribery of both national and foreign public officials by virtue of Article 16(1) of the UNCAC) defines corruption in the *public* sector by the *payer* of a bribe as the act of (a) “intentionally”; (b) “promis[ing], offering or giving”; (c) “to ... a [national or foreign] public official”; (d) “directly or indirectly”; (e) “of an undue advantage”; (f) “for the official himself or herself or another person or entity”; (g) “in order that the official act or refrain from acting in the exercise of his or her official duties”.

7 Corruption by the *recipient* of a public sector bribe is similarly defined under Article 15(b) as the mirror image of the bribe payer’s corrupt act (but is only applicable to national, as opposed to foreign, public officials) as follows: (a) is replaced by “intentional”; (b) is replaced by “solicitation or acceptance”; and (c) is replaced by “*by ... a [national or foreign] public official*” [emphasis added].

8 Corruption in the *private* sector by the *payer* and *recipient* of a bribe in Article 21 closely tracks the same linguistic formulae used in Articles 15(a) and 15(b). Essentially:³²

³⁰ As of 21 December 2011.

³¹ Compare Art 16 of the United Nations Convention against Corruption (UN Doc A/58/422) (31 October 2003; entry into force 14 December 2005) with §§78dd-1(a)(1), 78dd-1(a)(2), 78dd-2(a)(1) and 78dd-2(a)(2) (anti-bribery provisions in respect of issuers and domestic concerns); §§78dd-1(a)(3) and 78dd-2(a)(3) (anti-bribery provisions in respect of issuers and domestic concerns acting through intermediaries); and §§78dd-3(a)(1), 78dd-3(a)(2) and 78dd-3(a)(3) (anti-bribery provisions in respect of conduct by non-US persons within the US) of the US Foreign Corrupt Practices Act (15 USC §78dd-1). For commentary, see Colin Nicholls QC *et al*, *Corruption and Misuse of Public Office* (Oxford University Press, 2nd Ed, 2011) at para 16.19 *et seq*.

³² David Chaikin, “Commercial Corruption and Money Laundering: A Preliminary Analysis” (2008) 15(3) JFC 269 at 270–271.

[t]he object of the [private sector bribe] is to influence the conduct of the person who receives the bribe – who will act in a manner which is favourable to the briber, and not give proper consideration to the interests of his/her employer, principal, fiduciary or client.

9 Article 21(a) defines corruption by the *payer* of a bribe as the act of (a) “intentionally”; (b) “promis[ing], offering or giving”; (c) “directly or indirectly”; (d) “of an undue advantage”; (e) “to any person who directs or works, in any capacity, for a private sector entity”; (f) “for the person himself or herself or for another person”; (g) “in order that he or she, in breach of his or her duties, act or refrain from acting”. Corruption by the *recipient* of a private sector bribe is similarly defined in Article 21(b), except that (a) is replaced by “intentional”; (b) is replaced by “solicitation or acceptance”; and (e) is replaced by “*by* any person who directs or works, in any capacity, for a private sector entity” [emphasis added].

10 Further elucidation of each of these elements of corrupt conduct is beyond the scope of this article, though their general thrust is consonant with the popular meaning of corruption introduced above³³ as being, generally speaking, “the misuse of entrusted power for private gain”.³⁴

11 There is yet another form of corruption described in Article 18 of the UNCAC as “trading in influence”³⁵ which is more controversial and

³³ See para 3.

³⁴ See Transparency International’s Frequently Asked Questions about Corruption, available at <http://archive.transparency.org/news_room/faq/corruption_faq> (accessed 10 April 2013).

³⁵ Article 18 of the United Nations Convention against Corruption (UN Doc A/58/422) (31 October 2003; entry into force 14 December 2005) (“UNCAC”) defines trading in influence as:

- (a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person *abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage* for the original instigator of the act or for any other person;
- (b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or

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will be the subject of further analysis in the course of this article. It suffices to mention at this juncture that the elements of trading in influence are similar to Articles 15 and 16, except that the offence

herself or for another person in order that the public official or the person *abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage.*

[emphasis added]

Compare Art 18 of the UNCAC with Art 12 of the Council of Europe Criminal Law Convention on Corruption (Eur TS No 173) (27 January 1999; entry into force 1 July 2002) (see para 5 above):

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any person referred to in Articles 2, 4 to 6 and 9 to all in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.

See also Art 4(1)(f) of the African Union Convention on Preventing and Combating Corruption (11 July 2003; entry into force 5 August 2006):

1. This Convention is applicable to the following acts of corruption and related offences:

...

(f) the offering, giving, solicitation or acceptance directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result ...

involves a person having “real or supposed influence” over public bodies or officials, trading the “abuse” of such influence (as opposed to the payment of bribes), in return for an “undue advantage” from a person seeking this influence. Trading in influence will also be included in this article’s working definition of corruption.

12 The authors now introduce the issues of corruption which arise in international arbitration. Broadly speaking, one can distinguish between issues of corruption which arise at the *primary tribunal* level before the award is rendered and those which arise thereafter if the award is challenged before *reviewing national courts*, which may be asked to set aside or refuse enforcement of the award.

13 This article will first address the factual and legal issues encountered at the *primary tribunal* level, according to the rough chronological manner in which they are likely to arise in the course of the arbitration.

- (a) Where the evidence discloses a *prima facie* suggestion of corruption, but neither party advances allegations of such wrongdoing, the question arises as to whether tribunals are entitled to investigate and inquire into the issue of corruption *sua sponte*.³⁶
- (b) When all the evidence is before the tribunal (whether it is adduced by the parties or derived from the tribunal’s *sua sponte* investigations), the tribunal will then have to make relevant findings of fact which may go towards establishing corrupt conduct. This gives rise to questions as to which party bears the burden of proving corruption and the requisite standard of proof that must be discharged to establish corruption.³⁷
- (c) In order to conclude that a party has committed a “corrupt” act and, if so, what legal consequences ensue, a tribunal must consider whether the established facts make out all the elements of the offence of corruption *under the applicable law*. In the first instance, the tribunal will look to the law chosen by the parties to govern their contract (or, in the absence of choice, the otherwise applicable

³⁶ See paras 16–29 below.

³⁷ See paras 30–53 below.

proper law of the contract). However, not all cases can be resolved by simply applying the governing law of the contract. Mandatory laws or public policies of the place of performance or arbitral seat may provide that one or both parties had committed corrupt acts, or entered into their contract with corrupt intentions, and thus invalidate claims brought in connection with the parties' contract. Conversely, the law chosen by the parties to govern the contract may regard the same conduct to be uncorrupt and thus uphold contractual and other related claims by the parties. While it is true that no jurisdiction will countenance the blatant provision of gratification to government officials³⁸ in order that they neglect their duties or perform them improperly,³⁹ different jurisdictions adopt contrasting attitudes to the propriety of "agency" or "intermediary" contracts – agreements under which an intermediary is engaged by a principal to assist in procuring for the latter public contracts or licences and approvals to do business in specified countries – as national laws diverge on whether and in what circumstances such contracts conceal attempts to bribe or unduly influence public officials. Choice of laws analysis comes into play in such cases to determine whether mandatory laws or public policies

³⁸ Besides Arts 15 and 16 of the United Nations Convention against Corruption (UN Doc A/58/422) (31 October 2003; entry into force 14 December 2005) and Art 5 of the Council of Europe Criminal Law Convention on Corruption (Eur TS No 173) (27 January 1999; entry into force 1 July 2002) (see para 5), see in relation to the bribery of foreign public officials Art I of the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (17 December 1997; entry into force 15 February 1999); §§78dd-1, 78dd-2 and 78dd-3 of the US Foreign Corrupt Practices Act (15 USC §78dd-1); s 6 of the UK Bribery Act 2010 (c 23); and Colin Nicholls QC *et al*, *Corruption and Misuse of Public Office* (Oxford University Press, 2nd Ed, 2011) at para 18.14 (discussing Brazilian legislation), 18.41 (discussing Chinese legislation), 18.97 (discussing Russian legislation), 18.113 (discussing South African legislation), 17.06 (discussing Australian legislation) and 17.30 (discussing Canadian legislation).

³⁹ See, however, n 20 above and n 159 below.

- which prohibit intermediary agreements override the parties' chosen law.⁴⁰
- (d) What legal consequences flow from a finding that one or both parties are guilty of corrupt dealings? The authors analyse below how a finding of corruption affects the tribunal's jurisdiction, as well as the arbitrability, admissibility and the merits of the parties' claims.⁴¹
- (e) A final matter for a tribunal to consider is whether arbitrators who have made a finding of corruption or suspect its occurrence are bound to disclose the relevant facts to the relevant authorities, and how this obligation squares with their duty to preserve the confidentiality of arbitral proceedings.⁴²
- (f) It should be noted that the above mentioned issues arise in both investment *treaty*- and *contract*-based arbitrations (with the exception of conflict of laws analysis in relation to intermediary agreements,⁴³ which is relevant only to contract-based arbitrations).⁴⁴ However,

⁴⁰ See paras 54–93 below.

⁴¹ See paras 94–105 below.

⁴² See paras 106–110 below.

⁴³ See paras 54–93 below.

⁴⁴ This is due to the different applicable laws in these two types of arbitration. The issues arising from treaty-based arbitrations are generally governed by public international law. Where municipal law is relevant because it is referred to in an investment treaty, the host State's laws are usually identified as being applicable. See, for instance, the bilateral investment treaty between Spain and El Salvador, which was the foundation of the investor's claim in *Inceysa Vallisoletana, SL v Republic of El Salvador* [Award] ICSID Case No ARB/03/26 (2 August 2006) (see in particular [195] and [207]). Accordingly, treaty-based arbitrations do not generally require conflict of laws analysis to determine the applicable law. For a summary of the distinction between these two types of arbitration, see Bernardo Cremades, "Corruption and Investment Arbitration" in *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner* (Gerald Aksen *et al* eds) (ICC, 2005) at pp 210–213; and Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2007) at para 3.51. For a more in-depth discussion, see rr 5, 6 and 10 and
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more difficult considerations arise when assessing the legal consequences of corruption in treaty-based arbitrations (as opposed to contract-based arbitrations). A live issue in treaty-based arbitration disputes is whether a host State can raise the defence of investor corruption to avoid liability for breach of investment protection standards where the State participated in or condoned an investor's corrupt acts, for instance, by soliciting and receiving bribes from the investor, or refusing to take action against the corrupt investor and complicit state officials.⁴⁵ This issue is comprehensively discussed elsewhere by the second author,⁴⁶ and is beyond the scope of the present article, which will only discuss the legal consequences of a finding of corruption⁴⁷ in relation to *contract*-based arbitrations.

14 Finally, this article will address the issues of corruption which arise at the setting aside and enforcement stages before *national courts*, when an arbitral award is challenged on the basis that it upholds a contract tainted by corruption.⁴⁸ Note that investment treaty-based arbitrations adjudicated under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States do not have to

their commentary in Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009).

⁴⁵ See generally *Wena Hotels Ltd v Arab Republic of Egypt* [Award] ICSID Case No ARB/98/4 (8 December 2000) at [111] and [116]–[117]; Vale Columbia Center on Sustainable International Investment, *International Investment Law & the Fight against Corruption* (Open Society Justice Initiative Concept Paper, 17 June 2009) at pp 10–11; Peter Muchlinski, Federico Ortino & Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) at pp 596–597; and Bernardo Cremades, “Corruption and Investment Arbitration” in *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner* (Gerald Aksen *et al* eds) (ICC, 2005) at p 216.

⁴⁶ Kevin Lim, “Upholding Corrupt Investors’ Claims against Complicit or Compliant Host States – Where Angels Should Not Fear to Tread” in *Yearbook on International Investment Law and Policy 2011–2012* Part 2 (Karl Sauvant ed) (Oxford University Press, 2013).

⁴⁷ See paras 94–105 below.

⁴⁸ See paras 111–198 below.

grapple with such setting aside and enforcement issues, since the convention provides that International Centre for Settlement of Investment Disputes arbitral awards are not subject to review by national courts.⁴⁹

15 The authors begin the discussion with the first issue of corruption which a tribunal may encounter – whether the tribunal has the right and/or obligation to inquire into the existence of corruption *sua sponte*.

II. The tribunal's right and obligation to inquire into corruption *sua sponte*

16 Parties' claims or defences may be expressly premised upon the other party's corrupt dealings, or their joint corrupt object underlying a contract in dispute.⁵⁰ A tribunal is clearly obliged to investigate and rule upon the existence and consequences of corruption in such case to resolve the parties' dispute. As Gary Born correctly points out:⁵¹

... insofar as arbitrators are requested to make a binding arbitral award through an adjudicative process, either awarding monetary sums or declaratory relief, it is a vital precondition to the fulfillment of this mandate that they consider and decide claims that contractual agreements are invalid, unlawful, or otherwise contrary to public policy ... a tribunal is incapable of deciding that Party A is legally obligated to pay €100, or to hand over specified property, to Party B without considering public policy objections to the existence of such an obligation. Inherent in the legally-binding resolution of a dispute and the making of a legally-binding award is the duty to

⁴⁹ See Arts 53 and 54 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (18 March 1965; entry into force 14 October 1966) and the limited grounds for annulling an International Centre for Settlement of Investment Disputes award under Art 52, which differ from the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959) grounds for setting aside or refusing enforcement of commercial arbitration awards.

⁵⁰ See further para 35 below.

⁵¹ Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at p 2183.

consider and resolve public policy (and other mandatory legal) objections. [emphasis added]

17 However, if neither party alleges corruption but the evidence on record leads the tribunal to suspect that corrupt activities may have been afoot,⁵² it is less clear whether a tribunal may assume of its own accord an inquisitorial role to establish their occurrence and rule upon their consequences.⁵³ An award could be at risk of being set aside⁵⁴ or refused

⁵² As Cremades and Cairns note in Bernardo Cremades & David Cairns, “Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud” in *Arbitration, Money Laundering, Corruption and Fraud* (Kristine Karsten & Andrew Berkeley eds) (Dossiers-ICC Institute of World Business Law, 2003) at p 79:

... allegations [of corruption] might not be explicitly made by either party, but, rather, enter into the arbitration by suspicion or innuendo as the proceedings progress, or the parties might acknowledge an element of corruption ... but ask that the arbitral tribunal ignore it in deciding the dispute before it.

The latter (more exceptional) scenario arose in ICC Case 1110 (1963), (1994) 10(3) Arb Int'l 282 in which both parties acknowledged that the object of a commission agreement included the bribery of Argentinian officials so that the respondent would be awarded a public contract, but nonetheless remained of the view that the commission agreement was valid and binding and requested the tribunal to decide the case without reference to the corrupt purpose of the agreement. See n 280 below for further discussion of this case.

⁵³ Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at para 2.140.

⁵⁴ Article 34(2)(a)(iii) of the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) states:

34

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

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enforcement⁵⁵ if arbitrators stray into *ultra petita* territory by enquiring into the existence of corruption and ruling upon its consequences, where such issues are not raised by the parties.⁵⁶ Paradoxically, if a tribunal declines to take the initiative in probing the existence of corruption, national courts reviewing a subsequent challenge to the award may be tempted to make their own enquiries to ascertain the existence of corruption and uphold the challenge on public policy grounds should corruption be revealed.⁵⁷

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside ...

⁵⁵ Article 36(1)(a)(iii) of the UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17 annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) (“UNCITRAL Model Law”) and Art V(1)(c) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959) provide for refusal of enforcement of an award on the same basis as setting aside of an award under Art 34(2)(a)(iii) UNCITRAL Model Law.

⁵⁶ See Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at para 2.140.

⁵⁷ An award may be set aside or refused enforcement on public policy grounds: Arts 34(2)(b)(ii) and 36 of the UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) and Art V(2)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959). As Cremades and Cairns observe in Bernardo Cremades & David Cairns, “Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud” in *Arbitration, Money Laundering, Corruption and Fraud* (Kristine Karsten & Andrew Berkeley eds) (Dossiers-ICC Institute of World Business Law, 2003) at pp 78–79:

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18 Is the tribunal then stuck between a rock and a hard place? The authors think not. The argument that a tribunal exceeds its mandate by inquiring into issues of corruption *sua sponte* is not supported by legal principle or policy.

19 While an award may be challenged under Articles 34(2)(a)(iii) and 36(1)(a)(iii) of the United Nations Commission of International Trade Law (“UNCITRAL”) Model Law on International Commercial Arbitration (“Model Law”)⁵⁸ and Article V(1)(c) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”)⁵⁹ on the basis that the tribunal has “deal[t] with a dispute not contemplated by or not falling within the terms of the submission to arbitration”, this provision is narrowly construed by state courts, which are loath to find that a tribunal has exceeded its powers.⁶⁰ The general proposition that

If a contract involves elements of bribery or money laundering, then the arbitral tribunal is the forum to evaluate the evidence and determine the implications of the bribery and money laundering for the claims and defences of the parties, under the contract and the applicable law. *In practical terms, therefore, a court hearing an application for setting aside or for recognition and enforcement is much more likely to uphold an award, or not recognize and enforce an award, notwithstanding bribery or money laundering, where the issues of bribery or money laundering have been acknowledged and dealt within the award by the arbitral tribunal.* [emphasis added]

See paras 166–172 below, where corruption as a public policy bar to enforcement is discussed; and paras 118–165, where the different judicial attitudes towards the review of arbitral awards challenged on public policy grounds. Of particular relevance is the discussion at paras 155–166 below regarding the “contextual review” approach.

⁵⁸ UN Doc A/40/17, annex I; UN Doc A/61/17, annex I (21 June 1985; amended 7 July 2006).

⁵⁹ 330 UNTS 3 (10 June 1958; entry into force 7 June 1959).

⁶⁰ *Elite Inc v Texaco Panama Inc* 777F Supp 289 at 292 (SDNY, 1991); *Banco de Seguros del Estado v Mut Marine Office, Inc* 344 F 3d 255 (2d Cir, 2003); Paris *Cour d’appels* judgment of 10 March 1988 (1989) 2 Rev Arb 269; Swiss Federal Tribunal’s judgment of 19 December 2001 (2002)

emerges from a distillation of various case law and commentary is that a tribunal will not be regarded as having exceeded its authority so long as the matters determined or the evidence relied upon in its award are relevant to resolution of the dispute submitted to the tribunal.

20 In *Minmetals Germany GmbH v Ferco Steel Ltd*,⁶¹ Colman J refused to sustain the respondent's challenge under, *inter alia*, section 103(2)(d) of the UK Arbitration Act 1996⁶² (which is *in pari materia* with the aforementioned provisions of the New York Convention and UNCITRAL Model Law). The respondent resisted enforcement on the basis that the tribunal had exceeded its mandate by quantifying the claimant's loss according to findings made in separate arbitration proceedings (regarding a sub-sale contract between the claimant and a third party, which was decided by the same tribunal), which neither claimant nor respondent had raised or submitted as evidence in their arbitration. Colman J dismissed this argument, reasoning that a tribunal acts within its mandate so long as it relies on evidence which is *relevant* to the resolution of the *dispute submitted for determination* by the parties, even if such evidence had not been raised by either party.⁶³

20(3) ASA Bulletin 493. See generally Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at pp 2607–2608.

⁶¹ [1999] 1 All ER (Comm) 315.

⁶² c 23 (UK).

⁶³ *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 at 325–326. See also *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v Cubic Defense Systems, Inc* 29 F Supp 2d 1168, which held that an award cannot be refused enforcement under Art V(1)(c) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959) merely because the tribunal relies on a legal theory other than that argued by the parties:

Cubic's claim that the use of legal theories not presented by the parties precluded confirmation of the Award was rejected by the Ninth Circuit. See *Ministry of Defense* 969 F 2d at p 771. Under the Convention, a court is to determine 'whether the award exceeds the scope of the [arbitration agreement], not whether the award exceeds the scope of

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... evidence derived from [the tribunal's] own investigations ... went to a central issue within the overall dispute referred to arbitration, namely what loss had been caused to [claimant] by [respondent's] breaches of contract ... 'the scope of submission' [within the meaning of s 103(2)(d) of the UK Arbitration Act 1996] ... falls to be defined by reference to the issues to be resolved by the arbitrators ... [t]his head of objection to enforcement must therefore be rejected. [emphasis added]

21 Similarly, the Singapore Court of Appeal observed in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK*⁶⁴ (interpreting its earlier decision in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank*⁶⁵) that, in determining whether a tribunal exceeds its mandate in considering and deciding a particular matter, its relevance to the issues submitted by the parties to the tribunal for resolution is the key ingredient to be considered:⁶⁶

the parties' pleadings'. *Id.* Respondents in Ministry of Defense objected to confirmation of that award 'because the award [was] not based on the same legal theory as that stated in the pleadings'. The court found that the subject matter of respondent's claim was 'obvious[ly]' the contracts between the parties and to the extent the 'award resolves the claims and counterclaims connected with the two contracts it ... does not exceed the scope of the submission to arbitration'. *Id.* Comparing *Ministry of Defense* to this case, the court finds that the subject matter of this dispute is the Service and Sales Contracts between Cubic and Iran. The ICC Award resolves the parties' claims arising from these Contracts and the fact that the Award is not based on the same legal theories as stated in the pleadings cannot be a basis for refusing to confirm it.

⁶⁴ [2011] 4 SLR 305.

⁶⁵ [2007] 1 SLR(R) 597. This decision was subsequently followed by the Court of Appeal in *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98.

⁶⁶ *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305. See also *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Herbert Kronke *et al* eds) (Kluwer Law International, 2010) at p 259.

In *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597, this court held (at [44]) that the court had to adopt a two-stage enquiry in assessing whether an arbitral award ought to be set aside under Art 34(2)(a)(iii) of the Model Law. Specifically, it had to determine: (a) first, what matters were within the scope of submission to the arbitral tribunal; and (b) second, whether the arbitral award involved such matters, *or whether it involved 'a new difference ... irrelevant to the issues requiring determination'*⁶⁷ and is thus 'outside the scope of the submission to arbitration' [emphasis added]

22 Respected commentators are also in accord with this view. Born notes that:⁶⁸

[A]n arbitral tribunal does not exceed its authority ... [merely] by relying on arguments or authorities not raised by the parties to support their claims. Doubts about the scope of the parties' submissions are resolved in most legal systems in favor of encompassing matters decided by the arbitrators.

23 Emmanuel Gaillard and John Savage also make the following relevant observations:⁶⁹

The arbitrators will also fail to comply with their brief by ruling *ultra petita* or, in other terms, by ruling on claims not made by the parties ... [However,] [t]he fact that arbitrators may have based their decision on allegations or arguments which were not put forward by the parties does not amount to a failure to comply with their brief. They only fail to comply with their brief where they grant one of the parties more than it actually sought in its claims.

⁶⁷ *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [30].

⁶⁸ Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at p 2608. See also *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Herbert Kronke et al eds) (Kluwer Law International, 2010) at p 265.

⁶⁹ See Emmanuel Gaillard & John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) at para 1631.

24 Given that corrupt dealings by one or both parties can have a dispositive impact on the enforceability of claims submitted to the tribunal⁷⁰ and are therefore *relevant* to the resolution of the dispute between the parties, it stands to reason that consideration of issues of corruption falls well within the tribunal's mandate, even if neither party raises corruption as part of its claim or defence and the tribunal conducts its own investigations into corruption *sua sponte*. In other words, the propriety of parties' conduct – assessed in accordance with the applicable rules governing illegality and public policy – must necessarily be considered by the tribunal as *part and parcel of its mandate* to determine the parties' claims, defences and counterclaims, which therefore renders the existence of corrupt dealings by the parties a relevant matter for the tribunal to investigate and determine of its own accord.⁷¹ Arbitral case

⁷⁰ The legal consequences of a finding of corruption in relation to contract-based arbitrations are discussed at paras 94–105 below. A finding of investor corruption in investment treaty-based arbitrations is also relevant to the resolution of the dispute between the corrupt investor and host State: see, for instance, *Wena Hotels Ltd v Arab Republic of Egypt* [Award] ICSID Case No ARB/98/4 (8 December 2000) at [111] and [116]–[117]. However, note the authors' comments made at para 14 above.

⁷¹ The ambit of the tribunal's mandate to deal with issues of illegality and public policy was considered by the Singapore Court of Appeal in *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 which held that “public policy is a question of law which an arbitrator must take cognizance of if he becomes aware of it in the course of hearing the evidence presented during arbitral proceedings”. The court accepted the reasoning in Gary Born, *International Commercial Arbitration* vol 1 (Kluwer Law International, 2009) at p 835 which stated that:

... where the parties' contract raises issues of illegality, violations of public policy ... then the tribunal's mandate must necessarily include consideration of those issues insofar as they would affect its decision or the enforceability of its award.

In this case, PT Prima International Development pleaded that the management contract had become illegal under Indonesian law to limit the period for which Kempinski Hotels SA (“Kempinski”) could claim damages. The Court of Appeal found, *inter alia*, that the arbitral tribunal was correct

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law affirms the legitimacy of such *sua sponte* investigation of corruption,⁷² and as Richard Kreindler notes:⁷³

... illegality contentions going to the nullity of the main contract ... even if initiated by the tribunal itself, should normally be deemed to 'fall within the terms of the submission to arbitration' ... [as] it has a core relevance to ... public policy ... [and] should be seen as necessarily falling within the terms of virtually any submission to arbitration ... a tribunal-initiated investigation of illegality is not tantamount to *ultra petita* [as] [t]he tribunal comes to a legal conclusion as to the validity of the main contract, the claims under that contract ... or the unmeritoriousness of the claims due to the invalidity of the contract ... The Tribunal's decision following on such self-initiated investigation can 'fit' into the claims and ... defences already made.

25 It is only "[w]here ... a suspected or manifest illegality is *irrelevant* to the claims, defences ... then the arbitrator should have no right or

in holding that he had no power to award damages to Kempinski for the period when the contract was performed illegally as to do so would have been contrary to the public policy of Indonesia.

⁷² See the arbitral case law cited in Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at pp 361–364, which generally declare that "an arbitral Tribunal [has] authority to invoke and pronounce nullity [of a contract providing for corruption] by its own motion". *Cf* ICC Case No 6497 (1994) (with which the authors disagree for the reasons stated at p 73):

The demonstration of the bribery nature of the agreement has to be made by the Party alleging the existence of bribes ... A civil court, and in particular an arbitral tribunal, has not the power to make an official inquiry and has not the duty to search independently the truth ...

⁷³ Richard Kreindler, "Aspects of Illegality in the Formation and Performance of Contracts" 16th ICCA Congress, London (May 2002) at pp 252–253. See also Richard Kreindler, "Public Policy and Corruption in International Arbitration: A Perspective for Russian Related Disputes" (2006) 72(3) *Arbitration* 236 at 245–246.

duty to engage in investigations and findings which are the province of the state criminal authorities” [emphasis added].⁷⁴

26 Accordingly, a tribunal that does uncover evidence of corruption *sua sponte* and makes relevant consequent findings is not giving either party “more than it actually sought in its claims”,⁷⁵ defences, or counterclaims. Rather, it is rigorously and faithfully ascertaining whether it ought to uphold such claims, defences and counterclaims *which have been submitted to it for resolution*, by applying (as it should) the consequences of illegality which flow from a finding of corruption under the applicable law. Such a tribunal should therefore be safe from state courts’ accusations of having exceeded its authority. So long as due process concerns are met, in that arbitrators inform parties of the basis for their suspicions of corruption and provide them with an opportunity to make submissions on the matter,⁷⁶ arbitrators are entitled (indeed,

⁷⁴ Richard Kreindler, “Is the Arbitrator Obligated to Denounce Money Laundering, Corruption of Officials, *etc?* The Arbitrator as Accomplice – Sham Proceedings and the Trap of the Consent Award” in Theodore Moran, *Combating Corrupt Payments in Foreign Investment Concessions: Closing the Loopholes, Extending the Tools* (Washington: Center for Global Development Working Group on Corrupt Payments, 2008) at p 3.

⁷⁵ See Emmanuel Gaillard and John Savage at para 23 above.

⁷⁶ See *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 at 656:

Art V of the [New York] Convention protects the requirements of natural justice reflected in the *audi alteram partem* rule. Therefore, where the tribunal is procedurally entitled to conduct its own investigations into the facts, the effect of this provision will be to avoid enforcement of an award based on findings of fact derived from such investigations if the enforcer has not been given any reasonable opportunity to present its case in relation to the results of such investigations. Art 26 of the CIETAC Rules by reference to which the parties had agreed to arbitrate provided: ‘... The arbitration tribunal may, if it deems it necessary, make investigations and collect evidence on its own initiative.’ That, however, was not treated by the Beijing court as permitting the tribunal to reach its

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obliged) to inquire into corruption and compel the production of evidence or the submission of arguments if the parties refuse to be forthcoming and make the relevant ruling on the basis of such inquiry.

27 The policy considerations favouring the tribunal's self-enquiry into suspicions of corruption are also clear.⁷⁷ A tribunal is not "solely a manifestation and instrumentalization of party autonomy" which can ignore "international goals of sanctioning illegality".⁷⁸ Tribunals must remain vigilant and alert to the possibility of corrupt dealings being hidden by one or both parties, otherwise they may become unwitting

conclusions and make an award without first disclosing to both parties the materials which it had derived from its own investigations. Bernardo Cremades & David Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud" in *Arbitration, Money Laundering, Corruption and Fraud* (Kristine Karsten & Andrew Berkeley eds) (Dossiers-ICC Institute of World Business Law, 2003) at p 83:

The party or parties suspected of bribery ... must be fully informed of the tribunal's suspicions and allowed the time and opportunity to make a full response. They are entitled to know the basis of the allegations against them and should be granted an oral hearing if they so request.

See also Richard Kreindler, "Is the Arbitrator Obligated to Denounce Money Laundering, Corruption of Officials, *etc?* The Arbitrator as Accomplice – Sham Proceedings and the Trap of the Consent Award" in Theodore Moran, *Combating Corrupt Payments in Foreign Investment Concessions: Closing the Loopholes, Extending the Tools* (Washington: Center for Global Development Working Group on Corrupt Payments, 2008) at p 2: "[T]he parties must be made aware of, and be given a reasonable opportunity to comment in particularized fashion on, the suspicion or evidence of illegality."

⁷⁷ Bernardo Cremades & David Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud" in *Arbitration, Money Laundering, Corruption and Fraud* (Kristine Karsten & Andrew Berkeley eds) (Dossiers-ICC Institute of World Business Law, 2003) at pp 80–81.

⁷⁸ Richard Kreindler, "Approaches to the Application of Transnational Public Policy by Arbitrators" 6th IBA International Arbitration Day, Sydney (13 February 2003) at p 15.

accessories to heinous acts “more odious than theft”.⁷⁹ In this regard, it is important for tribunals to bear in mind that many arbitral jurisdictions are anxious to preserve the finality of arbitral awards and generally refuse to disturb the tribunal’s findings.⁸⁰ This should doubly incentivise tribunals to properly investigate suspicions of corruption, so that their awards do not become a means for undeserving and unscrupulous parties to exploit minimal judicial intervention and thereby reap the benefit of their misdeeds.⁸¹

28 However, a note of caution is in order: tribunals should only pursue the issue of corruption where there is some *prima facie* evidence of wrongdoing and not “every suspicious element in the execution or

⁷⁹ *World Duty Free Co Ltd v Republic of Kenya* [Award] ICSID Case No ARB/00/7 (4 October 2006) at [173]. As Catherine Kessedjian, “Transnational Public Policy” in *ICCA Congress Series No 13, Montreal (2006): International Arbitration 2006: Back to Basics?* (Albert Jan van den Berg ed) (Kluwer Law International, 2007) at p 863 notes:

[A]rbitrators, as major actors in society, must be aware and alert and must recognize the cases in which fundamental norms are at stake. They must do their job in calling the parties’ attention to the problem and asking them to discuss it fully. It would be a disservice to the parties, to the arbitration process and to society at large to say that arbitrators can only look at issues which have been posed by the parties. By doing so, they would become accomplice to the grossest violations of transnational public policy and fuel the debate against arbitration that has already started. In the arbitration process as in all dispute resolution mechanisms, the tribunal is faced with facts, circumstances, documents, testimonies and it is for the parties and the arbitrators together to formulate the issues at stake. [emphasis added]

⁸⁰ See the discussion at paras 111–198 below.

⁸¹ *Cf* ICC Case No 7047 (1994), which held that:

The word ‘bribery’ is clear and unmistakable. If the defendant does not use it in his presentation of facts an *arbitral tribunal does not have to investigate. It is exclusively the parties’ presentation of facts that decides in what direction the arbitral tribunal has to investigate.* [emphasis added]

The authors disagree, for the reasons mentioned in this part.

performance of the contract should set the tribunal off on an inquisitorial exercise of its own irrespective of the wishes of the parties”.⁸² A *laissez-faire* attitude that closes its eyes to all evidence of corruption is as undesirable as an over-zealous approach to detecting corruption, which will bog down arbitral proceedings with unnecessary demands for information and explanation, at the expense of parties who are likely to be innocent of wrongdoing. This would compromise the institution of international arbitration as surely as ignoring compelling evidence of corruption would.

29 It would not be wise to propose any arbitrary threshold of evidence required to trigger *sua sponte* inquiries from the tribunal, as the matter is not simply one of evidence, but also one of proportionality, which would make the potential difficulty for parties to provide exculpatory explanations a relevant consideration. For example, even if there is only a slight suggestion of corruption, given the strong public policy considerations favouring a vigilant attitude against corruption, a tribunal may be justified in asking for an explanation from a party, if it should be relatively easy for that impugned party to provide evidence exculpating itself if it were innocent. What tribunals can do is to formulate tactful and discreet ways in which it may enquire into the possibility of corruption, at as little cost to the expeditious flow of proceedings as possible.⁸³

⁸² Bernardo Cremades & David Cairns, “Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud” in *Arbitration, Money Laundering, Corruption and Fraud* (Kristine Karsten & Andrew Berkeley eds) (Dossiers-ICC Institute of World Business Law, 2003) at p 81. See para 48 below for a discussion of the possible evidentiary indicia of corruption.

⁸³ See Cremades and Cairns’s suggestion in Bernardo Cremades & David Cairns, “Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud” in *Arbitration, Money Laundering, Corruption and Fraud* (Kristine Karsten & Andrew Berkeley eds) (Dossiers-ICC Institute of World Business Law, 2003):

A tribunal concerned, for example, by the remuneration arrangements for a foreign agent can seek an explanation of those arrangements without suggesting they might have a corrupt purpose. A discreet

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Ultimately, a sensible and flexible approach is needed, which balances the need for efficacious proceedings with tribunals' responsibilities to the administration of justice.

III. The burden of proving corruption and the requisite standard of proof

30 In international arbitration, it is axiomatic that each party bears the burden of proving the facts relied on in support of its claim or defence.⁸⁴ The standard of proof is often assumed to be a balance of probabilities, or, in other words, more likely than not.⁸⁵ Can there be any justification for departing from these basic propositions where corruption is sought to be established, given the limits of the tribunal's powers of investigation and compulsion and given that those who participate in bribery and

request for further information, if properly used, should enable an arbitral tribunal to either eliminate a suspicion of illegal activity or to confirm the need for the possibility of bribery, money laundering or serious fraud to be raised explicitly with the parties.

⁸⁴ Article 27(1) of the UNCITRAL Arbitration Rules 2010 GA Res 65/22, UN GAOR 65th Sess (2010); Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at p 1857; *Antoine Biloune v Ghana Inv Centre* [Award on Jurisdiction and Liability] (27 October 1989); (1994) XIX YB Comm Arb 11 at 20; *Frederica Lincoln Riahi v Islamic Republic of Iran* [Concurring and Dissenting Opinion of J Brower in Award No 600-485-1] (27 February 2003); (2003) 37 Iran-US CTR 158 at [18]: "It is axiomatic that the burden of proving a claim lies with the party presenting it."

⁸⁵ Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at pp 1857–1858.

corruption often mask their activities with great ingenuity?⁸⁶ This is “one of the most contentious problems of corruption cases in arbitral practice”.⁸⁷

31 Some have suggested that a tribunal ought to make it easier for parties to establish the existence of corruption by reversing the *burden* of proving corruption (*ie*, requiring a party to disprove its involvement in corrupt activities where *prima facie* evidence of corruption exists)⁸⁸ and/or lowering the default balance of probability *standard* of proof. The reasons cited included the fact that a tribunal does not have the same subpoena and enforcement powers of a court to compel the production of evidence and, as one advocate of such an approach explains, “like most crimes and intentional misconduct, and perhaps more so, acts of corruption and collusion are specifically designed not to be able to be identified or detected”.⁸⁹ In addition, the complainant often cannot produce

⁸⁶ Constantine Partasides, “Proving Corruption in International Arbitration: A Balanced Standard for the Real World” (2010) 25(1) ICSID Rev-FILJ 47 at para 22. See generally Peter Muchlinski, Federico Ortino & Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) at pp 604–605.

⁸⁷ Peter Muchlinski, Federico Ortino & Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) at p 604; Mohamed Abdel Raouf, “How should International Arbitrators Tackle Corruption Issues?” (2009) 24(1) ICSID Rev-FILJ 100 at 106–107; A Timothy Martin, “International Arbitration and Corruption: An Evolving Standard” (2004) 1(2) TDM.

⁸⁸ In ICC Case No 6497 (1994), the tribunal remarked that:

The [party alleging corruption] has the burden of proof ... [Such party] may bring some relevant evidence for its allegations, without these elements being really conclusive. In such case, the arbitral tribunal may exceptionally request the other party to bring some counterevidence, if such task is possible and not too burdensome. If the other party does not bring such counter-evidence, the arbitral tribunal may conclude that the facts alleged are proven (Article 8 of the Swiss Civil Code). However, such change in the burden of proof is only to be made in special circumstances and for very good reasons.

⁸⁹ Karen Mills, “Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating
(continued on next page)

direct physical or documentary evidence of corruption,⁹⁰ whose case must stand or fall based on the strength of its witnesses' oral testimony, which may have little to recommend itself over the wrongdoers' evidence.

32 *EDF (Services) Ltd v Romania*⁹¹ (“*EDF*”) helpfully illustrates some of these difficulties encountered by parties attempting to prove corrupt conduct in international arbitration. In *EDF*, the investor alleged that it was the victim of senior Romanian officials' demands for bribes on two separate occasions, once at a parking lot of the Hilton Hotel in Romania, and again at a Romanian State Secretary's private residence. However, as Constantine Partasides aptly questions, “[h]ow do you fairly evaluate proof of a conversation in a car park and a living room”?⁹² In *EDF*, the investor could only rely on the testimony of its employees who allegedly received the bribe requests in its attempt to prove corruption by the respondent. This was countered by the respondent's witnesses' denials (these were the very persons accused of soliciting bribes), the lack of protest by the investor at the time the alleged solicitation of bribes occurred and the absolving decision of the Romanian Anti-corruption Authority.

33 The state of evidence was thus such that it was unlikely the investor successfully proved corruption on a balance of probabilities. The tribunal expressed sympathy for the investor's position, observing that “corruption ... is notoriously difficult to prove since, typically, there is little or no physical evidence”.⁹³ However, far from setting a more lenient standard of proof for the investor than the balance of probabilities standard, the tribunal raised the evidentiary bar, proclaiming that “[t]he seriousness of

Thereto” in *ICCA Congress Series No 11, London (2002): International Commercial Arbitration: Important Contemporary Questions* (Albert Jan van den Berg ed) (Kluwer Law International, 2003) at p 295.

⁹⁰ Matthias Scherer, “Circumstantial Evidence in Corruption Cases before International Arbitral Tribunals” (2002) 5 Int ALR 29.

⁹¹ [Award] ICSID Case No ARB/05/13 (8 October 2009).

⁹² Kyriaki Karadelis, “Corruption and the standard of proof” *Global Arbitration Review* (26 July 2010).

⁹³ *EDF (Services) Ltd v Romania* [Award] ICSID Case No ARB/05/13 (8 October 2009) at [221].

the accusation of corruption ... demands *clear and convincing evidence*⁹⁴ [emphasis added]. Unsurprisingly, it was held that the evidence adduced by the investor was “far from being clear and convincing”.⁹⁵

34 This position reflects the prevailing arbitral practice of subjecting complainants of corruption to a high standard of proof: in a survey of arbitral case law on corruption, it was found that in just one out of 25 cases, a “low” standard of proof was applied, whereas in 14 cases, a “high” standard of proof applied, which was variously described as “certainty”, “clear proof”, “clear and convincing evidence” and “conclusive evidence”.⁹⁶ Other cases can be cited for the same proposition.⁹⁷ This

⁹⁴ *EDF (Services) Ltd v Romania* [Award] ICSID Case No ARB/05/13 (8 October 2009) at [221].

⁹⁵ *EDF (Services) Ltd v Romania* [Award] ICSID Case No ARB/05/13 (8 October 2009) at [221].

⁹⁶ See Antonio Crivellaro, “Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence” in *Arbitration, Money Laundering, Corruption and Fraud* (Kristine Karsten & Andrew Berkeley eds) (Dossiers-ICC Institute of World Business Law, 2003) at pp 115–117.

⁹⁷ See *Westinghouse v Nat'l Power & Co* ICC Case No 6401 (1991) at [21]: “clear and convincing evidence amounting to more than a mere preponderance and cannot be justified by mere speculation”; *Dadras International v Iran* [Award] RLA-152 (Iran-US Claims Tribunal) (7 November 1995); (1997) XXII YB Comm Arb 504 at para 124: “‘clear and convincing evidence’ ... [an] enhanced proof requirement”; *Aryeh v Iran* RLA-145 (Iran-US Claims Tribunal), 1997 WL 1175787 at [159]: “clear and convincing evidence”; *African Holdings Co of America Inc and Société Africaine de Construction au Congo SARL v Democratic Republic of the Congo* [Award] ICSID Case No ARB/05/21 (29 July 2008) at [52]: “Irrefutable” evidence; *Oil Fields of Texas v Iran* (8 October 1986), (1987) XII YB Comm Arb 292 at para 25: “If reasonable doubts remain, such an allegation [of corruption] cannot be deemed to be established”, *ie*, allegations of corruption must be proven beyond a reasonable doubt; and *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt* [Award] ICSID Case No ARB/05/15 (1 June 2009) at [326]: “greater than the balance of probabilities but less than beyond reasonable doubt” or “clear and convincing evidence”.

standard of proof appears to approximate the “beyond reasonable doubt” standard in criminal law, in relation to which the UN Anti-Corruption Toolkit⁹⁸ observes:⁹⁹

... the nature of major corruption cases makes such a high burden of proof particularly difficult to meet. Senior officials actively engaged in corruption are often in a position to impede investigations and destroy or conceal evidence, and pervasive corruption weakens investigative and prosecutorial agencies to the point where gathering evidence and establishing its validity and probative value becomes problematic at best ...

35 Difficulties in proving corruption also often arise in private commercial arbitration disputes relating to “intermediary” or “agency” agreements. Brief digression from the issue of the standard and burden of proof is necessary to provide some background on these agreements. These are agreements under which an intermediary or agent (also variously known as “advisers”, “brokers”, “consultants”, “middlemen” or “representatives”¹⁰⁰) is engaged by his principal to assist in procuring for the latter a government contract or a licence or permit to do business in a

⁹⁸ Vienna, 4th Ed, September 2004. The UN Anti-Corruption Toolkit is described in its foreword thus:

The Toolkit provides, based on the recently adopted UN Convention against Corruption, an inventory of measures for assessing the nature and extent of corruption, for deterring, preventing and combating corruption, and for integrating the information and experience gained into successful national anticorruption strategies.

⁹⁹ For an example of government suppression of reports on investigations into allegations of corruption, see Maziar Jamnejad’s summary of the Chatham House International Law discussion group meeting on “*World Duty Free v The Republic of Kenya: A Unique Precedent?*” (28 March 2007) at p 15, available at <<http://www.chathamhouse.org/publications/papers/view/108450>> (accessed 11 April 2013).

¹⁰⁰ See the *Woolf Committee Report on Business Ethics, Global Companies and the Defence Industry: Ethical Business Conduct in BAE Systems plc – The Way Forward* (May 2008) at p 25.

particular country.¹⁰¹ They are popular with foreign firms which need intermediaries familiar with local laws and business customs in order to gain access to local markets.¹⁰² The parties often include arbitration clauses, which has led to a significant number of arbitral awards on the subject.¹⁰³ Corruption on the part of the intermediary and/or the principal is often alleged, resulting in disputes which fall into one of the following three scenarios:

- (a) Having procured the government contract or relevant approvals for his principal, the intermediary brings arbitration proceedings claiming his commission, which the principal refuses to pay on the ground that the intermediary had engaged in corrupt activities in performing the intermediary agreement, or the intermediary agreement is illegal or invalid as a contract providing for corruption.
- (b) Following the intermediary's failure to procure the government contract or relevant approvals, the principal brings arbitration proceedings to recover payments made to the intermediary, which the intermediary refuses to return on the ground that the intermediary agreement is illegal or invalid as a contract providing for corruption.
- (c) The State or state entity which awarded the government contract seeks a declaration (as claimant) that it was procured through corruption of its representatives by the principal's intermediary and is therefore unenforceable or subject to rescission, or argues it is not

¹⁰¹ See Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at pp 191–192.

¹⁰² See Matthias Scherer, "Circumstantial Evidence in Corruption Cases before International Arbitral Tribunals" (2002) 5 Int ALR 29 at 29.

¹⁰³ See, for instance, the arbitral awards cited in Matthias Scherer, "Circumstantial Evidence in Corruption Cases before International Arbitral Tribunals" (2002) 5 Int ALR 29 at 37–40 and Antonio Crivellaro, "Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence" in *Arbitration, Money Laundering, Corruption and Fraud* (Kristine Karsten & Andrew Berkeley eds) (Dossiers-ICC Institute of World Business Law, 2003) at pp 119–144.

liable (as respondent) on a claim brought by the principal for breach of contract (assuming that contract contains an arbitration clause).¹⁰⁴

36 Why is it the case that corruption on the part of the intermediary and/or the principal is often alleged? Intermediary agreements are usually drawn up in a fairly standard form, under which the intermediary undertakes to provide services which improve the chances of the principal obtaining a government contract, licence, or permit.¹⁰⁵ For instance, the intermediary may be tasked with conducting market research, providing advice on local regulations and negotiating or building relationships with government officials on his principal's behalf.¹⁰⁶ In exchange, the intermediary receives a commission which is calculated as a percentage of the value of the contract awarded to the principal, rather than the quality

¹⁰⁴ See Antonio Crivellaro, "Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence" in *Arbitration, Money Laundering, Corruption and Fraud* (Kristine Karsten & Andrew Berkeley eds) (Dossiers-ICC Institute of World Business Law, 2003) at p 113 and Peter Muchlinski, Federico Ortino & Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) at pp 592–610.

¹⁰⁵ See Antonio Crivellaro, "Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence" in *Arbitration, Money Laundering, Corruption and Fraud* (Kristine Karsten & Andrew Berkeley eds) (Dossiers-ICC Institute of World Business Law, 2003) at pp 110–118.

¹⁰⁶ See the *TRACE Due Diligence Guidebook: Doing Business with Intermediaries Internationally* (2010) at p 5, available at <<https://secure.traceinternational.org/data/public/The2010TRACEDueDiligenceGuidebook-65418-1.pdf>> (accessed 11 April 2013); *Wolf Committee Report on Business Ethics, Global Companies and the Defence Industry: Ethical Business Conduct in BAE Systems plc – The Way Forward* (May 2008) at p 25; and Antonio Crivellaro, "Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence" in *Arbitration, Money Laundering, Corruption and Fraud* (Kristine Karsten & Andrew Berkeley eds) (Dossiers-ICC Institute of World Business Law, 2003) at pp 110–118.

or quantity of the services provided.¹⁰⁷ The value of the awarded contract can be very large and commission payments correspondingly substantial;¹⁰⁸ hence, the intermediary's remuneration may be out of proportion to the nature of the services which he renders.¹⁰⁹ These potentially high rewards, coupled with the fact that the intermediary may not be reimbursed for his expenses and may only be paid when his efforts (which may take place over a significant period of time¹¹⁰) result in successful procurement of the desired contract, permit, or licence, contributes to "significant pressure [on the intermediary] to make a payment to a government official to 'ensure' success".¹¹¹ Some intermediaries "will be tempted, to obtain contracts with the aid of

¹⁰⁷ See the *TRACE Due Diligence Guidebook: Doing Business with Intermediaries Internationally* (2010) at p 5, available at <<https://secure.traceinternational.org/data/public/The2010TRACEDueDiligenceGuidebook-65418-1.pdf>> (accessed 11 April 2013); *Wolf Committee Report on Business Ethics, Global Companies and the Defence Industry: Ethical Business Conduct in BAE Systems plc – The Way Forward* (May 2008) at p 25; and Antonio Crivellaro, "Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence" in *Arbitration, Money Laundering, Corruption and Fraud* (Kristine Karsten & Andrew Berkeley eds) (Dossiers-ICC Institute of World Business Law, 2003) at pp 110–118.

¹⁰⁸ *Wolf Committee Report on Business Ethics, Global Companies and the Defence Industry: Ethical Business Conduct in BAE Systems plc – The Way Forward* (May 2008) at p 25.

¹⁰⁹ Antonio Crivellaro, "Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence" in *Arbitration, Money Laundering, Corruption and Fraud* (Kristine Karsten & Andrew Berkeley eds) (Dossiers-ICC Institute of World Business Law, 2003) at p 112.

¹¹⁰ As long as 20 years in some cases, as noted in the *Wolf Committee Report on Business Ethics, Global Companies and the Defence Industry: Ethical Business Conduct in BAE Systems plc – The Way Forward* (May 2008) at p 25.

¹¹¹ *TRACE Due Diligence Guidebook: Doing Business with Intermediaries Internationally* (2010) at p 5, available at <<https://secure.traceinternational.org/data/public/The2010TRACEDueDiligenceGuidebook-65418-1.pdf>> (accessed 11 April 2013).

corrupt payments either with or without the knowledge or connivance of the company”.¹¹² Moreover, some intermediary agreements may require the intermediary to exercise his personal influence over public officials in order to procure a contract or government approvals for his principal on the best possible terms.

37 These elements of intermediary agreements may give rise to concerns that part of the commission paid to the intermediary is meant to be reimbursement for bribes paid to government officials, or that bribes were in fact paid, whether with or without the principal’s consent. The intermediary may also exercise improper influence over government officials in order to procure a favourable result for his principal.¹¹³ Depending on the applicable legal regime, intermediary agreements providing for the exercise of influence by the intermediary may be regarded as legitimate lobbying contracts,¹¹⁴ or corrupt contracts for the

¹¹² *Woolf Committee Report on Business Ethics, Global Companies and the Defence Industry: Ethical Business Conduct in BAE Systems plc – The Way Forward* (May 2008) at p 25.

¹¹³ See the discussion at paras 56–63 below on the propriety of intermediary agreements under various national laws.

¹¹⁴ See paras 59–62 below for a discussion on the English view of lobbying contracts. In ICC Case No 7047 (1994), it was explained that an intermediary may engage in “lobbying” of government officials, so that they would award a contract to the intermediary’s principal. Such “lobbying” was described as follows (Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at p 352, fn 1068):

Lobbying for [Jugoimport]; let me explain to you that Kuwait is a small community, and the people who work in the Ministry of Defense or in Ministry of Finance, those are officers, and some of them, we go together to the beach, we are friends, we went to school together, they come to our house, we go to their house. We are a small community ... everyone knows each other. Lobbying means that when you have been trying to sell your equipment for more than 10 or 12 years, I lobby for [Jugoimport] and convince the people in the committee face to face that why don’t you try this M84, this is a very good tank, this is a tank which is virtually a T72 restructured from inside to meet your requirements? On the other side you would get a better buy from that,

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trading in influence (otherwise known as influence peddling¹¹⁵ or trafficking in influence¹¹⁶).¹¹⁷ Laws “[c]riminalising trading in influence seeks to reach the close circle of the official or the political party to which he belongs and to tackle the corrupt behaviour of those persons who are in the neighbourhood of power [but are not themselves decision-makers] and try to obtain advantages from their situation [by offering to misuse their influence on decision-makers in return for some form of benefit], contributing to the atmosphere of corruption”.¹¹⁸

38 The difficulty in proving corruption in connection with an intermediary agreement lies of course in demonstrating there was such impropriety involved or intended in the manner that the intermediary performed or was to perform the agreement.¹¹⁹ Aside from the problems

why don't you give a chance for them to do that? They are refusing, they don't want even to look at those products from those countries at all, they were concentrating on the Americans and Europeans; but lobbying means convincing the people to agree to have the chance for the Yugoslav [suppliers] to see their products and to test it, and if it goes through the test and the trial, they [*ie*, the Yugoslav suppliers] will be the one who get the job. The other one, I also lobbied the Minister of Finance that Kuwait will really get benefit from that they will reduce their debts. This is a part of lobbying, gathering information for [Jugoimport]. It's not secret information to know what would be the number of tanks they want, how much ammunition they want, what would be the training procedures, what would be the best for the Yugoslav [tanks] to work, to bring their people to Kuwait, to bring the people? This is part of the lobbying.

¹¹⁵ See Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at p 199.

¹¹⁶ See Art 433-1 of the Criminal Code of France (1810).

¹¹⁷ See paras 11–13 and n 35. See also Art 12 of the Council of Europe (“COE”) Criminal Law Convention on Corruption (Eur TS No 173) (27 January 1999; entry into force 1 July 2002).

¹¹⁸ Council of Europe Criminal Law Convention on Corruption (Eur TS No 173) (27 January 1999; entry into force 1 July 2002) Explanatory Report at para 64.

¹¹⁹ See discussion at paras 57–63 below.

already mentioned above that parties face in procuring evidence of corruption, one can also imagine how independent evidence necessary to corroborate a party's allegations of corruption will:¹²⁰

... have to come from the officials or politicians whom the intermediary has bribed, which is hardly likely when the bribe takers are likely to lay themselves open to the possibility of prosecution in their home countries.

39 Thus, some commentators have remarked that burden shifting (and presumably, the lowering of the burden of proof as well) is justifiable in adjudicating intermediary agreement disputes in which corruption is alleged, since:¹²¹

... the party accused of corruption is typically easily capable, if it is actually innocent of the allegations, of producing countervailing evidence (*eg*, proof that an intermediary spent unusually large consulting fees on legitimate goods or services in support of the investment or proof that a nontransparent ownership structure is not meant to conceal wrongful activities.

40 In view of the high standard of proof imposed by tribunals and the difficulty faced by parties in procuring evidence of corruption, there is considerable sympathy for those advocating lowering of the standard of proof or shifting the burden of proof to the impugned party. However, in the authors' opinion, Partasides makes the soundest suggestion: that (a) there should be no shifting of the burden of proving corruption, as "allegations of illegality must, like any other allegation, be proven"; and (b) tribunals should continue to apply the balance of probabilities standard when evaluating allegations of corruption.¹²²

¹²⁰ Colin Nicholls QC *et al*, *Corruption and Misuse of Public Office* (Oxford University Press, 2nd Ed, 2011) at para 9.134.

¹²¹ Carolyn Lamm, Hansel Pham & Rahim Moloo, "Fraud and Corruption in International Arbitration" in *Liber Amicorum Bernardo Cremades* (Miguel Àngel Fernandez-Ballesteros & David Arias eds) (La Ley grupo Wolters Kluwer, 2010) at p 701.

¹²² See Maziar Jamnejad's summary of the Chatham House International Law discussion group meeting on "*World Duty Free v The Republic of Kenya*."
(*continued on next page*)

41 Notwithstanding the fact that evidence of corruption is difficult to procure, the authors disagree with those who suggest that the tribunal should shift the *burden of proof* onto the impugned party, as it is too radical to depart from such a basic and widely accepted rule as the requirement that a party must prove the facts upon which it wishes to rely. This rule exists for good reason – to prevent parties from making baseless assertions and to secure the integrity of the fact finding process. It avoids the presumption that a fact exists when evidence is not sufficiently probative to demonstrate such. It is also, in a sense, a rule of natural justice and due process.¹²³ If this rule can be abridged in relation to proof of corruption, then by parity of reasoning there should be nothing to stop its application to other issues for which proof is difficult to obtain. This is not a slippery slope that international arbitration can afford to embark upon. Partasides cites the following passage from *Himpurna California Energy Ltd (Bermuda) v PT (Persero) Perusahaan Listrik Negara (Indonesia)* (“*Himpurna*”), which the authors regard as encompassing this non-derogable cardinal rule of law:¹²⁴

The members of the Arbitral Tribunal do not live in an ivory tower. Nor do they view the arbitral process as one which operates in a vacuum, divorced from reality. ... The arbitrators believe that cronyism and other forms of abuse of public trust do indeed exist in many countries, causing great harm to untold millions of ordinary people in a myriad of insidious ways. They would rigorously oppose

A Unique Precedent?” (28 March 2007) at pp 8–10, available at <<http://www.chathamhouse.org/publications/papers/view/108450>> (accessed 11 April 2013).

¹²³ Bernardo Cremades & David Cairns, “Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud” in *Arbitration, Money Laundering, Corruption and Fraud* (Kristine Karsten & Andrew Berkeley eds) (Dossiers-ICC Institute of World Business Law, 2003) at p 83. However, to the extent that Cremades and Cairns argue for a higher standard of proof of corruption, the authors disagree for the reasons set out in this part.

¹²⁴ *Himpurna California Energy Ltd (Bermuda) v PT (Persero) Perusahaan Listrik Negara (Indonesia)*, Final Award (4 May 1999) at [219] and [220].

any attempt to use the arbitral process to give effect to contracts contaminated by corruption.

But such grave accusations must be proven. There is in fact no evidence of corruption in this case. Rumours or innuendo will not do. Nor obviously may a conviction that some foreign investors have been unscrupulous justify the arbitrary designation of a particular investor as a scapegoat.

[emphasis added]

42 Turning to the requisite *standard of proof* that a party must discharge to establish corruption, like Partasides, the authors think it should remain the balance of probabilities standard. It should certainly not be pegged at the beyond reasonable doubt standard in criminal law, since the tribunal is dealing with the consequences of corruption on a matter of *civil* liability.¹²⁵ A tribunal does not impose criminal sanctions, which renders it unnecessary and undesirable for it to proceed with the same degree of caution as a criminal court would apply in ascertaining the facts of the case before it. More importantly, given the difficulty in proving corruption, a criminal standard of proof would be almost impossible to satisfy and plays directly into the hands of unscrupulous parties, who can simply deny wrongdoing and exploit the high threshold of proof to avoid liability. The current trend of tribunals imposing such a high standard of proof¹²⁶ is thus regrettable.

43 If tribunals are to assess the existence of corruption on a balance of probabilities standard, should they go about this task in the same way it would determine more mundane matters, such as whether, for instance, words amounting to a contractual offer were conveyed by one party to another? The answer to this question is: it depends. The balance of probabilities standard should be understood and applied in a nuanced fashion, which cannot be divorced from the particular circumstances of

¹²⁵ Maziar Jamnejad's summary of the Chatham House International Law discussion group meeting on "*World Duty Free v The Republic of Kenya: A Unique Precedent?*" (28 March 2007) at p 14, available at <<http://www.chathamhouse.org/publications/papers/view/108450>> (accessed 11 April 2013).

¹²⁶ See para 34 above.

each case. To determine whether corruption is proved on a balance of probabilities, it is necessary to consider factors such as the seriousness of the allegations of corruption and their legal consequences if proven,¹²⁷ the inherent likelihood or unlikelihood of corruption in the specific circumstances of the case and, as Partasides suggests, the “intrinsic difficulty of proving [corruption]”.¹²⁸

44 Hoffmann LJ illustrates how the inherent unlikelihood of a particular alleged event may heighten the cogency of the evidence required to establish its occurrence:¹²⁹

... some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent’s Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not.

¹²⁷ As the House of Lords recently held in *Re D (Northern Ireland)* [2008] UKHL 33 at [28]; [2008] 1 WLR 1499 at 1509:

... in some contexts a court or tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard ... Situations which make such heightened examination necessary may be the inherent unlikelihood of the occurrence taking place (Lord Hoffmann’s example of the animal seen in Regent’s Park), *the seriousness of the allegation to be proved or, in some cases, the consequences which could follow from acceptance of proof of the relevant fact* [emphasis added].

¹²⁸ Constantine Partasides, “Proving Corruption in International Arbitration: A Balanced Standard for the Real World” (2010) 25(1) ICSID Rev-FILJ 47 at para 53.

¹²⁹ *Secretary of State for the Home Department v Rehman* [2001] UKHL 47 at [55]; [2003] 1 AC 153 at 194; [2001] 3 WLR 877 at 895–896. Other common law jurisdictions have adopted the English approach: see, for instance, the leading Supreme Court of Canada decision in *R v Oakes* (1986) 26 DLR (4th) 200; and the Singapore Court of Appeal decision in *Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict* [2005] 3 SLR(R) 263.

45 Since in many cases, corruption will be inherently more unlikely than, for instance, words amounting to a contractual offer, it will therefore require more cogent evidence to establish. However, as Partasides rightly points out, this must be weighed with the interests of fairness, which require an arbitral tribunal to consider:¹³⁰

... the challenge the parties before them face in substantiating their claims [of corruption] due to the circumstances of those claims ... [and the need] to take account of the intrinsically difficult nature of demonstrating a bribe.

These factors may depress the strength of evidence of corruption required.

46 It should be noted that varying the quality of evidence required to prove corruption according to the above-mentioned factors does not entail departure from the balance of probabilities standard. As Richards LJ explains:¹³¹

Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application ... the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities. [emphasis in original omitted]

47 Under the rubric of this flexibly understood balance of probabilities standard, a tribunal may consider circumstantial evidence, as well as draw adverse inferences, in determining whether corruption has been proven by the complainant.

48 Under the applicable arbitration rules, a tribunal is usually conferred wide discretion to determine the admissibility, relevance, materiality and

¹³⁰ Constantine Partasides, "Proving Corruption in International Arbitration: A Balanced Standard for the Real World" (2010) 25(1) ICSID Rev-FILJ 47 at paras 55–56.

¹³¹ *R (N) v Mental Health Review Tribunal (Northern Region)* [2005] EWCA Civ 1605 at [62]; [2006] QB 468 at 497–498; [2006] 2 WLR 850 at 875.

the weight of the evidence adduced.¹³² Accordingly, a tribunal may find indirect or circumstantial evidence to be sufficient proof of corruption.¹³³ For instance, in ICC Case No 8891 (1998), the indirect evidence of a corrupt intermediary agreement was observed to include the following: (a) intermediary's inability to provide proof of his execution of the contractually stipulated services; (b) excessively high remuneration in relation to the type of services to be rendered; and (c) remuneration assessed based on the value of the contract awarded to the principal (as opposed to the quantity or quality of services rendered).¹³⁴ The list of "red flags" set out in the US Department of Justice's *Lay-Person's Guide to the FCPA* (officially known as *A Resource Guide to the US Foreign Corrupt Practices Act*),¹³⁵ the Woolf Committee's *Report on BAE*

¹³² See, for instance, Art 27(4) of the UNCITRAL Arbitration Rules 2010 GA Res 65/22, UN GAOR 65th Sess (2010) and Art 9(1) of the International Bar Association Rules on the Taking of Evidence in International Arbitration 2010 (29 May 2010).

¹³³ For instance, in ICC Case No 4145 (1984), even though the consultancy price of an intermediary agreement was "very high", the tribunal held that this alone was not sufficient circumstantial evidence to prove corruption. Cf ICC Case No 6497 (1994), where it was held that the "extremely unusual fee" of 33.33% gave rise to a "high degree of probability" that the intention of the intermediary agreement was to bribe government officials. See further generally Peter Muchlinski, Federico Ortino & Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) at pp 612–613.

¹³⁴ See generally Matthias Scherer, "Circumstantial Evidence in Corruption Cases before International Arbitral Tribunals" (2002) 5 Int ALR 29 at 31–36 (discussing in detail other circumstantial evidence which may indicate a corrupt intermediary agreement).

¹³⁵ US Department of Justice, *A Resource Guide to the US Foreign Corrupt Practices Act* (November 2012), available at <<http://www.justice.gov/criminal/fraud/fcpa/guidance>>, states at pp 21–23:

The FCPA prohibits corrupt payments through intermediaries. It is unlawful to make a payment to a third party, while knowing that all or a portion of the payment will go directly or indirectly to a foreign official. *The term 'knowing' includes conscious disregard and deliberate ignorance.* The elements of an offense are essentially the same as

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Systems,¹³⁶ and TRACE International's *Due Diligence Guidebook*¹³⁷ elucidate further circumstances which may indicate an intermediary's

described above, except that in this case the 'recipient' is the intermediary who is making the payment to the requisite 'foreign official'. ... in negotiating a business relationship, *the U.S. firm should be aware of so-called 'red flags'; ie, unusual payment patterns or financial arrangements, a history of corruption in the country, a refusal by the foreign joint venture partner or representative to provide a certification that it will not take any action in furtherance of an unlawful offer, promise, or payment to a foreign public official and not take any act that would cause the U.S. firm to be in violation of the FCPA, unusually high commissions, lack of transparency in expenses and accounting records, apparent lack of qualifications or resources on the part of the joint venture partner or representative to perform the services offered, and whether the joint venture partner or representative has been recommended by an official of the potential governmental customer.* [emphasis added]

See further World Compliance's "Navigating Through the FCPA Minefield, Debunking Myths, and Addressing Red Flags" White Paper, available at <<http://www.worldcompliance.com/en/resources/white-papers.aspx>> (accessed 12 April 2013), which lists 30 potential red flags.

¹³⁶ For background on the *Wolf Committee Report on Business Ethics, Global Companies and the Defence Industry: Ethical Business Conduct in BAE Systems plc – The Way Forward* (May 2008), see Colin Nicholls QC *et al*, *Corruption and Misuse of Public Office* (Oxford University Press, 2nd Ed, 2011) at paras 5.110–5.112. The *Wolf Committee Report on Business Ethics, Global Companies and the Defence Industry: Ethical Business Conduct in BAE Systems plc – The Way Forward* (May 2008) at p 26 lists the following red flags:

... a history of corruption in the territory; an Adviser has a lack of experience in the sector and/or with the country in question; non-residence of an Adviser in the country where the customer or the project is located; no significant business presence of the Adviser within the country; an Adviser represents other companies with a questionable reputation; refusal by an Adviser to sign an agreement to the effect that he has not and will not make a prohibited payment; an Adviser states that money is needed to 'get the business'; an Adviser requests 'urgent' payments or unusually high commissions; an Adviser requests payments

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be paid in cash, use of a corporate vehicle such as equity, or be paid in a third country, to a numbered bank account, or to some other person or entity; an Adviser requires payment of the commission, or a significant proportion thereof, before or immediately upon award of the contract by the customer to the company; an Adviser claims he can help secure the contract because he knows all the right people; an Adviser has a close personal/professional relationship to the government or customers that could improperly influence the customer's decision; an Adviser is recommended by a government official or customer; an Adviser arrives on the scene just before the contract is to be awarded; an Adviser shows signs that could later be viewed as suggesting he might make inappropriate payments, such as indications that a payment will be set aside for a government official when made to him; and/or there are insufficient *bona fide* business reasons for retaining an Adviser.

¹³⁷ "TRACE is a non-profit membership association working to reduce bribery in transactions involving intermediaries including agents, representatives, consultants, distributors and subcontractors among others": *TRACE Due Diligence Guidebook: Doing Business with Intermediaries Internationally* (2010) at p 1, available at <<https://secure.traceinternational.org/data/public/The2010TRACEDueDiligenceGuidebook-65418-1.pdf>> (accessed 11 April 2013) ("*TRACE Due Diligence Guidebook*"). The *TRACE Due Diligence Guidebook* states that the following acts or characteristics of an intermediary are red flags:

Requests payment in cash or to a numbered account or the account of a third party; Requests payment in a country other than the intermediary's country of residence or the territory of the sales activity (especially if it is a country with little banking transparency); Requests payment in advance or partial-payment immediately prior to a procurement decision; Requests payment for extraordinary, ill-defined or last-minute expenses; Has an employee who simultaneously holds a government position; Has a family member in a government position, especially if the family member works in a procurement or decision-making position or is a high-ranking official in the department that is the target of the intermediary's efforts; ... Has a business that seems understaffed, ill-equipped or inconveniently located to support the proposed undertaking; Has little or no expertise in the industry in which he/she seeks to represent his/her company; Is insolvent or has significant financial difficulties; Is ignorant or indifferent to local laws and

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involvement in corrupt dealings and also establish a principal's wilful blindness of the intermediary's corrupt intent if such circumstances were disregarded by the principal when it entered into the intermediary agreement (the latter will constitute corruption under certain legal regimes¹³⁸). The following have also been identified as potential indicia of corruption in general under the UNCAC¹³⁹ and the OECD Convention:¹⁴⁰ (a) the establishment of off-the-books accounts; (b) the making of off-the-books or inadequately identified transactions; (c) the recording of non-existent expenditures; (d) the entry of liabilities with incorrect identification of their object; (e) the use of false documents; and (f) the intentional destruction of bookkeeping documents earlier than foreseen by the law.¹⁴¹ Where necessary, expert testimony can be adduced to

regulations governing the region in question and the intermediary's proposed activities in particular ...

¹³⁸ For instance, under the US Foreign Corrupt Practices Act (15 USC §78dd-1), 'simple negligence' or 'mere foolishness' should not be the basis for liability. However ... *the so called 'head-in-the-sand' problem – variously described in the pertinent authorities as 'conscious disregard', 'willful blindness' or 'deliberate ignorance' – should be covered so that management officials could not take refuge from the act's prohibition by their unwarranted obliviousness to any action (or inaction), language or other 'signaling device' that should reasonably alert them of the 'high probability' of an FCPA violation.* [emphasis added]

See the 1977 Legislative History – House Report (House Conference Report No 100-576) at p 920, available at <<http://www.justice.gov/criminal/fraud/fcpa/history/1988/tradeact-100-418.pdf>> (accessed 4 March 2012).

¹³⁹ See Art 12(3).

¹⁴⁰ See Art 8(1).

¹⁴¹ See also Bernardo Cremades & David Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud" in *Arbitration, Money Laundering, Corruption and Fraud* (Kristine Karsten & Andrew Berkeley eds) (Dossiers-ICC Institute of World Business Law, 2003) at p 81.

assess these various indicia of corruption before a tribunal,¹⁴² so that the tribunal may better determine their weight and therefore whether corruption has been proven on a balance of probabilities.¹⁴³

49 In the exercise of its broad discretion in evaluating evidence of corruption, a tribunal may also draw adverse inferences¹⁴⁴ from an

¹⁴² See, for instance, Arts 25(3) and 25(4) of the 2012 International Chamber of Commerce Arbitration Rules (entry into force 1 January 2012), which provide that:

(3) The Arbitral Tribunal may decide to hear witnesses, *experts appointed by the parties* or any other person, in the presence of the parties, or in their absence provided they have been duly summoned.

(4) The Arbitral Tribunal, after having consulted the parties, *may appoint one or more experts, define their terms of reference and receive their reports*. At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert.

[emphasis added]

¹⁴³ Carolyn Lamm, Hansel Pham & Rahim Moloo, “Fraud and Corruption in International Arbitration” in *Liber Amicorum Bernardo Cremades* (Miguel Àngel Fernandez-Ballesteros & David Arias eds) (La Ley grupo Wolters Kluwer, 2010) at p 704.

¹⁴⁴ Adverse inferences are drawn by tribunals in other contexts as well. See, for instance, Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at para 6.129, fn 81:

The Iran-US Claims Tribunal drew adverse inferences from the silence of a party in the face of alleged breach or non-performance of the contract when some complaint would have been expected and from failure of a party to mention a point in a contract or in contemporaneous correspondence consistent with their position in the arbitration.

See also Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at pp 1855–1856:

Tribunals are permitted to rely on presumptions or inferences regarding evidence. Examples include negative inferences drawn from a party’s failure to produce obviously material documents or witnesses in its control, a party’s failure to comply with disclosure orders, other types of procedural misconduct in the arbitration, the absence of

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impugned party's failure, without sufficient justification, to provide evidence requested by the tribunal.¹⁴⁵ Commentators neatly summarise the position thus:¹⁴⁶

When deciding to draw adverse inferences, a tribunal must determine that: 1) the party requesting that an adverse inference be made has presented all relevant evidence in its possession and, in any event, has presented sufficient indicia of fraud or corruption to corroborate its allegations of illicit activity; 2) the party against whom the adverse inference is being made refuse to produce evidence, which it likely has access to and which it has been required to produce; 3) the inference being drawn is consistent with the facts in the record and logically related to the evidence being withheld.

contemporaneous objection to invoices or other correspondence, and the regularity of contemporaneous records.

¹⁴⁵ See Art 9(5) of the International Bar Association Rules on the Taking of Evidence in International Arbitration 2010 (29 May 2010):

If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.

See also Carolyn Lamm, Hansel Pham & Rahim Moloo, "Fraud and Corruption in International Arbitration" in *Liber Amicorum Bernardo Cremades* (Miguel Àngel Fernandez-Ballesteros & David Arias eds) (La Ley grupo Wolters Kluwer, 2010) at pp 704–706; and *Rockwell International Systems, Inc v Government of the Islamic Republic of Iran* (1989) 23 Iran-US Claims Tribunal Rep 150 (the tribunal observed in relation to Iran's refusal to grant the claimant access to relevant documents in its possession that "*prima facie* evidence must be recognized as a satisfactory basis to grant a claim where proof of the facts underlying the claim presents extreme difficulty *and an inference from the evidence can be drawn*" [emphasis added]).

¹⁴⁶ Carolyn Lamm, Hansel Pham & Rahim Moloo, "Fraud and Corruption in International Arbitration" in *Liber Amicorum Bernardo Cremades* (Miguel Àngel Fernandez-Ballesteros & David Arias eds) (La Ley grupo Wolters Kluwer, 2010) at p 706.

50 The tribunal may also draw adverse inferences from a party's failure or inability to adduce counter evidence where *prima facie* evidence of its involvement in corruption has been produced. The result of drawing such inferences may be to allow the tribunal to make a finding of corruption where the evidence is otherwise insufficient to meet the balance of probabilities standard.¹⁴⁷ Drawing of an adverse inference in this situation is different from reversing the burden of proof. An adverse inference only arises from a failure by the impugned party to adduce evidence, *which can be reasonably construed in the circumstances as an attempt to conceal corrupt activities*. It provides the party alleging corruption with an additional inferred fact to discharge its burden of proof, which burden remains on that party throughout the proceedings. On the other hand, a reversal of the burden of proof is effected upon mere provision of some *prima facie* evidence of corruption by the party alleging corruption, *even if there is no suspicious withholding of or refusal to adduce evidence by the impugned party*; the latter *thereafter* bears the burden of *disproving* corruption. One example of a case in which an adverse inference was drawn is ICC Case No 3916 (1982). Here, the tribunal held that the impugned intermediary's repeated refusal to disclose the "personal actions" taken to procure an Iranian public contract for his principal gave rise to the presumption that corrupt activities were being concealed.¹⁴⁸

51 The tribunal must, however, proceed with caution before drawing any adverse inference. An adverse inference should only be drawn if it is the natural inference from the facts, and dispositive effect given to it if it is so cogent or compelling that it tips the preponderance of evidence in favour of the existence of corruption. Silence can often be motivated by innocent reasons and even if it gives rise to a suspicion of wrongdoing, it

¹⁴⁷ Constantine Partasides, "Proving Corruption in International Arbitration: A Balanced Standard for the Real World" (2010) 25(1) ICSID Rev-FILJ 47 at paras 62–77.

¹⁴⁸ Maziar Jamnejad's summary of the Chatham House International Law discussion group meeting on "*World Duty Free v The Republic of Kenya: A Unique Precedent?*" (28 March 2007) at p 10, available at <<http://www.chathamhouse.org/publications/papers/view/108450>> (accessed 11 April 2013).

must be weighed against the weaknesses in the complainant's case. It is not in every case that an adverse inference can *in itself* fill in crucial gaps in the evidence. For instance, there should have been no room for drawing an adverse inference on the facts of *EDF*, even if there was no counter-evidence adduced by the respondent to rebut the allegations of corruption against it. The tribunal noted that, given the inconsistencies and weaknesses in the claimant's evidence of corruption, "the gaps in the [claimant's] story [of solicitation of bribes by the respondent] [were] very significant".¹⁴⁹ For example, when the principal witness for the claimant gave evidence that he had been informed of the identity of the person who solicited the bribe, he contradicted earlier denials made to the Romanian Anti-Corruption Authority that he did not know who that person was.¹⁵⁰ Moreover, such evidence as to that person's identity was hearsay which, whilst admissible, was insufficient proof of the respondent's solicitation of the bribe.¹⁵¹ Thus, even though the "[r]espondent's witnesses' denials [of corruption] were also not clear and convincing",¹⁵² the claimant arguably could not have discharged its burden of proof even on the balance of probabilities standard.

52 To conclude, the authors agree with Partasides' view that tribunals should eschew the "unthinking rigidity"¹⁵³ of invariably applying a "clear and compelling" standard of proof once corruption is alleged. Different circumstances call for different demands as to the strength and quality of the evidence required to prove corruption to the tribunal's satisfaction. The balance of probabilities standard remains the compass, but it is to be

¹⁴⁹ *EDF (Services) Ltd v Romania* [Award] ICSID Case No ARB/05/13 (8 October 2009) at [224].

¹⁵⁰ *EDF (Services) Ltd v Romania* [Award] ICSID Case No ARB/05/13 (8 October 2009) at [223].

¹⁵¹ *EDF (Services) Ltd v Romania* [Award] ICSID Case No ARB/05/13 (8 October 2009) at [224].

¹⁵² *EDF (Services) Ltd v Romania* [Award] ICSID Case No ARB/05/13 (8 October 2009) at [227].

¹⁵³ Constantine Partasides, "Proving Corruption in International Arbitration: A Balanced Standard for the Real World" (2010) 25(1) ICSID Rev-FILJ 47 at para 60.

flexibly understood and applied, so as to accommodate the specific circumstances of each case. Other devices, such as the drawing of adverse inferences and reliance on indirect indicia of corruption, assist tribunals in uncovering corruption which has been concealed from inspection. As Partasides points out:¹⁵⁴

Tribunals will sometimes know what they are looking at, even if there are some missing pieces. In the right circumstances, they shouldn't hesitate to make the logical deduction simply because the allegation is serious.

53 It is of course cautioned that inferences must be justifiably drawn on the facts and circumstantial evidence must carry sufficient weight to be probative of corruption. The fight against corruption must be balanced with the rights of the parties and the integrity of the fact finding process in international arbitration. While “[i]n reality, many arbitrators will allow corruption allegations to colour their judgment without actually stating that that is the case, chiefly due to the evidential difficulties faced if they were explicit in their views”,¹⁵⁵ arbitrators must not succumb to this temptation and instead remind themselves, as *Himpurna* emphasised, that mere “[r]umours or innuendo will not do”. Their duty is to decide cases by assessing the evidence in accordance with the law and not mere suspicions based on equivocal evidence.

¹⁵⁴ Constantine Partasides, “Proving Corruption in International Arbitration: A Balanced Standard for the Real World” British Institute of International and Comparative Law on *Impact of Bribery and Corruption on the International Arbitral Process*, London (18 January 2011) at para 69.

¹⁵⁵ Maziar Jamnejad’s summary of the Chatham House International Law discussion group meeting on “*World Duty Free v The Republic of Kenya: A Unique Precedent?*” (28 March 2007) at p 14, available at <<http://www.chathamhouse.org/publications/papers/view/108450>> (accessed 11 April 2013).

IV. Determining the law governing the elements and legal consequences of corruption: Conflict of laws analysis in relation to intermediary agreements

54 In order to make a finding that a party has committed a “corrupt” act and to determine the legal consequences which ensue, a tribunal must ascertain whether the established facts make out all the elements of the offence of corruption *under the applicable law*. In the first instance, the tribunal will look to the law chosen by the parties to govern their contract. Naturally, rational and sophisticated commercial parties will choose a law which upholds the validity of their contract – they will not subject the contract to a law containing anti-corruption regulations or public policy considerations rendering the contract unenforceable. However, mandatory laws or public policies of the place of performance or arbitral seat may provide, contrary to the parties’ chosen law, that one or both parties had committed corrupt acts, or entered into their contract with corrupt intentions.

55 Where such differences between the potentially applicable laws arise, conflict of laws analysis come into play to determine the law governing the existence and consequences of corruption. Of course, this scenario will almost never arise where outright bribery of government officials is in issue. No civilised country will tolerate such a clear case of corruption¹⁵⁶ and, therefore, regardless of the choice of law and substantive rules applied by the tribunal, the same result ensues:¹⁵⁷ a corrupt act will be deemed to have been committed or contemplated under the contract and claims brought by a corrupt party will be

¹⁵⁶ See paras 2 and 5–9 above. *Cf* Kenyan local customs, discussed at para 94 below.

¹⁵⁷ Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at pp 2139–2140. See also Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at pp 260–261.

dismissed.¹⁵⁸ This is a “false conflict” situation which does not call for the tribunal to engage in conflict of laws analysis.

56 However, a “true conflict” can arise in disputes involving intermediary agreements which contemplate the exercise of personal influence over government officials.¹⁵⁹ It will be recalled that intermediary agreements are contracts under which an intermediary is engaged by his principal to assist in procuring for the latter a government contract or licences and approvals to do business in a particular country.¹⁶⁰ Intermediary agreements often provide that the seat of arbitration and the country whose law governs the contract is not the country awarding the contract or licence. For instance, in *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd*⁶¹ (“*Hilmarton*”), the intermediary agreement between a French corporation and an English intermediary was to be performed in Algeria (the intermediary was to negotiate with Algerian government officials to procure for the principal a construction contract in Algeria), but was governed by Swiss law and provided for arbitration in Switzerland. The conflict between Algerian and Swiss law was evident in this case: anti-corruption regulations under Algerian law prohibited all intermediation in government procurement, whereas Swiss law applied no such presumption against intermediary agreements.

¹⁵⁸ For a discussion of the legal consequences of a finding of corruption, see paras 94–105 below.

¹⁵⁹ Conflict of laws analysis may also be necessary (whether or not an intermediary agreement is involved) where there are differences between the potentially applicable laws to the parties’ dispute with respect to the precise elements of corrupt conduct amounting to public or private sector bribery (see n 20 above and the accompanying text). Where such differences arise, the conflict of laws analysis set out in this part is also generally applicable *mutatis mutandis*. Note, however, that these differences are bound to be less pronounced as compared to the attitudes adopted by different jurisdictions towards the propriety of intermediary agreements (discussed in the following paragraphs).

¹⁶⁰ See para 35 above.

¹⁶¹ [1999] 2 Lloyd’s Rep 222 (“*Hilmarton*”). *Hilmarton* is discussed in greater detail at paras 77–78 below.

57 *Hilmarton* thus demonstrates the potential for true conflict to arise in disputes involving intermediary agreements. Some countries, such as Algeria (the place of performance in *Hilmarton*), adopt a broad prophylactic rule prohibiting intermediary agreements *per se*,¹⁶² “under the assumption that such [agreements] conceal corruption”,¹⁶³ in light of concerns¹⁶⁴ that intermediary agreements are intended for the bribery of, or the exercise of *improper* personal influence over, government officials, whether or not this is proven to have occurred or been intended by the parties. However, this is by no means a universal practice.¹⁶⁵ Many

¹⁶² See generally Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at pp 192–193 and 199; and Peter Muchlinski, Federico Ortino & Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) at p 607. Countries like Algeria, Libya and Saudi Arabia completely ban the use of intermediaries in the procurement of armament contracts (government entities only accept offers that come directly from suppliers and manufacturers). Other countries like Egypt, Kuwait and Bahrain restrict the appointment of intermediaries to registered consultant firms or domestic citizens.

¹⁶³ Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at pp 168–169.

¹⁶⁴ Discussed at paras 36–39 above.

¹⁶⁵ Some Gulf States in fact expressly permit or even mandate the use of local intermediaries in the procurement of public contracts: see Antonio Crivellaro, “Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence” in *Arbitration, Money Laundering, Corruption and Fraud* (Kristine Karsten & Andrew Berkeley eds) (Dossiers-ICC Institute of World Business Law, 2003) at p 112. See generally Sayed’s extensive discussion of the anti-corruption laws of various jurisdictions (Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at pp 190–230 and 348–353); Peter Muchlinski, Federico Ortino & Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) at pp 607–608, fn 107. See also *Shaikh Faisal v Swan Hunter Singapore Pte Ltd* [1995] 2 SLR(R) 605, a case which concerned the appointment of an intermediary in the United Arab Emirates (“UAE”) to tender for a contract to supply military vehicles to the UAE armed forces. This case

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other jurisdictions, such as Switzerland (the seat of arbitration and the country whose law the parties chose to govern the intermediary agreement in *Hilmarton*), eschew a *per se* prohibition against intermediary agreements and instead require demonstration that the parties in fact intended for the intermediary to bribe or otherwise exercise improper influence over public officials, or that the agreement was performed in this manner.

58 A number of legal regimes can be cited as adopting the latter position. For instance, Article 18 of the UNCAC,¹⁶⁶ Article 4(1)(f) of the African Union Convention on Preventing and Combating Corruption¹⁶⁷ and Article 12 of the COE Criminal Law Convention only require state parties to criminalise the “abuse” or exercise of “improper” influence by an influence peddler. The Explanatory Report to Article 12 of the COE Criminal Law Convention further provides that: “[i]mproper’ influence must contain a corrupt intent by the influence peddler: acknowledged forms of lobbying do not fall under this notion”.¹⁶⁸

59 A similar position prevails under English common law. In *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd*¹⁶⁹ (“*Lemenda*”) – a case concerning an intermediary agreement under which the plaintiff was to procure for the defendant the renewal of an oil supply contract, through the use of its personal influence on various persons in Qatar – Philips J recognised that, “in certain circumstances the employment of intermediaries to lobby for contracts or other benefits is a recognised and

demonstrates that both Singapore and the UAE do not prohibit the use of intermediaries in tendering for government contracts *per se*. See further n 172 below.

¹⁶⁶ See n 35 above.

¹⁶⁷ 11 July 2003; entry into force 5 August 2006.

¹⁶⁸ Council of Europe Criminal Law Convention on Corruption (Eur TS No 173) (27 January 1999; entry into force 1 July 2002) Explanatory Report at para 65. For an explanation of how lobbying works in practice, see n 114 above.

¹⁶⁹ [1988] QB 448.

respectable practice”.¹⁷⁰ Referring to this comment in *Lemenda*, Jack J in *Tekron Resources Ltd v Guinea Investment Co Ltd*¹⁷¹ explained that a representation agreement between the plaintiff and defendant, which required the plaintiff to conduct negotiations with the Government of Guinea in return for a commission, could not be held (as alleged) illegal and/or contrary to English or Guinean public policy, merely because it was contemplated that the plaintiff would use its personal influence in carrying out its obligations:¹⁷²

Mr Smouha submitted that there were *three reasons of public policy* why agreements such as the representation agreement should be considered to be contrary to public policy under English law. *The first was that, where an intermediary has a special personal relationship with an official, there is a risk that the official's decision will be affected. The second was that, where there is such a relationship, transparency may be lost. The third was that such an intermediary will inevitably be in a position of conflict because his desire to preserve his relationship will conflict with his duty to his client. I accept that these are valid considerations. They are not the only*

¹⁷⁰ *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448 at 458. Cf *Montefiore v Munday Motor Components Co Ltd* [1918] 2 KB 241. For an explanation of how lobbying works in practice, see n 114 above.

¹⁷¹ [2003] EWHC 2577.

¹⁷² *Tekron Resources Ltd v Guinea Investment Co Ltd* [2003] EWHC 2577 at [99] and [101]. For Singaporean authority to the same effect, see *Shaikh Faisal v Swan Hunter Singapore Pte Ltd* [1995] 2 SLR(R) 605 at [79], [88] and [93]:

There is really *nothing wrong as such* in the use of agents. In fact, that is the manner in which transnational transactions are often carried out ... It would be apparent that the fact situation in *Lemenda* is quite different from our present case. There the evidence clearly showed that the plaintiffs exercised *undue* influence on persons in authority; that was what was expected of the plaintiffs there ... There is no evidence before me at all that there is such a public policy in Singapore which prohibits a foreign arms supplier from appointing a local agent in relation to a tender. *Nothing is submitted to me to show that it is in the public interest of Singapore to prohibit such appointments.* [emphasis added]

considerations. The question is whether they require that an intermediary who deals with an official, a minister, a government department and successfully builds a relationship of respect, of confidence, of trust, is to be barred from further dealings by the very fact of the relationship once it has been sufficiently established. There are, of course, advantages in officials dealing with persons whom they respect and can trust and in whom they have confidence.

In my view it would be a substantial extension of the ambit of public policy as established in the cases if I were to accept Mr Smouha's submission. It would prevent the use of intermediaries in numerous situations where their use is now well-established in commercial situations, whether or not a 'public' body is involved. It would also bring in a serious element of uncertainty as to where the line was to be drawn. At what point would an intermediary cease to be able to negotiate fresh transactions with a particular third party? What happens when a position of 'influence' develops during a negotiation? The previous authorities which I have considered [which included the case of Lemenda] were concerned with what I may call the sale of influence and only influence, and in circumstances in which it could be considered that the use of the influence would involve some impropriety. I should not accept Mr Smouha's submission.

[emphasis added in bold and italics]

The same general principles appear applicable in civil law jurisdictions, which do not prohibit intermediary agreements *per se*. In its definition of "trafficking in influence", Article 433-1 of the French Criminal Code 1810 refers to "abuse" of influence to obtain "contracts or any other favourable decision from a public authority or the government". The tribunal in ICC Case No 7664 (1996) thus noted that, under French law, an agreement for an intermediary to exercise corrupt influence over public officials is illegal, but:¹⁷³

¹⁷³ ICC Case No 7664 (1996) at [66]. Translation of the award provided in Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at p 353. Challenges to the award in Switzerland and France were initially dismissed, but after the respondent filed a complaint claiming fraud and conspiracy in France and resultant criminal proceedings revealed a fraudulent scheme carried out
(continued on next page)

... [w]e know that in international trade a lot of the big ticket operations are accompanied by contracts of commission stipulating that the agent shall have the obligation to intervene in favour of the conclusion or the performance of the contract. Such a contract does not involve, in its own logic, any defect affecting its validity.

Likewise, applying Swiss law, the tribunal in ICC Case No 7047 (1994) (whose award was the subject of the *Westacre Investments Inc v Jugoimport-SDPR Holdings Co Ltd* (“*Westacre*”) proceedings in England¹⁷⁴ and Switzerland¹⁷⁵) held that:¹⁷⁶

Lobbying as such is not an illegal activity. Lobbying by private enterprises to obtain public contracts in third countries is frequently carried on with active support from the state, as witnessed by numerous visits of heads of government or heads of state, who are normally accompanied by representatives of commercial enterprises from the visitor’s country, in the hope that they will secure public contracts for their enterprises from the country they visit.

60 However, even these jurisdictions which eschew the adoption of a basic prohibition against intermediary agreements are liable to differ as to precisely where the line should be drawn between “acknowledged [and legitimate] forms of lobbying” on the one hand and “abuse” or “improper” exercise of influence on the other. Such differences between

by the claimant to conceal evidence of corruption during the arbitral proceedings, the award was ultimately set aside in Switzerland (the seat of arbitration) and refused enforcement in France. The case is discussed further at paras 122–123 and 140–141 below.

¹⁷⁴ *Westacre Investments Inc v Jugoimport-SDPR Holdings Co Ltd* [1999] 3 WLR 811.

¹⁷⁵ See the Swiss Federal Tribunal’s judgment of 30 December 1994, reviewed in Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at pp 401–402.

¹⁷⁶ (1995) 13(2) ASA Bulletin 301 at 339. See further Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at pp 350–351 discussing the application of Swiss law in the Swiss courts’ decisions in *Hilmarton Ltd v Omnium de Traitment et de Valorisation SA* [1999] 2 Lloyd’s Rep 222 and ICC Case No 4145 (1983, 1984, 1986).

the laws of these jurisdictions may also give rise to a “true conflict” situation requiring choice of law analysis.

61 Some jurisdictions are bound to take a more permissive attitude towards a broader range of lobbying practices than others. This is perhaps one of the main reasons why several State parties to the COE Criminal Law Convention have registered reservations to Article 12, which prohibits trading in influence.¹⁷⁷ The Netherlands, for instance, has declared that it will not fulfil its obligation under Article 12, on the basis that:¹⁷⁸

... certain forms of influence, whether financial or not, over decisions of public officials or politicians may be lawful [and] [i]t is only when the lobbying or attempt to exert influence results in the holding out the prospect of specific advantages to the public official(s) involved in the decision-making process, that the bounds of propriety are over-stepped.

62 As Abdulhay Sayed points out, in drawing a distinction between corrupt and (what he terms) “symbolic” influence, a multitude of factors may be considered relevant in determining whether an intermediary agreement should be regarded as corrupt trading in influence, such as the nature of the influence exercised by the intermediary and its compatibility with the public interest:¹⁷⁹

‘[S]ymbolic’ influence ... relates to the situation of an intermediary who does not use corrupt means ... in order to obtain favorable public decisions. Rather the intermediary attempts to use influence, understood in terms of a symbolic capital, which could be composed of *stature and respectability or recognized standing in society*, to obtain favorable public decisions. In appreciating symbolic influence, it would be appropriate to consider its *origin and direction*. *The origin of symbolic influence could include family relations with government officials, parasite friendship or business association with influential decision-makers* [in which case, the influence exercised is likely to be

¹⁷⁷ See para 58 above.

¹⁷⁸ Colin Nicholls QC *et al*, *Corruption and Misuse of Public Office* (Oxford University Press, 2nd Ed, 2011) at para 14.27.

¹⁷⁹ Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at p 200.

corrupt]. It could also include standing respectability in business circles as well as by State officials. *The direction of the symbolic influence played could either run against the public interest, or be compatible with such interest.* [emphasis added]

Any given jurisdiction may or may not take into consideration all or any of these factors. By way of example, the English common law view (set out in *Lemenda*) is that non-disclosure of the intermediary's financial interest to the public official who is to be influenced is one factor which may militate in favour of finding "abuse" or "improper" exercise of influence by the intermediary. Philips J thus held that:¹⁸⁰

... it is generally undesirable that a person in a position to use personal influence to obtain a benefit for another should make a financial charge for using such influence, *particularly if his pecuniary interest will not be apparent.* [emphasis added]

Since, in that case, "the influence was to be exerted in circumstances where it was essential that the person influenced should be *unaware of Mr Yassin's [the intermediary's] pecuniary interest* [and] [t]he amounts at stake, both in terms of the value of the contract that it was hoped to obtain and the *size of the commission to be earned by Mr Yassin, were enormous*" [emphasis added],¹⁸¹ the intermediary agreement was held to be contrary to English public policy. Another jurisdiction could conceivably adopt a different view or emphasise different factors.

63 It can thus be seen that jurisdictions may adopt differing attitudes to the propriety of intermediary contracts. The parties' chosen law may not prohibit an intermediary agreement, whereas the laws or public policy

¹⁸⁰ *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448 at 457–458.

¹⁸¹ *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448 at 458. Applying this principle in *R v V* [2008] EWHC 1531 (Comm), Steel J held (at [48]) that the intermediary agreement for the sale of the intermediary's influence on the state-owned entity was not in contravention of English public policy because the agreement did not require the intermediary to exert its influence without the state-owned entity's knowledge of the intermediary's financial interest.

rules of the place of performance or the arbitral seat may prohibit it absolutely, or may regard it as infected by impropriety which the chosen law disregards. In Sayed's words:¹⁸²

What is at stake at present is the issue whether a mandatory law prohibiting corruption or intermediation in government procurement has such an overwhelming claim to apply, that a choice of foreign law becomes, so to speak, impossible in its presence ... In other words, can the parties to a contract, which may raise allegations of corruption, choose a law precisely because it is indifferent to the kind of intermediary relationship embodied in the contract?

64 This issue will turn on: (a) the applicable conflict of laws rules; and (b) the conditions prescribed by the applicable conflict of laws rules for the chosen law to be overridden by the law of the place of performance or the arbitral seat.

A. *The applicable conflict of laws rules in international arbitration*

65 In international arbitration, there is considerable divergence in opinion as to the correct approach for determining the applicable conflict of laws rules.¹⁸³ This stems from the fact that, unlike national courts, arbitral tribunals do not have a "forum" as such, whose conflict of laws rules are automatically applicable.¹⁸⁴ Moreover, domestic arbitration

¹⁸² Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at p 169.

¹⁸³ Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at pp 2122–2138.

¹⁸⁴ See generally Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at pp 2124–2126. See also Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at p 264; Emmanuel Gaillard & John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) at para 1517; Bernard Hanotiau, "What Law Governs the Issue of Arbitrability?" (1996) 12 *Arb Int'l* 391 at 396–397.

legislation generally confer upon tribunals wide discretion to select “the conflict of laws rules which it considers applicable”.¹⁸⁵

66 National courts and arbitral awards increasingly reject the application of the seat’s conflict of laws rules, reasoning that international parties are guided by considerations of practical convenience in choosing the seat; it therefore should not be given any importance in determining the law applicable to the substance of the dispute.¹⁸⁶ One authority notes that:¹⁸⁷

The modern trend is to recognize that any perceived obligation to apply the choice of law rules of the seat stems from a false comparison of the seat of an arbitral tribunal with a judicial forum. A national court judge must apply the conflicts rules of the forum. ... The international arbitrator’s powers, on the other hand, are derived from an arbitration agreement, and an arbitrator does not exercise public or institutional power in the name of the State.

67 Thus, tribunals have adopted different approaches in determining the applicable substantive law, which are not derived from the seat’s national conflict of laws rules, such as the “cumulative” application of all conflicts rules of states with a meaningful connection to the dispute; the application of “international” choice of law rules derived from

¹⁸⁵ UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) Art 28(2). See to similar effect s 46(3) of the UK Arbitration Act 1996 (c 23). See also, generally, Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at pp 2115–2117.

¹⁸⁶ See Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at p 2126 citing, *inter alia*, *Konkar Indomitable Corp v Fritzen Schiffsagentur and Bereederungs GmbH* US Dist LEXIS 9637 (1981); *Corripagnie d’Armement Maritime SA v Compagnie Tunisienne de Nav SA* [1971] AC 572 at 600; ICC Case No 2930 (1982); ICC Case No 6527 (1991); and ICC Case No 8113(1995).

¹⁸⁷ Laurence Craig, William Park & Jan Paulsson, *International Chamber of Commerce Arbitration* (Oceana Publications, 3rd Ed, 1998).

non-national sources; and the application of the substantive law of the state with the closest connection to the dispute.¹⁸⁸

68 However, the authors prefer the approach suggested by Born, who persuasively argues that tribunals should continue to apply the seat's national choice of law rules.¹⁸⁹ This approach still finds favour in arbitral and national case law,¹⁹⁰ and accords best with the intentions of international commercial parties, as it provides for the governing law to be determined by a *predictable and presumptively neutral set of conflicts rules*. As Born explains:¹⁹¹

¹⁸⁸ See generally Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at pp 2128–2138. See also Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at pp 260–264.

¹⁸⁹ Except where there is evidence of contrary agreement by the parties, or some reason that application of the arbitral seat's conflicts rules would be anomalous: see Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at p 2142. See also generally Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at pp 2114–2117 (surveying the conflicts rules applicable to international arbitration under various national arbitration statutes).

¹⁹⁰ See the awards and decisions cited by Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at pp 2127–2128, fnn 95 and 99 and pp 2190–2191, fn 395, in particular ICC Case No 7262 (1996), in Grigera Naón, "Choice-of-Law Problems in International Commercial Arbitration" (2001) 289 *Recueil des Cours* 9, 231 (selection of Swiss arbitral seat "indicate[s] confidence of the parties in the Swiss legal system"; and ICC Case No 8619 (1997):

It can be reasonably argued that the parties who fail to explicitly agree on an applicable substantive law, but agree on arbitration at a specified place pursuant to specified arbitration rules and procedures ... *impliedly also agree – or at least impliedly accept a determination to that effect – on the conflict of laws rules of the law of the jurisdiction in which the place of arbitration is located.* [emphasis added]

¹⁹¹ Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at pp 2140–2142. See also Gary Born, *International*
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... *rational commercial parties desire predictability, certainty and neutrality* with regard to the substantive law applicable to their dispute ... Absent ... an international instrument [such as the UN Sale of Goods Convention or the Rome Convention], however, *there is as yet no sufficiently developed international conflicts regime to provide appropriate choice-of-law rules for application ... Accordingly, in these circumstances, the next-best solution is application of a neutral, predictable national choice-of-law rule.* Although there will be exceptions, the choice-of-law system of the arbitral seat presumptively provides a more plausible, sensible candidate for the choice of conflicts rules than any other system ... the parties' agreement to arbitrate in a particular place carries with it an implied acceptance of aspects of the procedural law of the arbitral seat (in particular, the arbitration law of the arbitral seat, which will often be mandatorily applicable). The legal rules that are encompassed by this implied agreement should ordinarily extend, absent contrary indication, to basic procedural and 'institutional' aspects of the dispute resolution process, such as choice-of-law rules. Further, the choice-of-law rules of the arbitral seat are presumptively neutral and objectively satisfactory to the parties (who have generally agreed upon the arbitral seat precisely because they regard it as neutral and acceptable). No less important, *selecting the choice-of-law rules of the arbitral seat provides a simple, easily-administrable and highly-predictable rule. This avoids the uncertainty and potential arbitrariness of inquiry into what choice-of-law rules are 'appropriate', or what substantive law should be 'directly' applied, as well as the uncertainties associated with the need to choose among a number of potentially-applicable conflicts systems ... doing so introduces unnecessary and damaging uncertainty into the choice-of-law process, which objectively rational commercial parties would never have intended.* [emphasis added]

B. Conflict of laws considerations determining whether the law of the place of performance or the seat of arbitration overrides the parties' chosen law

69 Having ascertained that the applicable conflict of laws rules are those of the seat, the tribunal should then have regard to these rules to determine whether the circumstances call for the parties' chosen law to be overridden by the laws or public policy rules of the place of performance, or that of the seat.

70 Let us recall that we are dealing with an intermediary agreement, which is valid under the chosen law, but illegal or contrary to public policy under the law(s) of the place of performance and/or the seat. While respect for party autonomy and freedom of contract requires that the parties' choice of law be upheld in most cases,¹⁹² conflict of laws rules of developed legal systems impose reasonable limits on party autonomy and allow the chosen law to be overridden under prescribed circumstances. Common candidates which may replace the parties' chosen law are the law of the place of performance and the arbitral seat.

(1) Law of the place of performance

71 Oftentimes, the parties and the intermediary agreement will have little or no connection with the jurisdiction that supplies the chosen law. They are instead more closely connected to the place of performance. Some jurisdictions provide that public policy considerations expressed through mandatory laws or *lois de police* of the place of performance can override the chosen law if they have a sufficiently close relationship to the parties' dispute.¹⁹³

¹⁹² See generally Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at p 163 and Peter Muchlinski, Federico Ortino & Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) at p 607.

¹⁹³ See generally Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at pp 2172–2173 and Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law

72 Mandatory laws are defined as:¹⁹⁴

imperative provision[s] of law which must be applied to an international relationship irrespective of the law that governs that relationship ... a matter of public policy ... so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws.

Whether a given rule is considered mandatory depends on the proper construction of its nature, purpose and scope.¹⁹⁵ For instance, in ICC Case No 7047 (1994) (the award in this case gave rise to the challenge proceedings in *Westacre*¹⁹⁶) the tribunal declared that a circular issued by the Kuwaiti Ministry of Defence (“MoD”) against the respondent which prohibited the use of intermediaries by the respondent in the procurement of contracts with the MoD¹⁹⁷ was merely a “contractual condition imposed by one contracting party – MoD – on the other party –

International, 2004) at pp 261–262. See, for instance, Arts 9(2), 9(3), 16 and 21 of the Rome I Regulation (No 593/2008) (17 June 2008); Art 11 of the Inter-American Convention on the Applicable Law to International Contracts (17 March 1994, Mexico); Art 16 of the Convention on the Law Applicable to Agency (14 March 1978, The Hague); and s 178 of the American Restatement of the Law on Conflict of Laws (reproduced in Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at pp 254–255).

¹⁹⁴ Pierre Mayer, “Mandatory Rules of Law in International Arbitration” (1986) 2 Arb Int’l 274 at 275.

¹⁹⁵ See generally James Fawcett & Janeen Carruthers, *Cheshire, North & Fawcett: Private International Law* (Peter North ed) (Oxford University Press, 14th Ed, 2008) at pp 728–741; and Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at pp 2186–2193.

¹⁹⁶ *Westacre Investments Inc v Jugoimport-SDPR Holdings Co Ltd* [1999] 3 WLR 811; discussed at paras 127–131 below.

¹⁹⁷ The terms of the circular are set out in Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at p 268, fn 840.

the [respondent]” and thus did not amount to a foreign mandatory law.¹⁹⁸ As Sayed explains:¹⁹⁹

... it was clear that the no-commission requirement [imposed by the MoD] did not express generally applicable rules, but was rather put forward during the negotiation process. They also were not justified by a general policy of fighting corruption in government procurement. Rather they appeared reactive. This has undermined their imperative pretense. In contrast, it may be argued that where a general law prohibiting intermediation practice is carried by a legislative intent to combat bribery, and is backed by a collection of sanctions suggesting a high degree of interest in determining the nature of the relationship under consideration, it would be more likely for it to be qualified as mandatory.

73 An example of a choice of law rule providing for application of mandatory laws of the place of performance is Article 9(3) of the Rome I Regulation.²⁰⁰ Article 9(3) permits discretionary application of the

¹⁹⁸ (1995) 13(2) ASA Bulletin 301 at 330.

¹⁹⁹ Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at pp 270–271.

²⁰⁰ The Rome I Regulation (No 593/2008) (17 June 2008) is based on and replaces the Rome Convention on the Law Applicable to Contractual Obligations 1980 (80/934/ECC) (19 June 1980; entry into force 1991) (“Rome Convention”). Although Art 1(2)(e) of the Rome I Regulation provides that “arbitration agreements” are “excluded from the scope of this Regulation”, “this only affects the clause itself; the remaining clauses in the contract will be within the scope of the [Rome I Regulation] and judges and arbitrators will have to apply the rules under the [Rome I Regulation] to them”: James Fawcett & Janeen Carruthers, *Cheshire, North & Fawcett: Private International Law* (Peter North ed) (Oxford University Press, 14th Ed, 2008) at pp 684–685. In the same vein, Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at p 2113 notes that the Rome Convention (and by extension, the Rome I Regulation) can be applied to international arbitrations seated in contracting states:

Most arbitral tribunals seated in a Contracting State have considered that the Rome Convention is potentially applicable, in the same manner as a national choice-of-law rule, to determine the substantive law applicable to contractual obligations. Commentators have also generally

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“overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed”, having regard to their “nature and purpose and to the consequences of their application or non-application”.²⁰¹ “Overriding mandatory provisions” are in turn defined in Article 9(1) as:

... provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

74 Similar effect is given to mandatory laws under Article 19(1) of the Swiss Private International Law Act 1987 (“PILA”), which provides for application of a “closely connected” foreign mandatory law over the law chosen by the parties (or the otherwise applicable proper law) if a party’s “legitimate and manifestly preponderant interests” so require:

Art 19

VII. Taking into account of mandatory provisions of foreign law

1 *If, pursuant to Swiss legal concepts, the legitimate and manifestly preponderant interests of a party so require, a mandatory provision of a law other than that designated by*

assumed the Convention’s applicability in international arbitrations sited in Contracting States, albeit without detailed analysis. In principle, the Rome Convention should be applied in international arbitration in the same manner that national choice-of-law rules are applied. That is because the Convention is a form of national choice-of-law rule, applicable to courts within Contracting States, which therefore possesses the same status *vis-à-vis* international arbitral tribunals seated within those states as an otherwise applicable national conflicts system or a substantive rule of law.

²⁰¹ See also Sayed’s comments on the Rome Convention on the Law Applicable to Contractual Obligations 1980 (80/934/ECC) (19 June 1980; entry into force 1991) in Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at pp 263–264; and James Fawcett & Janeen Carruthers, *Cheshire, North & Fawcett: Private International Law* (Peter North ed) (Oxford University Press, 14th Ed, 2008) at p 739.

this Code may be taken into account *if the circumstances of the case are closely connected with that law*.

- 2 In deciding whether such a provision must be taken into account, its purpose is to be considered as well as whether its application would result in an adequate decision under Swiss concepts of law.

[emphasis added]

Swiss arbitral tribunals have applied Article 19 of the PILA in the context of intermediary agreement disputes and held that mandatory rules of law contained in a law other than that chosen by the parties (for brevity, such rules are referred to as “foreign mandatory rules” or “foreign mandatory laws”), which prohibit the use of intermediaries *per se*, do not give rise to sufficiently “legitimate and manifestly preponderant” interest, or may not be sufficiently “closely connected” with the parties’ dispute, for them to supersede the parties’ chosen law.²⁰² Reasons given include the fact that these foreign mandatory rules serve the host State’s narrow domestic interest²⁰³ as opposed to the “fundamental interests of the individual or

²⁰² See the Jurgen Dohm Award (1989) (1993) 11(2) ASA Bulletin 216, reviewed in Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at pp 271–272.

²⁰³ The Swiss Federal Tribunal has, for instance, described the Algerian prohibition against intermediation in government procurement in its judgment of 17 April 1990 (*Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 Lloyd’s Rep 222) as being overly protectionist, because:

The Algerian provision at issue *prohibits all intervention of intermediaries in the conclusion of a contract, even in the absence of bribes, traffic in influence or doubtful activities; the prohibition is, therefore too broad and protectionist*, aimed at guaranteeing a state monopoly on foreign trade [emphasis added]

See Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at p 241. Note that the Federal Tribunal did not make this observation in the context of discussing Art 19 of the Private International Law Act 1987, though it nevertheless serves to illustrate the point: see Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at pp 236–243.

of the human community”;²⁰⁴ the parties were not citizens of the jurisdiction applying these foreign mandatory rules; or the intermediary agreement was not performed in that jurisdiction.²⁰⁵

75 Swiss courts have since held that Article 19 of the PILA does not apply to international arbitration²⁰⁶ because Article 187 of the PILA “constitutes in itself the entire private international law or conflict of laws system applicable to arbitral tribunals having their seat in Switzerland”²⁰⁷ and obliges Swiss arbitral tribunals to apply the chosen law of the parties as follows: “[t]he arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such choice, according to the law with

²⁰⁴ *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) at p 608.

²⁰⁵ See the Jurgen Dohm Award (1989) (1993) 11(2) ASA Bulletin 216, reviewed in Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at pp 271–272.

²⁰⁶ See the Swiss Federal Tribunal’s judgment of 30 December 1994 (1995) 13(2) ASA Bulletin 217 at 222.

²⁰⁷ *International Arbitration in Switzerland: A Handbook for Practitioners* (Gabrielle Kaufmann-Kohler & Blaise Stucki eds) (Kluwer Law International, 2004) at p 116. See also Loukas Mistelis, *Concise International Arbitration* (Kluwer Law International, 2010) at p 946:

... this special conflict of laws rule for international arbitration [in Art 187 of the PILA] is to be interpreted autonomously and excludes the applicability of the conflict of laws rules that are contained in the other chapters of the PILA and that are addressed to the state courts [such as Art 19 of the PILA].

See also *International Arbitration in Switzerland: An Introduction to and a Commentary on Articles 176–194 of the Swiss Private International Law Statute* (Stephen Berti *et al* eds) (Kluwer Law International, 2000) at p 486, where Pierre Karrer’s chapter states as follows:

Article 187 [PILA] embodies conflict of laws rules which leave no room for the direct application of the first eleven chapters of the [PILA] [which includes Art 19 of the PILA]. The latter apply only to Swiss state courts, a fact which is frequently overlooked outside Switzerland. The provisions of the first eleven chapters of the [PILA] apply by analogy only when this is made necessary by the specific nature of international arbitration.

which the action is most closely connected.”²⁰⁸ Nevertheless, the Swiss Federal Tribunal has held on more than one occasion that an arbitral tribunal must apply European Union Competition Law rules²⁰⁹ to determine the validity of a contract, even if the parties have chosen Swiss law as the contract’s governing law.²¹⁰ This suggests that arbitrators must still apply foreign mandatory rules under Article 187 of the PILA though it remains controversial what preconditions must be satisfied before such rules may be allowed to override the parties’ chosen law.²¹¹ Some commentators have argued that Article 19 of the PILA should be applied “by analogy”.²¹² Hence, like Article 19 of the PILA, a foreign mandatory law which is sought to be applied over the parties’ chosen law must have a close connection with the dispute and “objectives [which] ... appear to be worthy of protection” (the latter condition presumably approximates the “legitimate and manifestly preponderant” requirement in Article 19 of the PILA).²¹³ However, *unlike* Article 19 of the PILA, such

²⁰⁸ See further *Beta SA v Alpha International Corp* (1989) (1991) 9(3) ASA Bulletin 239 as discussed in Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at pp 269–270; and Jean-Francois Poudret *et al*, *Comparative Law of International Arbitration* (Sweet & Maxwell, 2nd Ed, 2007).

²⁰⁹ 1 December 2011.

²¹⁰ See, for instance, the Swiss Federal Tribunal’s judgments of 28 April 1992 (1992) 10(3) ASA Bulletin 368; and 8 March 2006 (2006) 24(3) ASA Bulletin 550.

²¹¹ Loukas Mistelis, *Concise International Arbitration* (Kluwer Law International, 2010) at p 948.

²¹² *International Arbitration in Switzerland: A Handbook for Practitioners* (Gabrielle Kaufmann-Kohler & Blaise Stucki eds) (Kluwer Law International, 2004) at pp 127–128; Gabrielle Kaufmann-Kohler & Antonio Rigozzi, *Arbitrage International: Droit et pratique a la lumiere de la LDIP* (Schulthess, 2nd Ed, 2006) at paras 661–662.

²¹³ *International Arbitration in Switzerland: A Handbook for Practitioners* (Gabrielle Kaufmann-Kohler & Blaise Stucki eds) (Kluwer Law International, 2004) at p 128. See, for example, ICC Case No 9333 (1998) (reviewed in Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at pp 272–273), which “questioned the
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foreign mandatory law need not be compatible with *Swiss* public policy (referred to in Article 19 of the PILA as “Swiss legal concepts”), so long as it does not contravene transnational public policy (since the requirements of Article 19 of the PILA must be adapted for application in the context of international arbitration).²¹⁴ Other commentators instead favour a “stricter requirement”, *viz*, that foreign mandatory law should only be applied in the case where “the parties choose a law devoid of interventionist [*ie*, foreign mandatory] norms for the *sole purpose* of evading interventionist norms which would otherwise have been applicable” [emphasis added].²¹⁵ This principle of conflict of laws is also referred to as *fraus legis* or *fraude a la loi*.²¹⁶ Accordingly, although it appears to be incontrovertible that tribunals seated in Switzerland can take into account mandatory laws of the place of performance in determining the enforceability of the parties’ contract/intermediary agreement, even though it is valid under the chosen law, it remains an open question what circumstances justify such derogation from party autonomy.

existence of a strong and legitimate interest for the FCPA to apply to the contract under consideration”.

²¹⁴ Gabrielle Kaufmann-Kohler & Antonio Rigozzi, *Arbitrage International: Droit et pratique a la lumiere de la LDIP* (Schulthess, 2nd Ed, 2006) at para 662. See further Marc Blessing, *Impact of the Extraterritorial Application of Mandatory Rules of Law on International Contracts* (Helbing & Lichtenhahn, 1999) at pp 63–64.

²¹⁵ *International Arbitration in Switzerland: An Introduction to and a Commentary on Articles 176–194 of the Swiss Private International Law Statute* (Stephen Berti et al eds) (Kluwer Law International, 2000) at p 514; Jean-Francois Poudret *et al*, *Comparative Law of International Arbitration* (Sweet & Maxwell, 2nd Ed, 2007) at pp 302 and 615.

²¹⁶ *International Arbitration in Switzerland: An Introduction to and a Commentary on Articles 176–194 of the Swiss Private International Law Statute* (Stephen Berti *et al* eds) (Kluwer Law International, 2000) at p 514; Jean-Francois Poudret *et al*, *Comparative Law of International Arbitration* (Sweet & Maxwell, 2nd Ed, 2007) at pp 302 and 615. Discussed in greater detail at paras 80–81 below. See further Loukas Mistelis, *Concise International Arbitration* (Kluwer Law International, 2010) at p 948.

76 English common law conflicts rules, which are generally applicable in the common law Commonwealth countries²¹⁷ (but less so in the UK, where they have been overtaken by European conflicts rules such as the Rome I Regulation), disregard mandatory laws of the place of performance in favour of the parties' chosen law, subject to a number of limited exceptions.²¹⁸ The principal exception (relevant in the context of intermediary agreement disputes) was established in *Foster v Driscoll*:²¹⁹ a contract governed by English law will not be enforced if the common intention of the parties in entering into the contract was to perform, in a foreign and friendly country, an act which is illegal under the law of that country.²²⁰ Thus, the parties' contract (governed by English law) to

²¹⁷ However, it should be noted that "there has been increasing variations across common law countries in the specific choice of law rules developed": Yeo Tiong Min, *Conflict of Laws, Halsbury's Laws of Singapore*: vol 6(2) (Lexis Nexis, 2009) at para 75.250.

²¹⁸ Lawrence Collins, *Dicey, Morris and Collins on The Conflict of Law* (Sweet & Maxwell, 14th Ed, 2006) at para 32-140.

²¹⁹ [1929] 1 KB 470.

²²⁰ Where there is no intention to violate foreign law which is not the law of the place of performance, "the mere fact that a contract ... involves the doing of something which [such foreign law] prohibit[s] ... will not invalidate the contract, unless the prohibition forms part of the governing law": Lawrence Collins, *Dicey, Morris and Collins on The Conflict of Law* (Sweet & Maxwell, 14th Ed, 2006) at para 32-240. See further Lawrence Collins, *Dicey, Morris and Collins on The Conflict of Law* (Sweet & Maxwell, 14th Ed, 2006) at para 32-142, fn 51. However, the position is not settled as to whether illegality under the law of the place of performance overrides the parties' chosen law and renders the contract unenforceable, in the absence of a common intention to commit such illegality. In *Ralli Bros v Cornpania Naviera Sota y Aznar* [1920] 2 KB 287 ("*Ralli Bros*"), a contract governed by English law was, after formation of the contract, rendered illegal at the place of performance (Spain) due to the issuance of a Spanish decree which imposed maximum limits for the payment of freight on jute. These maximum limits were exceeded by the contractually stipulated payment amount. The court refused to enforce the contract due to the supervening illegality at the place of performance. After *Ralli Bros*, there has been "frequent *dicta* attributing decisive effect to illegality by the law of the place
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import whisky into the US, contrary to the American prohibition laws in force at the time, was unenforceable. Although a case has yet to arise which is directly on point,²²¹ commentators are of the view that “the result doubtless would have been the same if the contract had been governed by a foreign law [a law other than common law], according to which the contract had been enforceable”.²²² There is also strong (albeit *obiter*) suggestion that the *Foster v Driscoll* rule extends to cases where only *one* party has the *unilateral* intention to commit an illegality under the law of the place of performance, in which case that party (but not the innocent party) cannot enforce the contract.²²³ Such illegality at the place

of performance”, regardless of the governing law of the contract or whether illegality was initial or supervening. However, there is no direct authority on point, and it has been vigorously argued by experts in the field of common law conflict of laws that “such an approach is contrary to principle, and not dictated by the authorities”: James Fawcett & Janeen Carruthers, *Cheshire, North & Fawcett: Private International Law* (Peter North ed) (Oxford University Press, 14th Ed, 2008) at pp 759–760; Lawrence Collins, *Dicey, Morris and Collins on The Conflict of Law* (Sweet & Maxwell, 14th Ed, 2006) at paras 32-144–32-147 and 32-151. On this view, the rule set out in *Ralli Bros*:

... was not a principle of the conflict of laws at all, but merely an application of the English domestic rules with regard to the discharge or suspension of contractual obligations by supervening illegality.

Lawrence Collins, *Dicey, Morris and Collins on The Conflict of Law* (Sweet & Maxwell, 14th Ed, 2006) at para 32-147. It is outside the scope of this paper to further discuss the status of the *Ralli Bros* rule under common law.

²²¹ There have only been *obiter* remarks that an English court will *not* enforce a contract which the parties *intend* to perform illegally under the law of the place of performance, even if the contract is governed by *foreign* (as opposed to English) law and is enforceable under such foreign law: see, for instance, *Royal Boskalis Westminster NV v Mountain* [1999] 1 QB 674 at 692.

²²² James Fawcett & Janeen Carruthers, *Cheshire, North & Fawcett: Private International Law* (Peter North ed) (Oxford University Press, 14th Ed, 2008) at p 742, fn 651. See also Lawrence Collins, *Dicey, Morris and Collins on The Conflict of Law* (Sweet & Maxwell, 14th Ed, 2006) at para 32-241.

²²³ See *Royal Boskalis Westminster NV v Mountain* [1999] 1 QB 674 at 692.

of performance is seen as requiring considerations of comity of nations and public policy to be taken into account, which are weighty enough to justify holding the contract unenforceable, contrary to the parties' chosen law.²²⁴ Accordingly, tribunals applying common law conflicts rules will not enforce intermediary agreements entered into by parties with the common intention of contravening anti-corruption laws at the place of performance, nor will it uphold claims by a party having a unilateral intention to contravene such laws, whatever the governing law of the intermediary agreement.²²⁵

77 This much was alluded to by the English High Court in *Hilmarton*.²²⁶ In *Hilmarton*, Omnium de Traitement ("OTV") resisted enforcement of the award on the basis that it upheld an intermediary agreement which was illegal under the law of the place of performance. Under the agreement, Hilmarton Ltd ("Hilmarton") was to negotiate with Algerian government officials to procure for OTV a construction contract in Algeria. In return, if Hilmarton succeeded in obtaining the construction contract for OTV, Hilmarton was entitled to be paid a commission of 4% of the total contract value on an instalment basis. OTV stopped making payments after half of Hilmarton's commission had been paid. Hilmarton sought to recover the remainder of its commission in arbitration proceedings held in Switzerland. The first tribunal observed that intermediary agreements for the procurement of public contracts, such as that between OTV and Hilmarton, were illegal under Algerian law. Since contravention of the Algerian prohibition against intermediary agreements (which was aimed at fighting corruption in general) also breached Swiss conception of good morals, the tribunal held that the

²²⁴ James Fawcett & Janeen Carruthers, *Cheshire, North & Fawcett: Private International Law* (Peter North ed) (Oxford University Press, 14th Ed, 2008) at p 742; Lawrence Collins, *Dicey, Morris and Collins on The Conflict of Law* (Sweet & Maxwell, 14th Ed, 2006) at paras 32-238–32-241.

²²⁵ Cf the contrary approach under the Rome I Regulation (No 593/2008) (17 June 2008), which regards the parties' intentions to be irrelevant: see paras 80–81 below.

²²⁶ *Hilmarton Ltd v Omnium de Traitement et de Valorisation SA* [1999] 2 Lloyd's Rep 222.

intermediary agreement was null and void under its Swiss governing law and dismissed Hilmarton's claim. However, the first tribunal's award was set aside by the Swiss Federal Tribunal in its judgment of 17 April 1990 on the basis that the Algerian prohibition was "too broad and protectionist", prohibiting to the detriment of the parties' freedom of contract "all intervention of intermediaries in the conclusion of a contract, even in the absence of bribes, traffic in influence or doubtful activities",²²⁷ whereas Swiss law regarded intermediary agreements to be perfectly valid and lawful, so long as they were entered into for non-corrupt purposes.

78 Following annulment of the award, a second tribunal was constituted, which found the intermediary agreement to be valid and ordered OTV to pay the balance of Hilmarton's commission. When the second tribunal's award was presented for enforcement in England, the High Court dismissed OTV's challenge and enforced the award. The court made the following observation regarding the operation of the *Foster v Driscoll* rule in the context of intermediary agreements:

It may well be that an English arbitral tribunal, chosen by the parties, and applying English law as chosen by the parties, would have reached a different result (than that reached by the Swiss tribunal). It may well be that such a tribunal would have dismissed Hilmarton's claim, applying the full rigour of the principle stated by Viscount Simonds in *Regazzoni v KC Sethia* [a case applying the *Foster v Driscoll* rule] thus:²²⁸

... whether or not the proper law of the contract is English law, an English Court will not enforce a contract, or award damages for its breach if its performance will involve the doing of an act in a foreign and friendly State which violates the law of the State.

I should add that in applying this principle it is immaterial whether the contract itself is governed by English or foreign law.

²²⁷ Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at p 241.

²²⁸ *Hilmarton Ltd v Omnium de Traitment et de Valorisation SA* [1999] 2 Lloyd's Rep 222 at 224.

One can conclude from the foregoing discussion that the conditions to be satisfied for the mandatory laws of the place of performance to override the parties' chosen law vary, depending on which conflicts rules the tribunal is applying. The authors therefore disagree with the unqualified statement that:²²⁹

[i]nternational arbitrators should accept that, in order to establish the legality or validity of an agency agreement submitted to them, they cannot simply disregard the mandatory legal provisions of the [place of performance].

That is a question to be resolved by the applicable choice of law rules: if they reject the application of mandatory laws of the place of performance, then the chosen law must prevail. For instance, mandatory laws of the place of performance which prohibit intermediary agreements as such are unlikely to be given effect under an "analogous application" of Article 19 of the Swiss PILA by a tribunal.²³⁰ On the other hand, there is a higher chance that the *Foster v Driscoll* rule will give effect to these mandatory laws.

79 It is often said by way of counter argument that a tribunal will fail in its duty to render an enforceable award if foreign mandatory laws are ignored, since the award will be refused enforcement on public policy

²²⁹ Antonio Crivellaro, "Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence" in *Arbitration, Money Laundering, Corruption and Fraud* (Kristine Karsten & Andrew Berkeley eds) (Dossiers-ICC Institute of World Business Law, 2003) at p 118. See also the arguments in Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at pp 258–259:

- (i) "[S]ince national legal systems have conceded to giving greater autonomy to Arbitrators in the discharge of their adjudicatory functions, they expect, in return, that sensitive national policies as enacted in mandatory laws are taken into due consideration and applied by Arbitrators."
- (ii) "Arbitrators have all interest in lending favourable ears to such national mandatory laws, since systematic failure to do so might jeopardize general national support of the autonomy of arbitration."
- (iii) "[A]n Arbitrator has an obligation to render enforceable awards."

²³⁰ See paras 74–75 below.

grounds, if it is sought to be enforced in the jurisdiction which prescribes these foreign mandatory laws.²³¹ Tribunals do indeed have a duty to render an enforceable award,²³² but they are not compelled to render a *universally* enforceable award,²³³ because the tribunal has the equally

²³¹ Article V(2)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959) provides that:

Recognition and enforcement of an arbitral award *may* also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

...

(b) The recognition or enforcement of the award would be contrary to the *public policy of that country*.

[emphasis added]

See generally *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Herbert Kronke *et al* eds) (Kluwer Law International, 2010); and Bernard Hanotiau & Olivier Caprasse, "Public Policy in International Commercial Arbitration" in *Enforcement of Arbitration Agreements and International Arbitral Awards* (Cameron May, 2008) at pp 793–794.

²³² The tribunal's duty to render an enforceable award is expressly stipulated in Art 41 of the 2012 International Chamber of Commerce Rules (entry into force 1 January 2012) and Art 32.2 of the London Court of International Arbitration Arbitration Rules (effective 1 January 1998). It may also be an implied duty which all tribunals must discharge, taking into account the underlying objectives of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959).

²³³ The public policy ground for refusing enforcement of an award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959) ("New York Convention") refers to the public policy of the country where the award is sought to be enforced. Accordingly, contravention of the public policy of a country *other* than the country of enforcement does not justify refusal of enforcement. *Cf* contravention of public policy at the seat of arbitration, which may result in the award being set aside at the seat of arbitration: in such case, Art V(1)(e) of the New York Convention provides that the award

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important duty of deciding the parties' dispute in accordance with the correct legal principles (including choice of law principles).²³⁴ Born rightly argues that:²³⁵

... it is the conflicts rules applicable to the parties' dispute – and not the unilateral definitions of foreign legal systems – which must define the circumstances in which a choice-of-law clause will be overridden ...

This may, in exceptional cases, produce an award that is not enforceable in the foreign state whose mandatory rules are not applied.

This result is more tolerable, however, than an award that is based on the application of the 'wrong' legal rules, particularly where those rules purport to apply by virtue of an exorbitant jurisdictional claim.

[emphasis added]

80 So far, the authors' discussion has been limited to conflicts rules which provide that the parties' chosen law may be overridden *to the extent* of its inconsistency with mandatory laws of the place of performance. In certain cases, conflicts rules may even provide for *complete* displacement of the chosen law by the law of the place of performance. Under common law, the law with which the dispute is most closely connected applies in replacement of the chosen law, where the choice of law is not *bona fide* or legal, or is contrary to public policy.²³⁶ The test for what constitutes a choice of law which is not *bona fide* or legal, or is contrary to public policy, is narrowly circumscribed – it is not satisfied merely because the contract has no objective connection with the law chosen by the parties; what is required is that the *sole intention* of the parties in choosing the governing law was to evade the objective proper law (*ie*, the law most

may be refused enforcement *in all other countries*. See the discussion at para 84 and n 251 below.

²³⁴ See, for instance, ICC Case No 4219 (unpublished) and *Chambre de Commerce et d'Industrie de Geneve* Award of 23 February 1988, which refused to apply the law of the place of performance over the parties' chosen law. See also ICC Case No 8459 (1997), which refused to apply the US Foreign Corrupt Practices Act (15 USC §78dd-1) over the parties' choice of Swiss law.

²³⁵ Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at p 2192.

²³⁶ See *Vita Foods Products Inc v Unus Shipping Co Ltd* [1939] AC 277.

closely connected to the parties' dispute).²³⁷ This is largely similar to the doctrine of *fraude a la loi* in French private international law, which applies to invalidate a choice of law if it is the "product of a fraudulent scheme designed to use the principle of party autonomy to choose a 'complacent' law, for the sole purpose of escaping the application of 'disturbing' mandatory provisions".²³⁸

81 Thus, a bad faith choice of law by the parties, solely to evade mandatory laws of the place of performance (typically, the law most closely connected to intermediary agreement dispute), may justify a tribunal applying doctrines of *fraude a la loi* to disregard the chosen law in favour of the law of the place of performance. It is of interest to note that, by way of contrast, the Rome I Regulation regards the parties' subjective motives to be immaterial,²³⁹ choosing instead to uphold the chosen law of the parties, subject to mandatory laws of the country connected with "all other elements relevant to the situation [other than the law chosen by parties]".²⁴⁰ This limitation on the parties' choice of law:²⁴¹

... will stop many cases of evasion of the law [caught by French and common law principles of *fraude a la loi*] [footnote: but not necessarily all cases ...], *although it goes wider than this* and it will ensure that [for instance, in the case of an entirely German contract which contains an exemption clause] any German controls on exemption clauses apply *even if the parties have chosen French law for some perfectly legitimate reason*, such as the fact that this is the applicable law under some related contract between the parties. [emphasis added]

²³⁷ *Peh Teck Quee v Bayerische Landesbank Girozentrale* [1999] 3 SLR(R) 842.

²³⁸ Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at p 169.

²³⁹ James Fawcett & Janeen Carruthers, *Cheshire, North & Fawcett: Private International Law* (Peter North ed) (Oxford University Press, 14th Ed, 2008) at p 696.

²⁴⁰ Art 3(3) of the Rome I Regulation (No 593/2008) (17 June 2008).

²⁴¹ James Fawcett & Janeen Carruthers, *Cheshire, North & Fawcett: Private International Law* (Peter North ed) (Oxford University Press, 14th Ed, 2008) at pp 695–697.

(2) *Law of the arbitral seat*

82 Tribunals must also conduct choice of law analysis to determine whether the arbitral seat's laws or public policy rules override the parties' chosen law and invalidate their intermediary agreement.²⁴²

83 Under common law conflicts rules, the stipulations of the parties' chosen law are not usually overridden by illegality under the law of the forum,²⁴³ since the forum usually has little or no connection to a contract governed by foreign law and to be performed in a foreign jurisdiction.²⁴⁴ The exception is where local rules of illegality constitute forum mandatory rules applicable to the contract, regardless of the law chosen by the parties.²⁴⁵ Article 9(2) of the Rome I Regulation similarly provides that "the overriding mandatory provisions of the law of the forum"²⁴⁶ may be applied to the parties' dispute.

84 Turning to the forum's public policy rules (as opposed to mandatory laws), they typically do not override the chosen law under conflicts rules, unless the dispute has a sufficiently close connection with the forum,²⁴⁷ or the public policy contravened is of a fundamental moral nature.²⁴⁸ For instance, Article 21 of the Rome I Regulation provides for the parties' chosen law (or the otherwise applicable proper law) to be superseded by

²⁴² See generally Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at pp 2186–2189.

²⁴³ *Vita Foods Products Inc v Unus Shipping Co Ltd* [1939] AC 277; *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90.

²⁴⁴ See Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at p 2187 and fn 381.

²⁴⁵ *The Hollandia* [1983] 1 AC 565; *Block Bros Realty Ltd v Mollard* (1981) 122 DLR (3d) 323.

²⁴⁶ For the definition of "overriding mandatory provisions", see para 73 above.

²⁴⁷ Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at p 2187, fn 382; James Fawcett & Janeen Carruthers, *Cheshire, North & Fawcett: Private International Law* (Peter North ed) (Oxford University Press, 14th Ed, 2008) at pp 142 and 741.

²⁴⁸ See James Fawcett & Janeen Carruthers, *Cheshire, North & Fawcett: Private International Law* (Peter North ed) (Oxford University Press, 14th Ed, 2008) at pp 142–146.

the forum's public policy rules if the chosen law "is manifestly incompatible with the public policy (*ordre public*) of the forum".²⁴⁹ Taking care not to apply a law which violates the arbitral seat's fundamental public policy concerns (or mandatory laws) ties in neatly with the tribunal's duty to render an enforceable award, as courts of the arbitral seat can base their decision to set aside arbitral awards upon contravention of the same notion of public policy,²⁵⁰ which in turn allows courts elsewhere to refuse enforcement of the annulled award pursuant to Article V(1)(e) of the New York Convention.²⁵¹

²⁴⁹ James Fawcett & Janeen Carruthers, *Cheshire, North & Fawcett: Private International Law* (Peter North ed) (Oxford University Press, 14th Ed, 2008) at pp 741–743.

²⁵⁰ This is discussed further at paras 166–169 below. See generally Richard Kreindler, "Is the Arbitrator Obligated to Denounce Money Laundering, Corruption of Officials, etc? The Arbitrator as Accomplice – Sham Proceedings and the Trap of the Consent Award" in Theodore Moran, *Combating Corrupt Payments in Foreign Investment Concessions: Closing the Loopholes, Extending the Tools* (Washington: Center for Global Development Working Group on Corrupt Payments, 2008) at p 2; Richard Kreindler, "Approaches to the Application of Transnational Public Policy by Arbitrators" 6th IBA International Arbitration Day, Sydney (13 February 2003) at p 5; and Tom Toulson, "Illegality and Public Policy: Are the English Courts Getting it Wrong?" *Global Arbitration Review* (18 October 2010).

²⁵¹ Article V(1)(e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959) provides that a court may refuse recognition or enforcement of an award where: "The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made" [emphasis added]. An award which has been set aside due to its contravention of the international public policy of the *arbitral* seat can be refused enforcement in all other countries (on the Art V(1)(e) ground), whereas awards which contravene the public policy of the *place of performance* will typically only be refused enforcement by the courts at the place of performance (since the public policy exception to enforcement in Art V(2)(b) applies only where the public policy of the *place of enforcement* is contravened). The arbitrator's duty to render an enforceable award thus requires him to give greater

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85 Similar rules apply under common law,²⁵² though it provides an additional third ground for the forum's public policies to override the chosen law.²⁵³ The case of *Lemenda* illustrates the operation of this third ground.²⁵⁴

86 In *Lemenda*, the plaintiff entered into an agreement with the defendant to procure for the latter renewal of an oil supply contract from the state owned national oil corporation of Qatar. Under the agreement, the plaintiff was to use its influence on Qatari officials to procure renewal of the contract and, in return, it would receive a commission of US\$0.30 per barrel of oil. The oil supply contract (governed by Qatari law) was renewed and the plaintiffs claimed for its commission under the intermediary agreement (governed by English law). Under Qatari law, such intermediary agreements to influence public officials were contrary to public policy.

87 The court held that the intermediary agreement was unenforceable. It drew a distinction between rules of public policy which, if infringed, "the English court will not enforce ... whatever the proper law of the

deference to contravention of public policy at the arbitral seat, as opposed to the place of performance (see also the discussion at paras 79–80 above regarding contravention of public policy at the place of performance). Cf Dana Freyer, "The Enforcement of Awards Affected by Judicial Orders of Annulment at the Place of Arbitration" in Emmanuel Gaillard & Domenico Di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards* (Cameron May, 2008) at pp 757–786, which notes that some countries like France do not view the annulment of an award at the seat of arbitration as a bar to enforcement.

²⁵² James Fawcett & Janeen Carruthers, *Cheshire, North & Fawcett: Private International Law* (Peter North ed) (Oxford University Press, 14th Ed, 2008) at pp 142–146 and 741.

²⁵³ See Lawrence Collins, *Dicey, Morris and Collins on The Conflict of Law* (Sweet & Maxwell, 14th Ed, 2006) at para 32-238.

²⁵⁴ For another case applying the principles of *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448 in the context of an intermediary agreement, see *Shaikh Faisal v Swan Hunter Singapore Pte Ltd* [1995] 2 SLR(R) 605.

contract and wherever the place of performance” and other principles of public policy, which are “purely domestic”.²⁵⁵

88 The former type of public policy, which may be referred to as international public policy,²⁵⁶ is defined as “some moral, social or economic principle so sacrosanct in English eyes as to require its maintenance at all costs and without exception”.²⁵⁷ It is similar to the kind of national interests preserved in Article 21 of the Rome I Regulation, which allows courts to disregard foreign law if to apply it would be “manifestly incompatible with the public policy (*ordre public*) of the forum”.

89 *Lemenda* noted that it was contrary to English public policy “founded on general principles of morality”²⁵⁸ to enforce the intermediary agreement, it being:²⁵⁹

... generally undesirable that a person in a position to use personal influence to obtain a benefit for another should make a financial charge for using such influence, particularly if his pecuniary interest will not be apparent [which was the case on the facts].

90 However, since such public policy was “purely domestic”²⁶⁰ to English law (*ie*, it was not international public policy), its contravention was not by itself sufficient to bar enforcement of a contract performed outside England.

²⁵⁵ *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448 at 459.

²⁵⁶ Not to be confused with transnational public policy which, unlike international public policy, is not tied to a particular national view of public policy: see paras 92 and 169 below.

²⁵⁷ James Fawcett & Janeen Carruthers, *Cheshire, North & Fawcett: Private International Law* (Peter North ed) (Oxford University Press, 14th Ed, 2008) at p 140.

²⁵⁸ *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448 at 461.

²⁵⁹ *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448 at 458. See para 62 above.

²⁶⁰ *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448 at 459.

91 In order to find that the intermediary agreement was unenforceable, the court had regard to the attitude of the country of performance towards the parties' intermediary agreements. In this case, Qatar (the place of performance) had the *same* public policy as England and deemed the contract contrary to public policy. The court held that even though the intermediary agreement was only contrary to English domestic public policy, "international comity combines with English domestic public policy to militate against enforcement".²⁶¹ In other words, under common law conflicts rules, an intermediary contract which contravenes the public policy of both the place of performance and the forum will not be enforced, even if the public policy in question is not international public policy (note that it is controversial whether this ground for applying the arbitral seat's *domestic* public policy over the parties' chosen law can be invoked where the contract is *not* governed by common law²⁶²).

C. Relevance of transnational public policy in conflict of laws analysis

92 Tribunals must apply the law which is determined to be applicable according to the foregoing analysis (be it the parties' chosen law or some other foreign mandatory law or public policy), unless it is contrary to

²⁶¹ *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448 at 459.

²⁶² The *Lemenda* principle was originally stated in terms of a contract governed by English law. However, Waller LJ's interpretation of *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448 ("*Lemenda*") (in *Westacre Investments Inc v Jugoimport-SDPR Holdings Co Ltd* [1999] 3 WLR 811 at 824–825 ("*Westacre*")) in the context of his discussion of a contract governed by Swiss law may be read as implying that the *Lemenda* principle is applicable even to a contract not governed by English law. It should be noted that although Waller LJ was the dissenting judge in *Westacre*, the majority – Mantell LJ and Sir David Hirst – agreed with his interpretation of *Lemenda*.

transnational public policy.²⁶³ Transnational public policy refers to “fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by ... ‘civilised nations’”.²⁶⁴ In contrast to international public policy, transnational public policy is not tied to any particular national legal system’s view of public policy, but rather, refers to values shared by civilised nations.²⁶⁵ Transnational public policy overrides national laws that may otherwise be applicable pursuant to the relevant conflict of laws rules.²⁶⁶ In the commercial arbitration context, it is correct to give effect to transnational public policy, since failure to do so would breach the international public policy of, and render the award unenforceable in, most jurisdictions around the world.²⁶⁷

93 Outright bribery aimed at subverting state officials’ proper discharge of their duties is clearly a violation of transnational public policy (arguably, private sector bribery likewise contravenes transnational public policy

²⁶³ ICC Case No 7047 (1994); *Wena Hotels Ltd v Arab Republic of Egypt* [Award] ICSID Case No ARB/98/4 (8 December 2000); ICC Case No 3916 (1982).

²⁶⁴ The International Law Association International Arbitration Committee’s Interim Report on *Public Policy as a Bar to Enforcement of International Arbitral Awards* (2000). See generally Bernard Hanotiau & Olivier Caprasse, “Public Policy in International Commercial Arbitration” in *Enforcement of Arbitration Agreements and International Arbitral Awards* (Cameron May, 2008) at pp 794–796.

²⁶⁵ See further para 169 below.

²⁶⁶ Richard Kreindler, “Approaches to the Application of Transnational Public Policy by Arbitrators” 6th IBA International Arbitration Day, Sydney (13 February 2003) at pp 8–13; Berthold Goldman, “*La Lex Mercatoria dans les Contrats et l’Arbitrage Internationaux: Realite et Perspectives*” (1979) 106 JDI (Clunet) 475 at 483; Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at p 2197.

²⁶⁷ Carolyn Lamm, Hansel Pham & Rahim Moloo, “Fraud and Corruption in International Arbitration” in *Liber Amicorum Bernardo Cremades* (Miguel Àngel Fernandez-Ballesteros & David Arias eds) (La Ley grupo Wolters Kluwer, 2010) at pp 708–709. See also Andrea Menaker, “The Determinative Impact of Fraud and Corruption on Investment Arbitrations” (2010) 25(1) ICSID Rev-FILJ 67 at 72.

for the reasons discussed above²⁶⁸).²⁶⁹ Thus, the tribunal in *World Duty Free v Republic of Kenya*²⁷⁰ (“*World Duty Free*”) gave short shrift to the claimant’s contention that bribes paid to a former Kenyan president and other high-level public officials (to procure a contract to run duty-free operations in Kenya’s international airports) were lawful as they were sanctioned under local Kenyan custom^{271,272}

It is ... unnecessary for this Tribunal to consider the effect of a local custom which might render legal locally what would otherwise violate transnational public policy or the foreign applicable law chosen by the contractual parties for their transaction ... The Tribunal would likewise have been minded to decline in the present case to recognise any local custom in Kenya purporting to validate bribery committed by the Claimant in violation of international public policy.

However, laws prohibiting intermediary agreements which contemplate the exercise of influence over government officials do not reflect transnational public policy, given the significant differences between jurisdictions regarding the propriety of such agreements.²⁷³ Parties thus cannot mount contravention of transnational public policy as an argument to escape from their obligations under these intermediary agreements, so long as they are valid under the parties’ chosen law, and any mandatory laws of the place of performance or arbitral seat which prohibit them do not override the parties’ chosen law (according to the relevant conflicts rules).

²⁶⁸ See n 22 above.

²⁶⁹ See paras 2 and 5–9 above.

²⁷⁰ See n 8 above.

²⁷¹ The claimant investor argued that the alleged US\$2m bribe to the former Kenyan president was made under the “Harambee” system of “mobiliz[ing] resources through private donations for public purposes” and was therefore legally justified: see *World Duty Free Co Ltd v Republic of Kenya* [Award] ICSID Case No ARB/00/7 (4 October 2006) at [110].

²⁷² See *World Duty Free Co Ltd v Republic of Kenya* [Award] ICSID Case No ARB/00/7 (4 October 2006) at [170]–[172].

²⁷³ Discussed at paras 56–63 above.

V. Legal consequences of a finding of corruption

94 As mentioned earlier, disputes arising out of intermediary agreements fall into one of the following three cases:

- (a) having procured the government contract or relevant approvals for his principal, the intermediary brings arbitration proceedings claiming his commission;
- (b) following the intermediary's failure to procure the government contract or relevant approvals, the principal brings arbitration proceedings to recover payments made to the intermediary; or
- (c) the State or state entity which awarded the government contract seeks a declaration (as claimant) that it was procured through corruption of its representatives by the principal's intermediary and is therefore unenforceable or subject to rescission, or argues it is not liable (as respondent) on a claim brought by the principal for breach of contract (assuming that contract contains an arbitration clause).

It should be noted that the third scenario can also arise between private parties and/or in the absence of an intermediary agreement, for instance, where a contracting party *itself* (rather than its intermediary) bribes an agent of the other private contracting party in order to procure the contract.

95 This part provides a brief sketch of the general legal consequences of a finding of corruption in these three scenarios, all of which arise in the context of *contract-based* arbitrations. As noted above,²⁷⁴ a different and more complicated scenario arises in the context of *investment* treaty-based arbitrations, which is outside the scope of this article.

A. Tribunal's jurisdiction and arbitrability of issues of corruption

96 It is now well settled that the separability presumption²⁷⁵ retains its full vigour even where corruption taints the contract underlying an

²⁷⁴ See para 13 above.

²⁷⁵ See Art 16(1) of the UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June
(continued on next page)

arbitration agreement. In *Premium Nafta Products Ltd v Fili Shipping Co Ltd* (“*Fiona Trust*”), the House of Lords explained the operation of the separability doctrine thus:²⁷⁶

The principle of separability ... means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a ‘distinct agreement’ and can be void or voidable only on grounds which relate directly to the arbitration agreement.

Since the allegation that the contract in *Fiona Trust* was procured by corruption could only be said to relate to the main contract, but not the arbitration agreement *in particular*,²⁷⁷ the arbitration agreement was

1985; amended 7 July 2006); Art 6(9) of the 2012 International Chamber of Commerce Rules (entry into force 1 January 2012); Art 23(1) of the UNCITRAL Arbitration Rules 2010 GA Res 65/22, UN GAOR 65th Sess (2010).

²⁷⁶ *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40 at [17].

²⁷⁷ See *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40 at [19]:

In the present case, it is alleged that the main agreement was in uncommercial terms which, together with other surrounding circumstances, give rise to the inference that an agent acting for the owners was bribed to consent to it. *But that does not show that he was bribed to enter into the arbitration agreement. It would have been remarkable for him to enter into any charter without an arbitration agreement, whatever its other terms had been.* Mr Butcher QC, who appeared for the owners, said that but for the bribery, the owners would not have entered into any charter with the charterers and therefore would not have entered into an arbitration agreement. But that is in my opinion exactly the kind of argument which section 7 [of the UK Arbitration Act 1996] was intended to prevent. It amounts to saying that because the main agreement and the arbitration agreement were bound up with each other, the invalidity of the main agreement should result in the invalidity of the arbitration agreement. The one should fall with the other because they would never have been separately concluded. But section 7 in my opinion means that they must be treated as having been separately concluded and *the arbitration agreement can be invalidated only on a ground which relates to the arbitration agreement and is not*

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found to be valid and court proceedings were stayed in favour of arbitration. Other jurisdictions and the majority of arbitral case law have applied the separability presumption in the same manner.²⁷⁸

97 In addition, it is widely recognised in modern times that issues of corruption are arbitrable.²⁷⁹ The contrary ruling in Judge Gunnar

merely a consequence of the invalidity of the main agreement.
[emphasis added]

²⁷⁸ See, for instance, Swiss Federal Tribunal's judgment of 2 September 1993 (*National Power Corp (Philippines) v Westinghouse (USA)* (1994) 12(2) ASA Bulletin 244); Peter Muchlinski, Federico Ortino & Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) at pp 611–612, fn 127 (citing ICC Case No 3916 (1982), ICC Case No 4145 (1983) and ICC Case No 5622 (1988)); Antonio Crivellaro, "Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence" in *Arbitration, Money Laundering, Corruption and Fraud* (Kristine Karsten & Andrew Berkeley eds) (Dossiers-ICC Institute of World Business Law, 2003) at p 117 (citing ICC Case No 6474 (1992)); ICC Case No 5943 (1990); and ICC Case No 6248 (1990). See generally Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at paras 2.89–2.100 and 5.96; Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at pp 382–384; Richard Kreindler, "Aspects of Illegality in the Formation and Performance of Contracts" 16th ICCA Congress, London (May 2002); and Richard Kreindler, "Public Policy and Corruption in International Arbitration: A Perspective for Russian Related Disputes" (2006) 72(3) *Arbitration* 236.

²⁷⁹ Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at pp 804–805; Antonio Crivellaro, "Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence" in *Arbitration, Money Laundering, Corruption and Fraud* (Kristine Karsten & Andrew Berkeley eds) (Dossiers-ICC Institute of World Business Law, 2003); Richard Kreindler, "Aspects of Illegality in the Formation and Performance of Contracts" 16th ICCA Congress, London (May 2002); ICC Case No 4145 (1983 and 1984); ICC Case No 6286 (1991).

Lagergren's award in ICC Case No 1110 (1963)²⁸⁰ and certain idiosyncratic court decisions²⁸¹ are not followed.

98 Accordingly, in all of the three scenarios mentioned above,²⁸² a tribunal will almost invariably find that it has jurisdiction and any issues of corruption in dispute are arbitrable. It follows that the tribunal is entitled and obliged to adjudicate the parties' disputes – it can receive evidence and arguments from the parties relating to corruption and/or investigate corruption *sua sponte* (if necessary), and then rule on its

²⁸⁰ In ICC Case No 1110 (1963), Judge Gunnar Lagergren declined jurisdiction in an arbitration concerning a claim by an intermediary for commission in respect of his engagement to bribe Argentinean officials in order to procure a government contract for his principal. Judge Lagergren stated that:

... parties who ally themselves in an enterprise of the present nature must realize that they have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes.

It was previously thought that Judge Lagergren declined jurisdiction because he regarded the arbitration agreement as having been tainted by the corruption, which would have meant that he had incorrectly failed to give effect to the separability presumption. However, it has been clarified that Judge Lagergren's decision was actually based on the non-arbitrability of a corrupt agreement, since the "the arbitration agreement in ICC Case No 1110 in fact truly constituted a wholly separate and independent agreement drawn up for the purpose of the reference after the dispute had arisen": see J Gillis Wetter, "Issues of Corruption before International Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case No 1110" (1994) 10 *Arb Int'l* 277; and Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at para 2.137, fn 203.

²⁸¹ See, for instance, the Pakistani decisions of *The Hub Power Co (HUBCO) v Pakistan WAPDA plc* 2000 SC 841 and *Société Générale Surveillance SA v Islamic Republic of Pakistan* (3 July 2002) (2003) 28 *YB Comm Arb* 1312. These decisions are reviewed in Peter Muchlinski, Federico Ortino & Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) at pp 602–603.

²⁸² See para 94 above.

existence and consequences under the applicable law.²⁸³ The following part discusses how a finding of corruption affects the admissibility and merits of the corrupt party's claims.

B. Admissibility and merits of the claim

99 Issues of admissibility and the merits are determined by the applicable law selected by choice of law analysis.²⁸⁴

100 Most national systems of law draw a distinction between contracts that are *procured by* corruption and contracts that *provide for* corruption (such joint intention to commit corrupt acts under the contract may be expressly stipulated or may, as is more commonly the case, remain unwritten). Contracts *procured by* corruption are merely voidable at the instance of the innocent party,²⁸⁵ whereas contracts which *provide for*

²⁸³ Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at paras 2.138–2.139.

²⁸⁴ Discussed at paras 54–93 above.

²⁸⁵ See, for instance, the discussion of English law in *World Duty Free Co Ltd v Republic of Kenya* [Award] ICSID Case No ARB/00/7 (4 October 2006) at [164] (citing *Panama & South Pacific etc v India etc Works Co* (1875) 10 Ch App 515; *Armagas v Mundogas* [1986] 1 AC 717; and *LogicRose Ltd v Southend United FC Ltd* [1988] 1 WLR 1256).

See also the Council of Europe Criminal Law Convention on Corruption (Eur TS No 173) (27 January 1999; entry into force 1 July 2002), which requires European member States to provide for civil remedies relating to, *inter alia*, contracts tainted by corruption and which likewise draws a distinction between contracts *procured by*, and contracts *providing for*, corruption. Article 8(2) of the convention provides that:

Each Party shall provide in its internal law for the possibility for all parties to a contract whose consent has been undermined by an act of corruption to be able to apply to the court for the contract to be declared void, notwithstanding their right to claim for damages.

On the other hand, for contracts which provide for corruption, Art 8(1) provides that: “Each Party shall provide in its internal law for any contract or clause of a contract providing for corruption to be null and void.”

corruption may be considered null and void.²⁸⁶ The difference between the two is that a voidable contract is “intrinsically valid” until the innocent party takes positive steps to set it aside, whereas a contract which is null and void need not be set aside as it is from the outset regarded as “entirely ineffectual”.²⁸⁷

101 For instance, under English common law, an innocent party is not compelled to set aside a voidable contract and may choose to “keep the contract alive and enforce it according to its terms”.²⁸⁸ If the innocent party continues with the enforcement and performance of the voidable contract with knowledge of the circumstances rendering the contract voidable, it may lose the right thereafter to rescind the contract.²⁸⁹

²⁸⁶ See, for instance, Art 8(1) of the Council of Europe Criminal Law Convention on Corruption (Eur TS No 173) (27 January 1999; entry into force 1 July 2002) (“COE Criminal Law Convention”), above, n 285; Art 20 of the Swiss Federal Code of Obligations 1912; s 134 of the German Civil Code 1896. On the Swiss Federal Code of Obligations, see François Dessemontet and Tuğrul Ansay, *Introduction to Swiss Law* (Kluwer/Schulthess, 3rd Ed, 2004) at p 109. See further the Explanatory Report to Art 8(1) of the COE Criminal Law Convention (noting that “in most European countries, the contract the cause of which is illegal is null and void”.); and Peter Muchlinski, Federico Ortino & Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) at pp 600 and 609 (in particular, the arbitral awards cited at p 609, fn 114).

Cf the contrary position under English law: see Nelson Enonchong, *Illegal Transactions* (LLP, 1998) at p 31; Nelson Enonchong, “Effects of Illegality: A Comparative Study in French and English Law” (1995) 44(1) ICLQ 196; and *Chitty on Contracts* (Hugh Beale gen ed) (Sweet & Maxwell, 30th Ed, 2008) at para 16-010: “illegal contracts are *not devoid of legal effect*, but the *ex turpi causa* maxim entails that no action on the contract can be maintained” [emphasis added].

²⁸⁷ See Lord Mustill’s expert legal opinion in *World Duty Free Co Ltd v Republic of Kenya* [Award] ICSID Case No ARB/00/7 (4 October 2006) at [164].

²⁸⁸ *World Duty Free Co Ltd v Republic of Kenya* [Award] ICSID Case No ARB/00/7 (4 October 2006) at [164].

²⁸⁹ *World Duty Free Co Ltd v Republic of Kenya* [Award] ICSID Case No ARB/00/7 (4 October 2006) at [164].

Assuming the innocent party instead decides to set aside a voidable contract procured by corruption, “it is no bar to avoidance of [such a] contract that the innocent party may previously have committed a breach of that contract”.²⁹⁰ After rescission of the contract, *restitutio in integrum* may be claimed to restore the parties to the position they would have occupied if the contract had not been performed. However, *restitutio in integrum* does not require the victim of corruption to return to the corrupt party the bribe paid to the victim’s agent; the victim is entitled to recover the bribe from its agent²⁹¹ and keep it.²⁹²

102 These rules governing voidable contracts determine whether a party which has been induced to enter into a contract through corruption of its agent can rescind the contract in the third scenario mentioned above.²⁹³ *World Duty Free*²⁹⁴ provides an example of a contract which was voidable because it was procured by corruption and was eventually set aside by the victim of corruption, Kenya. The investor in *World Duty Free* was an Isle of Man corporation known as World Duty Free Co Ltd. It initiated ICSID

²⁹⁰ *World Duty Free Co Ltd v Republic of Kenya* [Award] ICSID Case No ARB/00/7 (4 October 2006) at [183]. See also *Barry v Stoney Point Canning Co* (1917) 55 SCR 51.

²⁹¹ A State whose officials have been bribed may bring a civil action against them to recover the bribe moneys, even if the bribe moneys or the official in question is in a foreign jurisdiction: see Colin Nicholls QC *et al*, *Corruption and Misuse of Public Office* (Oxford University Press, 2nd Ed, 2011) at paras 9.02–9.04 (discussing Art 53(a) of the United Nations Convention against Corruption (UN Doc A/58/422) (31 October 2003; entry into force 14 December 2005) and the UK Proceeds of Crime Act 2002 (c 29)) and para 9.43 (discussing *Attorney-General for Hong Kong v Charles Warwick Reid* [1994] 1 AC 324).

²⁹² *World Duty Free Co Ltd v Republic of Kenya* [Award] ICSID Case No ARB/00/7 (4 October 2006) at [186] (citing *LogicRose Ltd v Southend United FC Ltd* [1988] 1 WLR 1256). See also *Chitty on Contracts* (Hugh Beale gen ed) (Sweet & Maxwell, 30th Ed, 2008) at para 29-156; and Peter Muchlinski, Federico Ortino & Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) at p 601.

²⁹³ See para 94 above.

²⁹⁴ See n 8 above.

arbitration against Kenya pursuant to an arbitration clause in a contract to run duty-free operations in Kenya's international airports in Nairobi and Mombasa, alleging that Kenya had breached the contract by, *inter alia*, appointing a receiver over its operations. During the proceedings, the investor filed a memorial in which the investor admitted to paying a US\$2m "personal donation" to Daniel arap Moi, then President of Kenya, "in order to be able to do business with the Government of Kenya".²⁹⁵ The tribunal had no doubt that this was a bribe to obtain the contract.²⁹⁶ Consequently, it held that under English law (the governing law of the contract²⁹⁷), the contract was voidable at the instance of Kenya, as the contract had been procured through corruption of its agent.²⁹⁸ Moreover, Kenya had not waived its right to rescind the contract, since Kenya formally gave notice of its avoidance of the contract in its counter-memorial, soon after its former president's acceptance of the bribe from the investor came to light in the investor's memorial.²⁹⁹ The contract was properly set aside and as a result, the investor's claim for breach of contract was dismissed.³⁰⁰

103 As for contracts which *provide for* corruption, without either party having to take any steps to set it aside, courts will not enforce the

²⁹⁵ *World Duty Free Co Ltd v Republic of Kenya* [Award] ICSID Case No ARB/00/7 (4 October 2006) at [66].

²⁹⁶ *World Duty Free Co Ltd v Republic of Kenya* [Award] ICSID Case No ARB/00/7 (4 October 2006) at [136].

²⁹⁷ There was some controversy as to whether English or Kenyan law applied owing to contradictory choice of law provisions in the contract, but the tribunal did not need to decide between either governing law clause since Kenyan law was in all material aspects the same as English law with regard to the issues in dispute between the parties. See *World Duty Free Co Ltd v Republic of Kenya* [Award] ICSID Case No ARB/00/7 (4 October 2006) at [158]–[159].

²⁹⁸ *World Duty Free Co Ltd v Republic of Kenya* [Award] ICSID Case No ARB/00/7 (4 October 2006) at [164] and [182].

²⁹⁹ *World Duty Free Co Ltd v Republic of Kenya* [Award] ICSID Case No ARB/00/7 (4 October 2006) at [182]–[183].

³⁰⁰ *World Duty Free Co Ltd v Republic of Kenya* [Award] ICSID Case No ARB/00/7 (4 October 2006) at [128] and [182]–[185].

contract, nor will the courts provide any other non-contractual (eg, restitutionary) remedies arising out of the contract.³⁰¹ Such contracts, as mentioned above, may be regarded to be null and void for illegality under the applicable law.³⁰² Moreover, the parties are precluded from maintaining any claims founded upon the contract (whether contractual or restitutionary in nature) by the equitable maxims *ex turpi causa non oritur actio* or *nemo auditur turpitudinem suam allegans* (an unlawful or morally reprehensible act cannot serve as the basis of an action in law) and *in pari delicto potior est conditio possidentis* (where the parties are both blameworthy, the defendant has the stronger position).³⁰³ These maxims are expressions of the “Clean Hands

³⁰¹ *Chitty on Contracts* (Hugh Beale gen ed) (Sweet & Maxwell, 30th Ed, 2008) at para 16-007.

³⁰² See para 100, n 286 and the accompanying text above.

³⁰³ *Holman v Johnson* (1775) 1 Cowp 341; *Harry Parker v Mason* [1940] 2 KB 590.

The Clean Hands Doctrine applies to both contractual and non-contractual claims: see generally Gerhard Dannemann, “Illegality as Defence against Unjust Enrichment Claims” (2000) Oxford U Comparative L Forum 4, available at <<http://ouclf.iuscomp.org/articles/dannemann.shtml>> (accessed 12 April 2013) (discussing the Clean Hands Doctrine in the context of restitutionary claims); Nelson Enonchong, *Illegal Transactions* (LLP, 1998) (discussing the Clean Hands Doctrine in the context of, *inter alia*, contractual, restitutionary and proprietary claims); Richard Kreindler, “Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine” in *Between East and West: Essays in Honour of Ulf Franke* (Kaj Hobér, Annette Magnusson & Marie Öhrström eds) (Juris, 2010) at pp 321–322 (citing, *inter alia*, s 242 of the German Civil Code 1896 and the Californian decisions *Camp v Mangels* 35 Cal App 4th 620 (1995) and *Bain v Doctor’s Co* 222 Cal App 3d 1048 (1990)); Nelson Enonchong, “Effects of Illegality: A Comparative Study in French and English Law” (1995) 44(1) ICLQ 196; and William Swadling, “The Role of Illegality in the English Law of Unjust Enrichment” (2000) Oxford U Comparative L Forum 5, available at <<http://ouclf.iuscomp.org/articles/swadling.shtml>> (accessed 12 April 2013).

Doctrine”,³⁰⁴ which bars a claimant’s claims due to its illegal or improper conduct in relation to those claims. Claims tainted by wrongdoing therefore will not succeed and the loss lies where it falls. As the Clean Hands Doctrine can be traced back to Roman law, it is also applicable under the law of many civil law jurisdictions.³⁰⁵ It operates, conceptually speaking, as a procedural bar to the *admissibility* of a claim.³⁰⁶

³⁰⁴ Carolyn Lamm, Hansel Pham & Rahim Moloo, “Fraud and Corruption in International Arbitration” in *Liber Amicorum Bernardo Cremades* (Miguel Àngel Fernandez-Ballesteros & David Arias eds) (La Ley grupo Wolters Kluwer, 2010) at pp 723–726; Richard Kreindler, “Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine” in *Between East and West: Essays in Honour of Ulf Franke* (Kaj Hobér, Annette Magnusson & Marie Öhrström eds) (Juris, 2010) at pp 318–319.

³⁰⁵ Gerhard Dannemann, “Illegality as Defence against Unjust Enrichment Claims” (2000) Oxford U Comparative L Forum 4, available at <<http://ouclf.iuscomp.org/articles/dannemann.shtml>> (accessed 12 April 2013) (citing the Czech and Slovak Civil Code of 1992). See also Richard Kreindler, “Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine” in *Between East and West: Essays in Honour of Ulf Franke* (Kaj Hobér, Annette Magnusson & Marie Öhrström eds) (Juris, 2010) at pp 317–318 (citing, *inter alia*, §§242 and 817(2) of the German Civil Code 1896) and Carolyn Lamm, Hansel Pham & Rahim Moloo, “Fraud and Corruption in International Arbitration” in *Liber Amicorum Bernardo Cremades* (Miguel Àngel Fernandez-Ballesteros & David Arias eds) (La Ley grupo Wolters Kluwer, 2010) at p 728.

³⁰⁶ See *World Duty Free Co Ltd v Republic of Kenya* [Award] ICSID Case No ARB/00/7 (4 October 2006) at [160] and [181]; Gerhard Dannemann, “Illegality as Defence against Unjust Enrichment Claims” (2000) Oxford U Comparative L Forum 4, available at <<http://ouclf.iuscomp.org/articles/dannemann.shtml>> (accessed 12 April 2013) (the *nemo auditur turpitudinem suam allegans* and *ex turpi causa non oritur action* maxims are “procedural and, technically speaking, not a defence but a limitation in making a claim”); Richard Kreindler, “Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine” in *Between East and West: Essays in Honour of Ulf Franke* (Kaj Hobér, Annette Magnusson & Marie Öhrström eds) (Juris, 2010) at pp 323–327; Carolyn Lamm, Hansel Pham & Rahim Moloo, “Fraud and Corruption in International Arbitration”

(continued on next page)

104 Where the applicable law reflects these principles, an agreement between a principal and his intermediary for the latter to corruptly procure a benefit from a third party is not enforceable, nor can money or property transferred under such an agreement form the subject of a claim.³⁰⁷ Thus, a corrupt intermediary which has fulfilled its duties under an intermediary agreement cannot claim his commission from the equally corrupt principal (the above-mentioned first scenario³⁰⁸), for *in pari delicto potior est conditio possidentis* – the defendant principal has the stronger position; neither can a corrupt principal recover advance payments made to an equally corrupt intermediary, even if the latter fails to procure the contract or relevant government approvals for the principal under the illegal intermediary agreement (the above-mentioned second scenario³⁰⁹). Reasoning along these lines was employed in cases like ICC Case No 6248 (1990) (addressing the first scenario) and ICC Case No 5943 (1990) (addressing the second scenario).³¹⁰

105 However, if only the intermediary intends to perform the intermediary agreement illegally and the principal is unaware of such intention, the latter can still bring claims founded upon the contract (whether contractual or restitutionary in nature), for in such case the contract remains lawful – “the fact that one party intends to perform the

in *Liber Amicorum Bernardo Cremades* (Miguel Àngel Fernandez-Ballesteros & David Arias eds) (La Ley grupo Wolters Kluwer, 2010) at pp 723–726.

³⁰⁷ *Chitty on Contracts* (Hugh Beale gen ed) (Sweet & Maxwell, 30th Ed, 2008) at paras 16-010 and 16-177. See, for instance, *Apthorp v Neville* (1907) 23 TLR 575 and *Parkinson v College of Ambulance Ltd* [1925] 2 KB 1.

³⁰⁸ See para 94 above.

³⁰⁹ See para 94 above.

³¹⁰ These cases are helpfully summarised in Antonio Crivellaro, “Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence” in *Arbitration, Money Laundering, Corruption and Fraud* (Kristine Karsten & Andrew Berkeley eds) (Dossiers-ICC Institute of World Business Law, 2003) at pp 128–130. Other relevant cases include ICC Case No 3913 (1981); ICC Case No 3916 (1982); ICC Case No 6497 (1994); ICC Case No 8891 (1998).

contract in an illegal way does not make the contract itself completely illegal” – and the principal is not *in pari delicto* (more accurately, he is not in any way *in delictum*).³¹¹ Thus, an innocent principal may be able to recover payments made to a corrupt intermediary if, after entering into a valid intermediary agreement, the principal discovers that the intermediary has bribed public officials in a bid to procure a contract or relevant government approvals for the principal (the above-mentioned second scenario³¹²).³¹³

³¹¹ Nelson Enonchong, *Illegal Transactions* (LLP, 1998) at pp 292–293 and 297–299 and *Chitty on Contracts* (Hugh Beale gen ed) (Sweet & Maxwell, 30th Ed, 2008) at para 16-011. For comparative law analysis, see Gerhard Dannemann, “Illegality as Defence against Unjust Enrichment Claims” (2000) Oxford U Comparative L Forum 4, available at <<http://ouclf.iuscomp.org/articles/dannemann.shtml>> (accessed 12 April 2013); and Nelson Enonchong, “Effects of Illegality: A Comparative Study in French and English Law” (1995) 44(1) ICLQ 196.

³¹² See para 94 above.

³¹³ Assuming the main contract or relevant government approvals have not yet been procured, the principal may terminate the intermediary agreement owing to the intermediary’s breach of contract (lawful performance of its obligations being impliedly, if not expressly, required under the intermediary agreement: see Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 2007) at para 7.11), and bring an action for money had and received to recover any advance payments made to the intermediary on the basis of total failure of consideration: see *Chitty on Contracts* (Hugh Beale gen ed) (Sweet & Maxwell, 30th Ed, 2008) at paras 12-026, 16-011, 24-50 and 29-054–29-059. Alternatively, if the main contract or relevant government approvals are initially procured but are subsequently rescinded by the Government owing to the intermediary’s corruption of its officials (see *Armagas Ltd v Mundogas SA* [1986] AC 717 at 744–745), the principal may thereafter bring a claim for damages arising out of the intermediary’s breach of contract. See further Nelson Enonchong, *Illegal Transactions* (LLP, 1998).

VI. Whether arbitrators have a duty or the right to report their suspicions of parties' corrupt activities to the authorities

106 A final matter to consider at the primary tribunal level is whether arbitrators have the obligation to report to relevant regulatory authorities corruption which come to their attention in the course of an arbitration³¹⁴ and, if so, whether this would be a violation of their obligation to maintain the confidentiality of the proceedings.³¹⁵

107 Any duty of disclosure can only arise from national legislation to which the tribunal members are subject.³¹⁶ Such duty overrides any express or implied obligation of confidentiality.³¹⁷ For instance,

³¹⁴ Mohamed Abdel Raouf, "How should International Arbitrators Tackle Corruption Issues?" (2009) 24(1) ICSID Rev-FILJ 100 at 119–120; Bernardo Cremades & David Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud" in *Arbitration, Money Laundering, Corruption and Fraud* (Kristine Karsten & Andrew Berkeley eds) (Dossiers-ICC Institute of World Business Law, 2003) at pp 84–85.

³¹⁵ It is uncontroversial that any implied obligation of confidentiality applicable to the parties also extends to the tribunal: see Michael Hwang SC & Katie Chung, "Protecting Confidentiality and Its Exceptions – The Way Forward?" (2009) ICC ICarb Bull (*Confidentiality in Arbitration: Commentaries on Rules, Statutes, Case Law and Practice Special Supplement*) 40. See generally the International Law Association International Arbitration Committee's Report on *Confidentiality in International Commercial Arbitration* (2010) at pp 5–8 and 20–22.

³¹⁶ Bernardo Cremades & David Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud" in *Arbitration, Money Laundering, Corruption and Fraud* (Kristine Karsten & Andrew Berkeley eds) (Dossiers-ICC Institute of World Business Law, 2003) at p 85.

³¹⁷ See, for instance, ss 23D(1) and 23D(8)–23D(9) of the Australian International Arbitration Act 1974 (Act No 136 of 1974) (taking into account amendments up to Act No 5 of 2011). See generally International Law Association International Arbitration Committee's Report on *Confidentiality in International Commercial Arbitration* (2010) at pp 5–8 and 20–22;

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anti-money laundering regulations (which often work hand-in-hand with anti-corruption legislation³¹⁸)³¹⁹ may impose on arbitrators an obligation to report his or her reasonable suspicions of a party's corrupt activities and exempt them from liability for any breach of confidentiality obligations. Singapore anti-money laundering legislation is apparently couched in broad enough terms to have such effect (although, to the authors' knowledge, no case has ever applied it in this context, nor has

and Michael Hwang SC & Katie Chung, "Defining the Indefinable: Practical Problems of Confidentiality in Arbitration" (2009) 26 J Int Arb 609 at 622.

³¹⁸ For instance, Art 13 of the Council of Europe ("COE") Criminal Law Convention against Corruption (Eur TS No 173) (27 January 1999; entry into force 1 July 2002) ("COE Criminal Law Convention") requires State parties to criminalise the conduct referred to in Arts 6(1) and 6(2) of the COE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Eur TS No 141) (8 November 1990; entry into force 1 September 1993) when the predicate offence consists of any of the offences contained in Arts 2–12 of the COE Criminal Law Convention against Corruption: see Colin Nicholls QC *et al*, *Corruption and Misuse of Public Office* (Oxford University Press, 2nd Ed, 2011) at para 14.29. As noted in David Chaikin, "Commercial Corruption and Money Laundering: A Preliminary Analysis" (2008) 15(3) JFC 269 at 270, corruption and money laundering often occur together, with the presence of one reinforcing the other. Corruption generates billions of dollars of funds that will need to be concealed through the money laundering process. At the same time, corruption contributes to money laundering activity through payment of bribes to persons who are responsible for the operation of anti-money laundering systems. The close linkage between corruption and money laundering suggests that policies that are designed to combat both crimes will be more effective.

³¹⁹ See generally Bernardo Cremades & David Cairns, "Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud" in *Arbitration, Money Laundering, Corruption and Fraud* (Kristine Karsten & Andrew Berkeley eds) (Dossiers-ICC Institute of World Business Law, 2003) at pp 70–75.

any arbitrator reported his or her suspicions of corruption aroused from hearing a case).³²⁰

108 The relevant anti-money laundering legislation in Singapore is the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (“SCA”).³²¹ Section 39(1) of the SCA imposes a duty of disclosure on a person who knows or has reasonable grounds to suspect that certain property may represent the proceeds of, was used in connection with, or is intended to be used in connection with criminal conduct.³²² “Property” is widely defined as “money and all other property, movable or immovable, including things in action and other

³²⁰ Cf international conventions and other initiatives which merely recommend that countries adopt measures to encourage the reporting of bribery, without specifying that these measures should include the imposition of a legal duty to report suspicions of knowledge of corrupt activities: see, for instance, Art 39(2) of the United Nations Convention against Corruption (UN Doc A/58/422) (31 October 2003; entry into force 14 December 2005) and Arts III(iv) and IX(i) and (iii) of the Organisation for Economic Co-operation and Development Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009).

³²¹ Cap 65A, 2000 Rev Ed.

³²² Section 39(1) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) reads as follows:

Duty to disclose knowledge or suspicion

39.—(1) Where a person knows or has reasonable grounds to suspect that any property:

- (a) in whole or in part, directly or indirectly, represents the proceeds of;
- (b) was used in connection with; or
- (c) is intended to be used in connection with,

any act which may constitute drug trafficking or criminal conduct, as the case may be, and the information or matter on which the knowledge or suspicion is based came to his attention in the course of his trade, profession, business or employment, he shall disclose the knowledge or suspicion or the information or other matter on which that knowledge or suspicion is based to a Suspicious Transaction Reporting Officer as soon as is reasonably practicable after it comes to his attention.

intangible or incorporeal property”,³²³ which could include contracts obtained through the bribery of government officials. “Criminal conduct” is also couched in broad terms as including, for instance, bribery in relation to both local and foreign government contracts.³²⁴ Thus, for instance, if an arbitrator sitting in Singapore has reasonable suspicions that a party bribed a foreign government official in order to procure a government contract *outside* Singapore (the contract and bribery of the foreign government official would constitute “property” and “criminal conduct” respectively under the SCA), it appears that section 39(1) imposes on him the obligation to report such suspicions to the relevant Singapore authorities. Failure to do so is grounds for a conviction and a fine.³²⁵

109 If disclosure is made pursuant to section 39(1) of the SCA, section 39(6) immunises the arbitrator from any breach of the obligation of confidentiality.³²⁶ Institutional rules also recognise compulsion of law

³²³ Section 2(1) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed).

³²⁴ Section 2(1) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed). The definition of “criminal conduct” includes both “serious offence” and “foreign serious offence”. “Foreign serious offence” is in turn defined as:

... an offence ... against the laws of, or of a part of, a foreign country ... and the act or omission constituting the offence or the equivalent act or omission would, if it had occurred in Singapore, have constituted a serious offence.

“Serious offence” is defined as, *inter alia*, the offences specified in the Second Schedule, which includes “Bribery in relation to Government contracts” and “Bribery of Member of Parliament” under ss 10 and 11 of the Singapore Prevention of Corruption Act (Cap 241, 1993 Rev Ed).

³²⁵ Section 39(2) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed).

³²⁶ Section 39(6) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) provides as follows:

(6) Where a person discloses in good faith to a Suspicious Transaction Reporting Officer —

(a) his knowledge or suspicion of the matters referred to in subsection (1)(a), (b) or (c); or

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as an exception to the duty of confidentiality. The Arbitration Rules of the Singapore International Arbitration Centre (“2010 SIAC Rules”), for instance, provide that parties or arbitrators may disclose matters relating to an arbitration “in compliance with the provisions of the laws of any State which are binding on the party making the disclosure”.³²⁷ The World Intellectual Property Organization (“WIPO”) Arbitration Rules similarly provide that the duty of confidentiality is binding on the parties and arbitrators “except to the extent ... required by law”.³²⁸

110 It should also be noted that, even if there is no legal compulsion for an arbitrator to disclose corrupt activities, disclosure *of his or her own accord* to the relevant authorities may fall under the public interest or interests of justice exceptions to confidentiality.³²⁹ Thus, for instance, it

(b) any information or other matter on which that knowledge or suspicion is based,
the disclosure shall not be treated as a breach of any restriction upon the disclosure imposed by law, contract or rules of professional conduct and he shall not be liable for any loss arising out of the disclosure or any act or omission in consequence of the disclosure.

³²⁷ Article 35.2(d) of the 2010 Singapore International Arbitration Centre (“SIAC”) Arbitration Rules (4th Ed, 1 July 2010). Article 35.2(d) of the 2013 SIAC Arbitration Rules (5th Ed, 1 April 2013) states the same.

³²⁸ Article 76(a) of the World Intellectual Property Organization (“WIPO”) Arbitration Rules (effective 1 October 2002). See also Arts 73–75 of the WIPO Arbitration Rules.

³²⁹ See, for instance, the exceptions to the duty of confidentiality imposed by recent arbitration legislation enacted in countries such as:

- (a) Australia: Section 23G(1) of the Australian International Arbitration Act 1974 (Act No 136 of 1974) (taking into account amendments up to Act No 5 of 2011) reads:

A court may make an order allowing a party to arbitral proceedings to disclose confidential information in relation to the arbitral proceedings ... if:

- (a) the court is satisfied, in the circumstances of the particular case, that the public interest in preserving the confidentiality of arbitral proceedings is outweighed by

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other considerations that render it desirable in *the public interest* for the information to be disclosed ...

[emphasis added];

- (b) New Zealand: Section 14E(2) of the New Zealand Arbitration Act 1996 (1996 No 99) (reprinted as at 1 January 2011) reads:

The High Court may make an order [allowing a party to disclose any confidential information] only if —

- (a) it is satisfied, in the circumstances of the particular case, that the public interest in preserving the confidentiality of arbitral proceedings is outweighed by other considerations that render it desirable *in the public interest* for the confidential information to be disclosed ...

[emphasis added]

- (c) Scotland: Rule 26(1) of the Scottish Arbitration Rules reads:

Disclosure by the tribunal, any arbitrator or a party of confidential information relating to the arbitration is to be actionable as a breach of an obligation of confidence unless the disclosure —

...

- (c) is required – in order to *enable any public body or office-holder to perform public functions properly*,

...

- (e) is in the *public interest*,

- (f) is necessary in the *interests of justice* ...

[emphasis added]

See generally International Law Association International Arbitration Committee's Report on *Confidentiality in International Commercial Arbitration* (2010) at pp 16–17 and 20–22.

However, not all jurisdictions recognise an obligation of confidentiality in the absence of express provision in national arbitration laws or parties' arbitration agreements for arbitral proceedings to be kept confidential. Disclosure of matters relating to arbitrations seated in these jurisdictions, in the absence of express agreement by the parties to preserve the confidentiality of the arbitration proceedings, will not give rise to breach of confidentiality. Hence, there is no need for a party which has disclosed to the relevant authorities matters relating to an arbitration supporting its suspicion of corruption to plead any public interest or interests of justice exception to confidentiality, it not being bound by any obligation of

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has been held that a party's disclosure to regulatory authorities of documents relating to an arbitration providing evidence of the commission of dishonest and fraudulent acts was not a breach of that party's implied duty of confidentiality in arbitration.³³⁰ In principle, the same exception should also apply to arbitrators.

VII. The judicial scrutiny of corruption-tainted arbitral awards at the setting aside and enforcement stages

111 When a tribunal renders an award upholding an allegedly corrupt agreement, the award is often challenged by the losing party in national courts on public policy grounds.³³¹

confidentiality in the first place. See generally Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at pp 2262–2264 (noting that countries like Sweden and the US do not recognise an implied duty of confidentiality).

³³⁰ *AAV v AAZ* [2011] 1 SLR 1093. See also Michael Hwang SC & Katie Chung, "Defining the Indefinable: Practical Problems of Confidentiality in Arbitration" (2009) 26 J Int Arb 609 at 625–626; and Michael Hwang SC & Nicholas Thio, "A Contextual Approach to the Obligation of Confidentiality in Arbitration in Singapore: An Analysis of the Decision of the High Court in *AAV & Others v AAZ*" (2012) 28(2) Arb Int'l 225.

³³¹ Here, we are referring to challenges on the basis of substantive public policy, which "goes to the recognition of rights and obligations by a tribunal or enforcement court in connection with the subject matter of the award", as opposed to procedural public policy, "which goes to the process by which the dispute was adjudicated": The International Law Association International Arbitration Committee's Interim Report on *Public Policy as a Bar to Enforcement of International Arbitral Awards* (2000) at p 17. It is uncontroversial that an award will be refused enforcement or set aside if there was corruption on the part of a tribunal member as a violation of procedural public policy, there being an international consensus in this regard: The International Law Association International Arbitration Committee's Interim Report on *Public Policy as a Bar to Enforcement of International Arbitral Awards* (2000) at p 24. Such violations of procedural public policy will therefore not be the focus of this paper. Australia, New
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112 Article V(2)(b) of the New York Convention and Article 36 of the UNCITRAL Model Law enshrine the public policy of the forum as grounds upon which arbitral awards may be refused *enforcement* by the courts. They provide that:

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: ... The recognition or enforcement of the award would be contrary to the *public policy* of that country. [emphasis added]

113 In similar terms, Article 34(2)(b)(ii) of the UNCITRAL Model Law provides for the setting aside of an award on grounds of public policy: “An arbitral award *may* be set aside by the court specified in article 6 only

Zealand, India and Zimbabwe, for instance, have enacted modified versions of the UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) which provide that the public policy grounds of enforcement and setting aside of awards includes the case where “the making of the award was induced or affected by fraud or corruption”: The International Law Association International Arbitration Committee’s Interim Report on *Public Policy as a Bar to Enforcement of International Arbitral Awards* (2000) at pp 24–25. Similarly, in Singapore, s 24(a) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) provides that

Notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if —

(a) *the making of the award was induced or affected by fraud or corruption ...*

[emphasis added]

The Ontario Court of Appeal in *Corporacion Transnacional de Inversiones SA de CV v STET Intl SpA* (2000) 49 OR 3d 414 is also described as having held that the:

... public policy exception applies when an award offends local principles of justice and fairness in a way attributable to another jurisdiction’s procedural or substantive rules or tribunal ignorance or corruption.

Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at p 2851, fn 703.

if ... the court finds that ... the award is in conflict with the *public policy* of this State” [emphasis added]. Most developed national arbitration statutes are broadly similar to the UNCITRAL Model Law in this regard.³³²

114 The leading arbitration jurisdictions interpret the grounds for setting aside of awards in conformity with the corresponding New York Convention grounds for refusal of enforcement.³³³ It is therefore unnecessary to draw any distinction between the concept of public policy under the setting aside and enforcement regimes as the extent of the court’s scrutiny of international arbitration awards is the same regardless of where the award is made.³³⁴

A. Competing considerations: Balancing the finality of arbitral awards and the forum’s fundamental public policy concerns

115 A court “may” set aside or refuse enforcement of an award if a party successfully establishes any one of the stipulated grounds under the New York Convention and UNCITRAL Model Law.³³⁵ Hence, even if contravention of public policy is made out, it is not mandatory for the court to annul the award or refuse to enforce it. The court has the discretion to determine the nature of forum public policy violation which warrants interference with the award.

116 In exercising this discretion, there is a tension between respecting the finality of arbitral awards on the one hand and policing the forum’s other public policy concerns on the other. Respect for the finality of arbitral awards serves a number of functions: it prevents the re-litigation of issues already determined in arbitration; encourages predictability in

³³² Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at pp 2566–2567.

³³³ See generally Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at pp 2552, 2556–2560 and 2827–2863.

³³⁴ The Singapore Court of Appeal recently affirmed this principle in *AJU v AJT* [2011] 4 SLR 739 at [37]–[38]. This case is discussed further at paras 132–139 below.

³³⁵ See paras 112–114 above.

the resolution of disputes through international arbitration; and preserves the principle of comity of nations.³³⁶ However, public policy covers a broader array of state interests extending beyond these policy goals underlying preservation of award finality. For present purposes, the most relevant manifestation of public policy in direct tension with award finality is the prohibition against agreements considered contrary to good morals or public order, such as contracts for corruption and bribery.³³⁷ National courts are understandably loath to enforce, by upholding arbitral awards, agreements which may be repugnant to the forum's fundamental moral values and which undermine fair competition as well as integrity in public administration.

117 When a reviewing court is asked to set aside or refuse enforcement of an award, on the basis that the award allegedly upholds a contract tainted by corruption, two issues arise: (a) whether the award's findings of fact and/or law should be re-examined by the court; and (b) whether the award, based on the tribunal's or the court's findings of facts and/or law (as the case may be), should be refused enforcement on public policy grounds. These are the two issues discussed below.

³³⁶ *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* 373 US 614 (1985); *Re an arbitration between Hainan Machinery Import and Export Corp and Donald & McArthur Pte Ltd* [1995] 1 SLR(R) 354; The International Law Association International Arbitration Committee's Interim Report on *Public Policy as a Bar to Enforcement of International Arbitral Awards* (2000) at pp 15–17.

³³⁷ Other manifestations of public policy include mandatory laws/*lois de police* (Pierre Mayer, "Mandatory Rules of Law in International Arbitration" (1986) 2 *Arb Int'l* 274 at 275: "an imperative provision of law which must be applied to an international relationship irrespective of the law that governs that relationship ... a matter of public policy ... so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws"); fundamental principles of law (such as the principle of good faith and *pacta sunt servanda*); and rules of natural justice. See generally The International Law Association International Arbitration Committee's Interim Report on *Public Policy as a Bar to Enforcement of International Arbitral Awards* (2000) at pp 17–30.

B. Competing judicial attitudes regarding the permissible extent of court review of tribunals' findings of fact and law

118 A tribunal may issue an award finding that corruption has not been proven by the complainant,³³⁸ or that the applicable law does not deem either party to have engaged in corrupt activities.³³⁹ Alternatively, the tribunal may issue an award without considering the possibility of corruption, since neither party had pleaded corruption as part of its case.³⁴⁰ The common element between these awards is that there is no finding of illegality or corruption. Parties dissatisfied with the award often apply to set aside or resist enforcement on the basis that (a) the tribunal did not properly consider the evidence of corruption put before it; (b) evidence of corruption was only discovered after the close of arbitral proceedings; or (c) the tribunal wrongly identified or applied the law governing issues of corruption.

119 There is a remarkable degree of variation, not only between jurisdictions but also between different courts *within* certain jurisdictions, regarding the permissible extent of court review of a tribunal's findings. The tension between award finality and public policy manifests itself in three competing judicial attitudes towards the scrutiny of awards, *viz*: (a) minimal review; (b) maximal review; and (c) contextual review.³⁴¹

(1) *Minimal review*

120 Courts which conduct minimal review show a great degree of deference to the findings made by the tribunal in its award.³⁴²

³³⁸ See paras 30–53 above.

³³⁹ See paras 54–93 above.

³⁴⁰ See paras 16–29 above.

³⁴¹ Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at pp 391–421.

³⁴² See generally Bernard Hanotiau & Olivier Caprasse, "Public Policy in International Commercial Arbitration" in *Enforcement of Arbitration Agreements and International Arbitral Awards* (Cameron May, 2008) at pp 811–815.

121 First, the court will refrain from reviewing the tribunal's identification and application of the law. The Swiss case of *Thomson-CSF v Frontier AG*³⁴³ and the US case of *Northrop Corp v Triad Financial Establishment*³⁴⁴ ("*Northrop v Triad*") exemplify this aspect of minimal review.

122 In the former, the Swiss Federal Tribunal in its judgment of 28 January 1997 dismissed an application to set aside the arbitral tribunal's award in ICC Case No 7664 (1996),³⁴⁵ which enforced commission payments due under an intermediary agreement between Frontier AG and Thomson-CSF (Thomson-CSF later became Thales, but to avoid confusion, the authors refer to it throughout this article as Thomson-CSF). Under the agreement, which was governed by French law, Frontier AG as intermediary was to assist Thomson-CSF in completing its sale of six *Lafayette-class* frigate warships to Taiwan. The parties had entered into the intermediary agreement on 19 July 1990 after the French government, owing to China's objections to the sale of the frigates to Taiwan, withdrew its authorisation for the transaction. In 1991, the French government dropped its opposition and re-authorised the deal, which allowed Thomson-CSF to sign a contract with Taiwan for the sale of the frigates, worth approximately US\$2.5bn. A year later, in 1992, Frontier AG brought arbitration proceedings in Switzerland, claiming that Thomson-CSF failed to pay its commission due under the intermediary agreement. One of the issues in dispute was the nature of the services envisaged under the intermediary agreement. Frontier AG contended that the purpose of the agreement was to engage the services of one Kwan, who was to use his connections in China to overcome Chinese officials' objections to the sale of the frigates through legitimate lobbying activities. In contrast, Thomson-CSF argued that Kwan was engaged to neutralise the French veto on the sale through corrupt influence peddling in France. The arbitral tribunal found, on the basis of

³⁴³ Swiss Federal Tribunal's judgment of 28 January 1997 (1998) 16(1) ASA Bulletin 118.

³⁴⁴ 593 F Supp 928 (1984).

³⁴⁵ Swiss Federal Tribunal's judgment of 28 January 1997 (1998) 16(1) ASA Bulletin 118 at 130. The award in ICC Case No 7664 (1996) is briefly mentioned at para 59 above.

its evaluation of the evidence presented in the case, that Kwan was engaged exclusively to overcome China's objections to the sale, but through methods which did not amount to corrupt influence peddling. It thus ordered Thomson-CSF to pay the commission owed to Frontier AG under the intermediary agreement.

123 This award was challenged by Thomson-CSF before the Swiss Federal Tribunal. One of the grounds of challenge was that the arbitral tribunal had failed to correctly apply Article 178 of the old French Penal Code of 1791. The argument pressed by Thomson-CSF was that Article 178 prohibited all agreements for the influence of public officials, which should have rendered invalid the intermediary agreement between the parties, since its purpose as found by the arbitral tribunal was to influence Chinese officials to retract their objections to the sale. The court dismissed this argument, holding that:³⁴⁶

It is a challenge according to which the arbitral authority has badly applied the law on the substance ('error *in iudicando*'). But this challenge, even if it is founded (which is not the case in the present matter), would not justify the setting aside of the award.

This case, which has come to be referred to as the "frigates-to-Taiwan" saga, was also litigated in France. The authors examine its facts and the French proceedings in greater detail below. It suffices to say at this point that the Swiss Federal Tribunal's decision in 1997 was not the end of the matter, in Switzerland as well as in France.

³⁴⁶ Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at p 400. Note that the Swiss Federal Tribunal's judgment of 17 April 1990 annulling the first award in *Hilmarton Ltd v Omnium de Traitment et de Valorisation SA* [1999] 2 Lloyd's Rep 222 (see para 77 above) on the basis of the tribunal's incorrect application of the applicable Swiss law came at a time when the Swiss courts favoured maximal review. See Sayed's explanation as to how the enactment of the Swiss Private International Law Act of 1987 led to a change in Swiss judicial attitudes towards the scrutiny of arbitral awards (Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at pp 394–396).

124 Turning to the US Ninth Circuit Court of Appeals decision in *Northrop v Triad*, the court similarly upheld an American Arbitration Association award enforcing payments of commissions to the claimant intermediary, who was to assist the respondent principal in the sale of military equipment and related support services to Saudi Arabia. The tribunal held, *inter alia*, that the respondent was not excused from performing the intermediary agreement under Californian law (the governing law of the contract), notwithstanding the promulgation of a Saudi Arabian decree prohibiting the use of intermediaries with respect to arms sales to the Saudi Arabian government.³⁴⁷ The court noted in relation to the permissible scope of judicial review on matters of law that:³⁴⁸

The arbitrators' conclusions on legal issues are entitled to deference here. The legal issues were fully briefed and argued to the Arbitrators; the Arbitrators carefully considered and decided them in a lengthy written opinion. To now subject these decisions to *de novo* review would destroy the finality for which the parties contracted and render the exhaustive arbitration process merely a prelude to the judicial litigation which the parties sought to avoid.

125 The Ninth Circuit Court of Appeals also observed that “the mere error of interpretation of California law would not be enough to justify refusal to enforce the Arbitrators' decision”.³⁴⁹

126 Second, a court which adopts a minimal review approach will generally refrain from re-opening a tribunal's findings of fact. The Swiss Federal Tribunal in *Thomson-CSF v Frontier AG*³⁵⁰ thus rejected a further argument by the respondent that the arbitral tribunal had relied on “non-existent evidence” in coming to its conclusion in the award that

³⁴⁷ The facts of *Northrop Corp v Triad Financial Establishment* 593 F Supp 928 (1984) are explored in greater detail in Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at pp 246–250.

³⁴⁸ *Northrop Corp v Triad Financial Establishment* 593 F Supp 928 at 1269 (1984).

³⁴⁹ *Northrop Corp v Triad Financial Establishment* 593 F Supp 928 at 1269 (1984).

³⁵⁰ See paras 120–123 above.

Kwan was engaged solely to overcome Chinese opposition to the sale of the frigates (rather than to neutralise the French government's veto on the sale through the exercise of corrupt influence on French officials), reasoning that "it was not within its authority to review the facts of the case or the way the award proceeded in weighing evidence" since "a critique on the appreciation of evidence [by the arbitral tribunal] ... is a critique of purely appellate nature, that could not be admitted".³⁵¹

127 Does this mean that a minimal review court will always take the award's findings of fact and law as they stand, lock, stock and barrel, in deciding whether to uphold a public policy challenge to an award? Case law has identified three limited instances in which the minimal review approach will allow a re-examination of the tribunal's findings.

128 *First*, the court may re-open the tribunal's findings of fact only if the challenging party adduces *fresh* evidence of illegality, which "is of sufficient cogency and weight to be likely to have materially influenced the arbitrators' conclusion had it been advanced at the [arbitration] hearing".³⁵² Fresh evidence may be more precisely defined as evidence which "was not available or reasonably obtainable ... at the time of the hearing of the arbitration".³⁵³ In contrast to *fresh* evidence, neither *new* evidence (evidence which is not fresh, since it could have been obtained during the arbitral proceedings, but was not presented to the tribunal) nor evidence which had been submitted to but rejected by the tribunal³⁵⁴ will be

³⁵¹ Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at p 399.

³⁵² Colman J at first instance in *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1998] 3 WLR 770 (QB) at 810 and Waller LJ in his Court of Appeal decision in *Westacre Investments Inc v Jugoimport-SDPR Holdings Co Ltd* [1999] 3 WLR 811 (CA) at 828.

³⁵³ Colman J at first instance in *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1998] 3 WLR 770 (QB) at 810 and Waller LJ in his Court of Appeal decision in *Westacre Investments Inc v Jugoimport-SDPR Holdings Co Ltd* [1999] 3 WLR 811 (CA) at 828.

³⁵⁴ Nelson Enonchong, "The Enforcement of Foreign Arbitral Awards Based on Illegal Contracts" [2000] LMCLQ 495 at 504–505.

considered by a minimal review court. The first instance³⁵⁵ and Court of Appeal³⁵⁶ decisions in *Westacre* illustrate this aspect of minimal review.

129 The claimant, *Westacre Investments Inc* (“*Westacre*”), entered into an intermediary agreement (governed by Swiss law) with the respondent, *Jugoimport-SPDR Holding Co Ltd* (“*Jugoimport*”) (a Yugoslavian state-owned company, formerly an agency of the Federal Secretariat of National Defence of Yugoslavia), to assist the latter in obtaining contracts for the sale of M-84 tanks and related equipment to the Kuwaiti Ministry of Defence (“*Sales Contract*”), in consideration of substantial commission payments (“*Intermediary Agreement*”). After *Westacre* obtained the *Sales Contract* for *Jugoimport*, the latter refused to pay the promised commission, whereupon *Westacre* commenced International Chamber of Commerce (“*ICC*”) arbitration to recover its commission. The arbitration was seated in Switzerland. During the arbitration, *Jugoimport* alleged that *Westacre* had bribed Kuwaiti officials in order to obtain the *Sales Contract* for *Jugoimport* and argued that *Westacre*’s claim for its commission should therefore be denied. The tribunal held that *Jugoimport* had failed to provide sufficient evidence of corruption to prove its allegations; hence, the intermediary agreement was valid and *Jugoimport* was ordered to pay the promised commission to *Westacre*.

130 When the award was presented for enforcement in England, *Jugoimport* challenged the award, raising the same argument. This time, however, *Jugoimport* attempted to introduce new evidence not put before the tribunal, by way of an affidavit (referred to in the court’s judgment as the “*Affidavit*”) alleging that *Westacre* was being used as a vehicle by Kuwaiti government officials to receive bribes under the *Intermediary Agreement*, and that *Westacre*’s witnesses gave false

³⁵⁵ *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1998] 3 WLR 770.

³⁵⁶ *Westacre Investments Inc v Jugoimport-SDPR Holdings Co Ltd* [1999] 3 WLR 811.

evidence at the arbitration hearing to conceal such corruption. Mantell LJ (with whom Sir David Hirst agreed) simply held that:³⁵⁷

[t]he allegation [of bribery] was made, entertained and rejected [by the tribunal] ... *in those circumstances and without fresh evidence* I would have thought that there could be no justification for refusing to enforce the award. [emphasis added]

131 The majority clearly shared the concerns expressed by Colman J at first instance, who declared that there exists the “strongest conceivable public policy” against re-opening arbitral awards’ findings of fact, hence the rule that they may only be disturbed upon production of fresh evidence:³⁵⁸

By [attempting to introduce the Affidavit in order to prove perjury committed at the arbitration hearing] the defendants, in effect, invite the enforcement court to retry issues of fact which the arbitrators had before them and which they had to and did determine. If the public policy defence ... extended to this ground, it would present an open invitation to disappointed parties to relitigate their disputes by alleging perjury and a major inroad would be made into the finality of [New York] Convention awards. ...

...

... As regards arbitrations, there is the strongest conceivable public policy against reopening issues of fact already determined by the arbitrators. That is the policy which ... it is now accepted, prohibits investigation by the courts ... of the weight of the evidence before the arbitrator in order to disturb findings of fact ... The introduction of fresh evidence in order to disturb an English award is subject to requirements similar to those relating to the introduction of fresh evidence to challenge an English judgment ... the fresh evidence must be of sufficient cogency and weight to be likely to have influenced the arbitrator's conclusion and the evidence must not have been available or reasonably obtainable at the time of the hearing.

³⁵⁷ See also Nelson Enonchong, “The Enforcement of Foreign Arbitral Awards Based on Illegal Contracts” [2000] LMCLQ 495 at 510.

³⁵⁸ *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1998] 3 WLR 770 at 804 and 808.

The principles of finality and justice are nicely balanced by that rule.

The authorities do not suggest that any different rule applies to English arbitrations in those cases where it is alleged that the consequence of permitting fresh evidence to be adduced would be that evidence given at the hearing by the successful party could be shown to have been perjured.

[emphasis added]

132 The *second* case which justifies minimal review interference with a tribunal's findings is where the tribunal errs in its identification or interpretation of the forum's public policy. If (and only if) such error of law leads the tribunal to uphold a contract repugnant to the forum's *international* public policy, the award can be set aside or refused enforcement by the court. This was part of the holding in the eagerly anticipated Singapore Court of Appeal case of *AJU v AJT*.³⁵⁹

133 The facts were as follows. AJU, a Thai company whose principal business was the production of television programmes, and AJT, a British Virgin Islands company, were parties to a contract enabling AJU to stage an annual tennis tournament in Bangkok for a term of five years. Disputes arose out of the contract, which led to the commencement by AJT of arbitration proceedings against AJU. In the course of arbitration proceedings, AJU lodged a complaint of fraud against AJT's sole director and shareholder and AJT-related companies with the Special Prosecutor's Office of Thailand, alleging forgery of a document providing that an AJT-related company held the rights to organise the tennis tournament. The Thai police commenced investigations against the alleged offenders on charges of fraud, forgery, and use of a forged document. Under Thai law, fraud is a compoundable offence, whereas forgery and use of a forged document are non-compoundable offences. The discontinuance of proceedings in relation to non-compoundable offences rests in the hands of the Thai Public Prosecutor; hence, withdrawal of a complaint in

³⁵⁹ [2011] 4 SLR 739. The Swiss Federal Tribunal's judgment of 28 January 1997 in *Thomson-CSF v Frontier AG* (1998) 16(1) ASA Bulletin 118 can be interpreted as standing for the same proposition. See commentary on the case in Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at pp 400–401.

relation to such offences will not necessarily cause the termination of criminal proceedings or investigations.

134 While the Thai authorities' investigations were underway, the parties negotiated and entered into a settlement agreement governed by Singapore law ("the Concluding Agreement"). Under the Concluding Agreement, AJT would terminate the arbitration upon receiving evidence of the withdrawal, discontinuance, or termination of the criminal proceedings in Thailand, and in return, AJU was required to pay AJT US\$470,000 as final settlement of the arbitration. Subsequently, AJU withdrew its complaint and paid the settlement sum in full. The Thai authorities in turn issued a cessation order for the charge of fraud and, citing insufficient evidence, a non-prosecution order for the forgery charges. However, AJT still refused to terminate the arbitration, taking the view that AJU had failed to comply with the Concluding Agreement, as Thai criminal investigations into the forgery charges could still be reactivated by the production of additional evidence.

135 AJU applied to the tribunal to terminate the arbitration, and AJT responded by challenging the validity of the Concluding Agreement on the ground of, *inter alia*, illegality, arguing that it was an agreement between the parties to stifle the prosecution in Thailand of the forgery charges in contravention of Thai law and accordingly, contrary to the public policy of Thailand and Singapore. AJT also argued that the non-prosecution order was procured by AJU through bribery and/or corruption of the Thai authorities. The issue of the validity of the Concluding Agreement was submitted to the tribunal, which rendered an interim award terminating the arbitration, as it found that the Concluding Agreement was valid and enforceable and that AJU did not obtain the non-prosecution order through bribery of the Thai authorities.

136 AJT sought to set aside the interim award on public policy grounds, arguing before the High Court that the Concluding Agreement was illegal as an agreement to stifle the prosecution of non-compoundable forgery charges in Thailand and that the non-prosecution order had been procured through bribery and/or corruption of the Thai authorities. Proceeding on the basis that this was "an appropriate case" for the court to intervene and re-open the tribunal's findings on the legality of the

Concluding Agreement, the High Court re-evaluated the evidence relating to AJT's allegations of illegality and concluded that the Concluding Agreement was illegal under its governing law (Singaporean law) and the law of the place of performance (Thai law), as it was an agreement between the parties to stifle the prosecution of non-compoundable offences under Thai law. The High Court, however, dismissed AJT's allegations that AJU had procured the non-prosecution order through bribery and/or corruption of the Thai authorities.

137 AJU appealed the High Court's decision, which the Court of Appeal overturned on the basis that the High Court had erred in re-opening the tribunal's findings of fact.³⁶⁰ The Court of Appeal's reasoning indicated its endorsement of the minimal review approach (though there is more than meets the eye to this, which the authors reserve for later discussion at the end of this part³⁶¹).

138 After setting out the two divergent approaches in England – that adopted by the *Westacre* majority on the one hand, and Waller LJ's more "interventionist" two-stage test in *Soleimany v Soleimany*³⁶² ("*Soleimany*") on the other – the Court of Appeal held that it was the *Westacre* majority's approach (endorsing Colman J's first instance judgment³⁶³) which was consonant with the legislative policy of "giving primacy to the autonomy of arbitral proceedings and upholding the finality of arbitral

³⁶⁰ The Singapore Court of Appeal in *AJU v AJT* [2011] 4 SLR 739 (CA) at [71] also disapproved of *Rockeby Biomed Ltd v Alpha Advisory Pte Ltd* [2011] SGHC 155 ("*Rockeby*"), which had cited the High Court decision in *AJT v AJU* [2010] 4 SLR 649 (HC) approvingly and held that "[i]n deciding the issue of illegality, [the court has] the power to examine the facts of the case afresh". See the authors' review of *Rockeby* in Michael Hwang SC & Kevin Lim, *Rockeby Biomed Ltd v Alpha Advisory Pte Ltd AS, High Court, Originating Summons No 1206 of 2010, 22 June 2011: A Contribution by the ITA Board of Reporters* (Kluwer Law International, 2011).

³⁶¹ See paras 194–197 below.

³⁶² [1998] 3 WLR 811. See paras 156–161 below.

³⁶³ *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1998] 3 WLR 770.

award”.³⁶⁴ In this regard, the Court of Appeal drew a distinction between errors of law relating to the forum’s public policy on the one hand, and errors of *fact* on the other. The Court of Appeal held that the public policy exception in Article 34(2)(b)(ii) of the UNCITRAL Model Law only permits setting aside of awards for errors of law as to *what constitutes Singapore’s international public policy*. It reasoned as follows:³⁶⁵

... the law [governing the Concluding Agreement] applied by the Tribunal was Singapore law ... the court cannot abrogate its judicial power to the Tribunal to decide what the public policy of Singapore is and, in turn whether or not the Concluding Agreement is illegal ... the court is entitled to decide for itself whether the Concluding Agreement is illegal and to set aside the Interim Award if it is tainted with illegality ...

... It is a question of law what the public policy of Singapore is. An arbitral award can be set aside if the arbitral tribunal makes an error of law in this regard ... Thus, in the present case, if the Concluding Agreement had been governed by Thai law instead of Singapore law, and if the Tribunal had held that the agreement was indeed illegal under Thai law (as [AJT] alleged) *but could nonetheless be enforced in Singapore because it was not contrary to Singapore’s public policy, this finding – viz, that it was not against the public policy of Singapore to enforce an agreement which was illegal under its governing law – would be a finding of law which, if it were erroneous, could be set aside under Art 34(2)(b)(ii) of the Model Law ...*

[emphasis added]

It is implicit that the “public policy” which the Court of Appeal referred to in the above passage was *international* as opposed to *domestic* public policy, for earlier in its judgment, the court observed that public policy under the UNCITRAL Model Law grounds for setting aside and refusal of enforcement has “an international focus”,³⁶⁶ and “must involve either ‘exceptional circumstances ... which would justify the court in refusing to

³⁶⁴ *AJU v AJT* [2011] 4 SLR 739 at [60].

³⁶⁵ *AJU v AJT* [2011] 4 SLR 739 at [62] and [67].

³⁶⁶ *AJU v AJT* [2011] 4 SLR 739 at [37].

enforce the award' ... or a violation of 'the most basic notions of morality and justice'".³⁶⁷

139 Turning to findings of fact by the tribunal, the Court of Appeal held in contrast that, even if they are made in error, they are nevertheless "final and binding on both parties",³⁶⁸ which mirrors the holding of the English Court of Appeal in *Westacre* and the Swiss Federal Tribunal in *Thomson-CSF v Frontier AG*.³⁶⁹ However, the Court of Appeal in *AJU v AJT* also (correctly) took care not to couch this principle in absolute terms, holding that a tribunal's findings of fact can be subject to court review in the limited circumstances "where there is fraud, breach of natural justice or some other recognised vitiating factor".³⁷⁰

140 The *third* instance in which a minimal review court may re-open an award's findings of fact is thus the existence of these vitiating factors pointed out in *AJU v AJT*. Although they were not present in *AJU v AJT*, fraud was in issue the *second* time that the *Thomson-CSF v Frontier AG* case went before the Swiss Federal Tribunal in 2009. This was more than a decade after the Federal Tribunal first dismissed Thomson-CSF's application to set aside the award.³⁷¹ In the interim, French criminal investigations had revealed a fraudulent scheme orchestrated by persons associated with Frontier AG to conceal the corrupt object of the intermediary agreement from the tribunal. Following release of the French criminal investigations' findings, Thomson-CSF submitted a petition for revision of the award, which the Federal Tribunal granted in its judgment dated 6 October 2009, pursuant to Article 123(1) of the Federal Statute on the Federal Tribunal.³⁷² The Federal Tribunal held that the requirements of Article 123(1) were satisfied, as the tribunal's decision had been materially influenced by the commission of a serious

³⁶⁷ *AJU v AJT* [2011] 4 SLR 739 at [38].

³⁶⁸ *AJU v AJT* [2011] 4 SLR 739 at [70] read with [69].

³⁶⁹ See paras 126 and 129–131 above respectively.

³⁷⁰ *AJU v AJT* [2011] 4 SLR 739 at [65].

³⁷¹ See paras 121–123 above.

³⁷² See generally Antonio Rigozzi & Elisabeth Leimbacher, "The Swiss Supreme Court Refits the Frigates" (2010) 27(3) J Int Arb 307.

criminal offence under Swiss law (*ie*, procedural fraud), which was established by the French criminal investigation's findings. The Federal Tribunal accordingly set aside the award and remanded the case back to the original arbitral tribunal, or to a new arbitral tribunal constituted under the ICC Arbitration Rules.³⁷³

141 It should be noted that "revision" of an arbitral award, the substance of which has become *res judicata*, is an exceptional remedy under Swiss law and is relatively unknown to most other national arbitration laws.³⁷⁴ Article 123(1) of the Federal Statute on the Federal Tribunal³⁷⁵ also does not appear to impose a *fresh* evidence requirement circumscribing the fraud exception,³⁷⁶ as required by the *Westacre* majority,³⁷⁷ and probably most other minimal review courts. Nevertheless, a challenge brought in similar circumstances as the *Thomson-CSF v Frontier AG* case will doubtless be upheld by minimal review courts in ordinary setting aside or enforcement proceedings, since criminal proceedings establishing fraud *after* the termination of arbitration proceedings surely constitute fresh evidence of fraud unavailable during the arbitration.

³⁷³ Entry into force 1 January 2012.

³⁷⁴ See Antonio Rigozzi & Elisabeth Leimbacher, "The Swiss Supreme Court Refits the Frigates" (2010) 27(3) J Int Arb 307 at 310–315; and Georg von Segesser & Schellenberg Wittmer, "Federal Tribunal Revises Award Influenced by Fraud" *Kluwer Arbitration Blog* (23 October 2009), available at <<http://kluwerarbitrationblog.com>> (accessed 12 April 2012).

³⁷⁵ Federal Statute of 17 June 2005.

³⁷⁶ Article 123(1) of the Federal Statute on the Federal Tribunal (17 June 2005) does not on its face require the petitioner to adduce fresh evidence, so long as he demonstrates that the tribunal's decision "has been influenced to the petitioner's detriment by a crime or a felony". Cf Art 123(2), which establishes a second ground for revision, which is where "the petitioner discovers, after the decision is rendered, relevant facts or conclusive evidence which he could not rely upon during the previous proceedings". See Antonio Rigozzi & Elisabeth Leimbacher, "The Swiss Supreme Court Refits the Frigates" (2010) 27(3) J Int Arb 307 at 311.

³⁷⁷ See paras 129–131 above.

(2) *Maximal review*

142 The authors now turn to the other end of the spectrum of judicial review approaches – maximal review. Maximal review may be described as “total scrutiny of the award both as a matter of fact and of law”³⁷⁸ which is applied by courts “jealous in preserving certain national values and policies”.³⁷⁹

143 The Paris *Cour d’appel* decision in *European Gas Turbines SA v Westman International Ltd*³⁸⁰ (“*Westman*”) exemplifies the maximal review approach.³⁸¹ In this case, a French company, Alsthom Turbines a Gaz SA (“Alsthom”) (Alsthom later became European Gas Turbines, but to avoid confusion, the authors refer to it throughout this article as Alsthom), entered into an intermediary agreement with Westman International Ltd (“Westman”), under which Westman was to promote Alsthom’s gas turbines so that it would obtain special prequalification status for a petrochemical project in Iran. In the event of special prequalification, Westman was to give Alsthom all useful information and advice to help secure for it a contract with the Iranian authorities for the supply of gas turbines on the best possible terms. In return for Westman’s services and to cover its expenses, Alsthom was to pay Westman a commission, which was to be fixed by mutual agreement before submission of Alsthom’s bid for the supply contract. The intermediary agreement was governed by French law and provided for ICC arbitration. After obtaining prequalification status and the supply contract, Alsthom refused to pay Westman the

³⁷⁸ Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at p 406.

³⁷⁹ Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at p 393. See further Bernard Hanotiau & Olivier Caprasse, “Public Policy in International Commercial Arbitration” in *Enforcement of Arbitration Agreements and International Arbitral Awards* (Cameron May, 2008) at pp 805–811.

³⁸⁰ Paris *Cour d’ael*/judgment of 30 September 1993 (1995) XX YB Comm Arb 198.

³⁸¹ See The International Law Association International Arbitration Committee’s Interim Report on *Public Policy as a Bar to Enforcement of International Arbitral Awards* (2000) at p 32.

agreed commission. Westman brought arbitration proceedings, claiming a 6% commission. Alsthom's defence was that the agreement was made for the illegal purpose of exercising corrupt personal influence over, and to pay bribes to, foreign government officials. The tribunal held that there was insufficient evidence to prove that the intermediary agreement's purpose was to carry out the alleged illegal activities and ordered Alsthom to pay Westman's commission, basing its calculations on evidence provided by Westman, which detailed the expenses it incurred in performing its obligations under the agreement.

144 Alsthom resisted enforcement of the award in France, alleging that: (a) Westman had committed perjury by certifying it had incurred expenses when this was untrue; and (b) such fraud had concealed the corrupt nature of the intermediary agreement. In support of its contentions, Alsthom relied on new documents showing that there were no records of Westman's alleged expenses, which Alsthom could have obtained during the arbitral proceedings, but did not raise before the tribunal.³⁸² The court held, on the basis of, *inter alia*, these new documents, that Westman had committed perjury and set aside the award on this ground alone. As the new documents did not themselves establish evidence of a corrupt agreement, the second ground (corruption) for setting aside the award failed.

145 The *Westman* judgment demonstrates several aspects of maximal review.

(a) Findings of fact and law can be reviewed *de novo*. Not only non-application, but bad application of law by the tribunal can be re-examined.³⁸³ Furthermore, the court can conduct extensive

³⁸² Nelson Enonchong, "The Enforcement of Foreign Arbitral Awards Based on Illegal Contracts" [2000] LMCLQ 495 at 514 notes that:

... the evidence was not fresh evidence since the documents were based on the accounts of Westman, which were presumably available at Companies House from 1985 to 1991, so that they could have been presented to the arbitrators before the award was signed in March 1992.

³⁸³ Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at pp 407–408.

re-ascertainment and re-evaluation of the facts.³⁸⁴ As *Westman* held, the court is entitled to “scrutinize the award ... both *as a matter of law and fact on all elements* specifically justifying the application or non-application of the international public policy rule” [emphasis added] and “[t]o decide otherwise would lead, in effect, to deprive the control of the judge of all efficacy, and therefore, of all its rationale”.³⁸⁵ The court therefore proceeded to “investigate all available evidence in detail. It conducted its investigation independently, and proceeded in the weighing of the evidence without reference to the award”.³⁸⁶

- (b) A reviewing court with a maximal review predisposition may consider evidence which could reasonably have been obtained during the arbitral proceedings, but was not raised by the challenging party (*ie*, evidence which is new but not fresh), such as the new documents Alsthom relied on to demonstrate *Westman*’s fraud.³⁸⁷
- (c) Although this was not specifically made clear in *Westman*, the broad principle of “total control”³⁸⁸ laid down in the court’s *dicta* strongly suggests that the court’s power to conduct *de novo* review of the facts extended even to contentions of fact which had been rejected by the tribunal (*ie*, evidence which is neither new nor fresh).

146 In line with *Westman*, the Paris *Cour d’appel* again demonstrated its predilection for maximal review when the award in the

³⁸⁴ Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at pp 407–408.

³⁸⁵ Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at p 409. See also Bernard Hanotiau & Olivier Caprasse, “Public Policy in International Commercial Arbitration” in *Enforcement of Arbitration Agreements and International Arbitral Awards* (Cameron May, 2008) at p 805.

³⁸⁶ Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at p 409.

³⁸⁷ Nelson Enonchong, “The Enforcement of Foreign Arbitral Awards Based on Illegal Contracts” [2000] LMCLQ 495 at 514.

³⁸⁸ Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at pp 408–409.

“frigates-to-Taiwan” case – the case which the Swiss Federal Tribunal had first declined to set aside in its judgment of 28 January 1997 in *Thomson-CSF v Frontier AG*³⁸⁹ – was presented for enforcement in France. Dramatic twists in the case were destined to ensue in France. On 4 September 1996, an enforcement order of the award was rendered by the Paris Tribunal of First Instance, which Thomson-CSF appealed. Thomson-CSF also filed a criminal complaint on 26 February 1997, alleging that one Sirven, who was “behind the veil of Frontier AG”,³⁹⁰ had committed fraud in the presentation of evidence in the arbitration proceedings by fabricating Kwan’s involvement to conceal a sophisticated scheme of corruption. The Paris Attorney General requested an investigation of attempted fraud and a number of persons, including Sirven and Kwan, were placed under investigation. On appeal before the Paris *Cour d’appel*, Thomson-CSF requested that relevant documents in the criminal investigation file be transmitted to the court and that proceedings be suspended pending release of the criminal investigation’s findings, and a final decision on the criminal charges.

147 Both requests were granted by the Paris *Cour d’appel* in its judgments of 10 September 1998 and 7 September 1999.³⁹¹ In the former judgment, the court reasoned, in very similar terms as its judgment in *Westman*, that:³⁹²

The power recognized to the arbitrator in international arbitration to appreciate the legality of a contract under rules of international public policy and to sanction illegality by pronouncing nullity, requires ... the control exercised by the annulment or the exequatur judge, on the ground of public policy violation ... the ability to appreciate *all elements of facts and law* allowing notably to justify the application

³⁸⁹ See paras 121–123 above.

³⁹⁰ Antonio Rigozzi & Elisabeth Leimbacher, “The Swiss Supreme Court Refits the Frigates” (2010) 27(3) *J Int Arb* 307 at 308.

³⁹¹ Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at p 410.

³⁹² Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at p 410.

of the rule of international public policy, and, in the affirmative, to measure the legality of the contract. [emphasis added]

It should be noted that the Paris *Cour d'appel* was not applying the fraud exception to non-interference with a tribunal's findings of fact under the *minimal* review approach, since the court ordered the stay when criminal investigations had just commenced and had yet to uncover *fresh* evidence of fraud,³⁹³ a necessary prerequisite to trigger the exception.³⁹⁴ Moreover, the court clearly indicated in the above-cited *dictum* that it was entitled and obliged to conduct total and comprehensive review of the tribunal's findings, *so long as the award was challenged on any international public policy ground* (whether on the basis of procedural fraud, corruption, or otherwise) and regardless whether there was sufficient evidence of fraud at the time the challenge was brought. Thus, the Paris *Cour d'appel* effectively conducted a *de novo* review of the merits by allowing the transmittal of relevant documents in the criminal investigation file to the enforcement proceedings and then staying the case pending the conclusion of the criminal investigations.

148 Like the Paris Court of Appeal in *Thomson-CSF v Frontier AG* and *Westman*, other European national courts also apply the maximal judicial review approach, such as:³⁹⁵

... the Court of First Instance of Brussels [as well as the Court of Appeals of Brussels³⁹⁶], the Higher Court of Dusseldorf and the Court of Appeal of The Hague [which] have all taken the position that they have the power to review awards without any limitation.

³⁹³ See in particular the Paris *Cour d'appel*'s judgment of 7 September 1999, which observed that "it would be premature to assert the existence of fraud ... while the magistrates have not completed their investigations".

³⁹⁴ See para 128 above.

³⁹⁵ Pierre Mayer, "The Second Look Doctrine: The European Perspective" (2010) 21 *Am Rev Int'l Arb* 201 at 204–205.

³⁹⁶ See the Brussels Court of Appeals' judgment of 22 June 2009 in *Cytec Industries BV v SNF SAS*, discussed in *DLA Piper's International Arbitration Newsletter* (13 August 2009), available at <<http://www.dlapiper.com/cytec-v-snf-judgment:the-end-of-a-belgian-french-dispute>> (accessed 12 April 2013).

However, during the course of the 11-year-long criminal investigations in the “frigates-to-Taiwan” case, French judicial attitudes towards the review of arbitration awards were to undergo a paradigm shift. In two cases concerned with challenges to awards on the ground of antitrust public policy violation, the French courts firmly relinquished the *maximal* review approach in *Westman* and *Thomson-CSF v Frontier AG* for the *minimal* review approach. The seminal Paris *Cour d’appel* judgment of 18 November 2004 in *SA Thales Air Defense v GIE Euromissile* (“*Euromissile*”) marked this rather abrupt shift in judicial attitudes.³⁹⁷ *Euromissile* drew upon an unpublished *Cour de Cassation* decision of 21 March 2000³⁹⁸ to hold that the permissible extent of the court’s review of awards on the public policy ground was limited to cases where it is demonstrated that there is “manifest, actual and specific”, or in other words, “flagrant, real and concrete” (“*flagrante, effective et concrete*”), violation of international public policy.³⁹⁹ The word “manifest” or “flagrant” in this test is key. It has been interpreted to mean that “[t]he task of a reviewing court is to *take the award as it is* [and] not to rewrite it” [emphasis added],⁴⁰⁰ or to “conduct a re-examination [of the merits] ... in the absence of a manifest violation”.⁴⁰¹ In other words, the court “will only determine whether the award ... *in light of the factual and legal*

³⁹⁷ Thomas Webster, “Review of Substantive Reasoning of International Awards by National Courts: Ensuring One-Stop Adjudication” (2006) 23(3) *Arb Int’l* 431 at 438; Dominique Hascher & Beatrice Castellane, “French Case Law Annual Report” (2010) 4 *Paris Journal of International Arbitration* 1017; Emmanuel Gaillard, “Extent of Court Review of Public Policy” *New York Law Journal* (5 April 2007).

³⁹⁸ Emmanuel Gaillard, “Extent of Court Review of Public Policy” *New York Law Journal* (5 April 2007).

³⁹⁹ Emmanuel Gaillard, “Extent of Court Review of Public Policy” *New York Law Journal* (5 April 2007); Dominique Hascher & Beatrice Castellane, “French Case Law Annual Report” (2010) 4 *Paris Journal of International Arbitration* 1017.

⁴⁰⁰ Dominique Hascher & Beatrice Castellane, “French Case Law Annual Report” (2010) 4 *Paris Journal of International Arbitration* 1017.

⁴⁰¹ Pierre Mayer, “The Second Look Doctrine: The European Perspective” (2010) 21 *Am Rev Int’l Arb* 201 at 205.

elements that were adopted by the arbitrator, violates public policy” [emphasis added] and any review on public policy grounds should be:⁴⁰²

... limited ... [and should not] second guess the award on the merits of the disputes [or] readjudicate the case on matters of facts and law ... with a new, deep and extensive investigation or discussion.

The *Cour de Cassation* in *SNF SAS v Cytec Industries BV* (4 June 2008) (“*Cytec*”) subsequently adopted the same approach as *Euromissile*.⁴⁰³

149 There is no room to argue that awards challenged for upholding contracts providing for corruption should be treated differently and be subjected to more intensive scrutiny than contracts which violate European Competition Law (as in *Cytec* and *Euromissile*), on the basis the international public policy violation resulting from the former is more serious than the latter. In *M Schneider Schaltgeratebau and Elektroinstallationen GmbH v CPL Industries Ltd* (10 September 2009) (“*M Schneider*”), the parties entered into a contract under which CPL Industries Ltd (“CPL Industries”) was to assist M Schneider in the negotiation and performance of public tender contracts in Nigeria. The contract required CPL Industries to provide M Schneider with access to “the wide connections of the eminent members of CPL Industries’ board of directors in Nigeria”.⁴⁰⁴ Moreover, the contract was signed by the daughter of the President of Nigeria, herself a public servant, using a false name.⁴⁰⁵ The sole arbitrator nevertheless decided that the evidence presented was insufficient to prove corruption and issued his award accordingly. The Paris *Cour d’Appel* (the same court which decided *Westman and Thomson-CSF v Frontier AG*) also dismissed M Schneider’s application to set aside the award on grounds of violation of international

⁴⁰² Roland Ziade & Charles-Henri De Taffin, “Note – 26 November 2009, Paris Court of Appeals” (2010) 2(4) *Int’l J Arab Arb* 138 at 149–151.

⁴⁰³ Dominique Hascher & Beatrice Castellane, “French Case Law Annual Report” (2010) 4 *Paris Journal of International Arbitration* 1017.

⁴⁰⁴ Dennis Bensaude & Jennifer Kirby, “A View from Paris – December 2009” (2009) 24(12) *Mealey’s Int’l Arb Rep* 8.

⁴⁰⁵ Recall the discussion on red flags at para 48 above, which may indicate a high probability that an intermediary will or has conducted corrupt dealings.

public policy, citing reasons which indicated its adoption of minimal judicial review.⁴⁰⁶ The court held that it was not permissible for M Schneider to raise before the court arguments which had already been rejected by the arbitrator, or to contest the arbitrator's detailed examination of the facts concluding that there was insufficient evidence of corruption, as a reviewing court was not supposed to re-visit the merits of an award absent a "blatant, actual and concrete" violation of public policy. The court also rejected M Schneider's argument that the award should be set aside because the arbitrator had made a finding of fraud but failed to draw the appropriate legal consequences therefrom: this argument relied on facts which M Schneider was aware of during the arbitration but failed to raise before the arbitrator and thus was not a permissible ground for setting aside the award. Accordingly, not only did the Paris *Cour d'appel* reject any suggestion that it should reexamine the merits of the award *de novo*; it also indicated that fresh (and not merely new) evidence was required to justify interference with the tribunal's findings.

150 The final resolution of *Thomson-CSF v Frontier AG* (which had been stayed in 1999) before the Paris Court of Appeal reinforces the French courts' currently prevailing minimal judicial review approach, in line with *M Schneider*, *Cytec* and *Euromissile*. Following an 11-year-long criminal inquiry, Thomson-CSF's allegations of procedural fraud were vindicated by the French examining magistrate's findings released on 1 October 2008.⁴⁰⁷ It was revealed that: (a) the true purpose of the intermediary agreement between Thomson-CSF and Frontier AG was to exercise corrupt influence over the French Foreign Minister, Roland Dumas, in order to overcome the French veto against the sale of the frigates; and (b) to conceal this fact from the tribunal and mislead it into awarding the commission payments to Frontier AG, Sirven had orchestrated the

⁴⁰⁶ Dennis Bensaude & Jennifer Kirby, "A View from Paris – December 2009" (2009) 24(12) *Mealey's Int'l Arb Rep* 8; Raed Mounir Fathallah, "Corruption in International Commercial and Investment Arbitration: Recent Trends and Prospects for Arab Countries" (2010) 2(3) *Int'l J Arab Arb* 65 at 82–83.

⁴⁰⁷ In an order abandoning prosecution of the case, due to the death of Sirven and closing investigations due to national security reasons.

fabrication of evidence relating to Kwan's lobbying activities in China, which did not in fact take place. Frontier AG recommenced proceedings before the Paris *Cour d'appel* on 28 April 2009, arguing that the award ought to be enforced by the court, notwithstanding the revelations from the criminal investigation, because the court was limited to ascertaining the award's compatibility *vis-à-vis* international public policy *based on the tribunal's factual findings* – which were that the intermediary agreement envisaged legitimate lobbying activities in China rather than corrupt influence peddling in France.⁴⁰⁸ Unsurprisingly, this argument failed. Relying on the criminal investigation's findings, the Paris *Cour d'appel* refused enforcement of the award in its judgment of 1 July 2010, on the basis that the award had been procured through procedural fraud.⁴⁰⁹ Reading this judgment together with *M Schneider*, *Cytec* and *Euromissile*, it appears that French courts now draw a distinction between the treatment of challenges to awards where “a fraud which has been influential on the arbitrator's decision” has been proven and those where such proof is lacking. Where fraud is proven, “the Court will be led into a re-examination of the facts of the case”, whereas in the absence of proof,⁴¹⁰ it “reverts to applying the rule according to which it cannot conduct a substantive review of the award [absent a ‘manifest, actual and specific’ breach of international public policy]”.⁴¹¹ This position is consistent with the minimal review approach's general resistance to judicial interference with an arbitral award's findings, *subject to the fraud exception*.⁴¹²

⁴⁰⁸ Dominique Hascher & Beatrice Castellane, “French Case Law Annual Report” (2010) 4 *Paris Journal of International Arbitration* 1017.

⁴⁰⁹ See Bernard Audit, “Note – *1er juillet* 2010, *Cour d'appel de Paris* (Pôle 1 – Ch 1)” (2010) 4 *Rev Arb* 863 at 866–867.

⁴¹⁰ It should be noted that the earlier decisions of the Paris *Cour d'appel* in 1998 and 1999 (see para 147 above) were not couched in these circumscribed terms.

⁴¹¹ Dominique Hascher & Beatrice Castellane, “French Case Law Annual Report” (2010) 4 *Paris Journal of International Arbitration* 1017.

⁴¹² See para 140 above.

151 Accordingly, the French courts no longer take a maximal review approach towards public policy challenges to arbitral awards, whereby the “State judge entirely appropriates the dispute in the way it was submitted to the Arbitrator”.⁴¹³ If the same facts as *Thomson-CSF v Frontier AG* in 1999 were to arise before the French courts, they probably will not stay proceedings pending criminal investigations as the Paris *Cour d’appel* first did, since a “manifest” or “flagrant” breach of international public policy could not have been discerned, nor was there fresh evidence of fraud, at the material time. Although not all French commentators are convinced by the merits of this minimal review approach,⁴¹⁴ “[French judicial] precedent is now well established” in its favour.⁴¹⁵

152 The position in Australia is less certain.

153 In the New South Wales Supreme Court case of *Corvetina Technology Ltd v Clough Engineering Ltd* (“*Corvetina*”),⁴¹⁶ the defendant resisted enforcement of the award on the basis that it upheld a contract (governed by English law) which was illegal under the law of the place of performance (Pakistan) and contravened both Australian and Pakistani public policy. In the course of the enforcement proceedings, the plaintiff sought an order that no discovery be ordered in the defendant’s favour until it was determined whether the defendant was entitled to rely on evidence of illegality which had been rejected by the arbitrator. McDougall J dismissed the plaintiff’s application, holding that:⁴¹⁷

⁴¹³ Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at p 408.

⁴¹⁴ See in particular Pierre Mayer, “The Second Look Doctrine: The European Perspective” (2010) 21 *Am Rev Int’l Arb* 201 at 205; and the commentary cited in Roland Ziade & Charles-Henri De Taffin, “Note – 26 November 2009, Paris Court of Appeals” (2010) 2(4) *Int’l J Arab Arb* 138 at 148.

⁴¹⁵ Roland Ziade & Charles-Henri De Taffin, “Note – 26 November 2009, Paris Court of Appeals” (2010) 2(4) *Int’l J Arab Arb* 138 at 147.

⁴¹⁶ [2004] NSWSC 700.

⁴¹⁷ *Corvetina Technology Ltd v Clough Engineering Ltd* [2004] NSWSC 700 at [14] and [18].

... it is open in principle to a defendant, in the position of the present defendant, to seek to rely on illegality, pursuant to s 8(7)(b) [of the Australian International Arbitration Act 1974⁴¹⁸], or its equivalent, even if the illegality was raised before and decided by the arbitrator ... The very point of provisions such as s 8(7)(b) is to preserve to the court in which enforcement is sought, the right to apply its own standards of public policy in respect of the award. *In some cases the inquiry that it required will be limited and will not involve detailed examination of factual issues. In other cases, the inquiry may involve detailed examination of factual issues. But I do not think that it can be said that the court should forfeit the exercise of the discretion ... There is, as the cases have recognised, a balancing consideration.* On the one hand, it is necessary to ensure that the mechanism for enforcement of international arbitral awards under the New York Convention is not frustrated. But, on the other hand, it is necessary for the court to be master of its own processes and to apply its own public policy. *The resolution of that conflict, in my judgment, should be undertaken at a final hearing and not on an interlocutory application.* [emphasis added]

Corvetina thus appeared to adopt the maximal review approach, in so far as it endorsed the Australian courts' broad 'discretion' to conduct a 'detailed examination of factual issues' (and, presumably, findings of law as well), and permitted discovery of documents even if they had been put before the arbitrator (which effectively allowed the defendant to re-argue evidence of illegality that had been dismissed by the arbitrator).

154 However, the Federal Court of Australia in *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd*⁴¹⁹ ("*Uganda Telecom*") has cast doubt on *Corvetina*, at least in view of the 2010 amendments to the Australian International Arbitration Act 1974. In relation to the challenging party's

⁴¹⁸ Section 8(7)(b) of the Australian International Arbitration Act 1974 (Act No 136 of 1974) provides that:

In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that: (a) ... or (b) to enforce the award would be contrary to public policy.

⁴¹⁹ [2011] FCA 131.

argument that the tribunal's assessment of general damages was excessive because it had failed to consider certain costs and expenses incurred, Foster J held that:⁴²⁰

The time for [the challenging party] to have addressed this matter was during the arbitration proceedings in accordance with the timetable laid down by the arbitrator. *It chose not to do so at that time. It cannot do so now ...* Erroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the New York Convention. [emphasis added]

The judge explained his reasoning as follows:⁴²¹

In the United States, the courts have generally regarded the public policy ground for non-enforcement as one to be sparingly applied. It has not been seen as giving a wide discretion to refuse to enforce an award which otherwise meets the definition of foreign arbitral award under the [New York] Convention.

...

... courts in the United States have held that there is a pro-enforcement bias informing the Convention ... *A more conservative approach has sometimes been taken in Australia ... In Corvetina Technology Ltd v Clough Engineering Ltd*⁴²² ... *Whether or not, in 2004, there was a general discretion in the Court to refuse to enforce a foreign award which was brought to the Court for enforcement, the amendments effected by the 2010 Act make clear that no such discretion remains. Section 8(7)(b) preserves the public policy ground. However, it would be curious if that exception were the source of some general discretion to refuse to enforce a foreign award. Whilst the exception in s 8(7)(b) has to be given some room to operate, in my view, it should be narrowly interpreted consistently with the United States cases ... To the extent that*

⁴²⁰ *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131 at [133].

⁴²¹ *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131 at [127] and [129]–[132].

⁴²² Here, Foster J cited parts of *Corvetina Technology Ltd v Clough Engineering Ltd* [2004] NSWSC 700, including the passage reproduced at para 153 above.

*McDougall I might be thought to have taken a different approach,
I would respectfully disagree with him.*

[emphasis added]

While *Uganda Telecom* did not directly address the Australian courts' entitlement to re-examine a tribunal's findings *of fact*, its narrow interpretation of section 8(7)(b) of the Australian International Arbitration Act, in line with the "pro-enforcement bias" of the New York Convention and its rejection of arguments of *law* which could have been but were not raised before the tribunal, suggest an attitude of minimal judicial review, which demands new, if not fresh evidence to overturn a tribunal's findings of fact, contrary to the position adopted in *Corvetina*. It remains to be seen how future case law will resolve this apparent conflict between *Corvetina* and *Uganda Telecom*.

(3) *Contextual review*

155 Contextual review is the third and final category of judicial approaches towards the scrutiny of arbitral awards. It occupies an intermediate position between minimal and maximal review in terms of the deference accorded to the findings of a tribunal.

156 The leading form of contextual review was suggested *obiter* in *Soleimany*.⁴²³ In *Soleimany*, the court refused to enforce an award rendered by the Beth Din (a Jewish rabbinical court which applies Jewish law), which upheld a contract between two Iranian merchants for the smuggling of Persian carpets out of Iran. This was accomplished through the bribery of diplomats, who were to use their diplomatic baggage to transport the carpets through customs and out of the country.⁴²⁴ The Beth Din acknowledged that the contract was illegal under Iranian law,

⁴²³ *Soleimany v Soleimany* [1998] 3 WLR 811.

⁴²⁴ See *Soleimany v Soleimany* [1998] 3 WLR 811 at 815. See also Colin Nicholls QC *et al*, *Corruption and Misuse of Public Office* (Oxford University Press, 2nd Ed, 2011) at para 9.124.

but held that “any purported illegality would have no effect on the rights of the parties” under the applicable Jewish law.⁴²⁵

157 At the enforcement stage, the court had no difficulty in refusing enforcement of the award for contravention of English public policy. This was not a case where the court had to re-open the tribunal’s findings in order to discover the commission of an illegality. Rather, by the tribunal’s own acknowledgement, the contract was a wholly illegal enterprise under Iranian law. The award could thus be set aside without further inquiry, since it incontrovertibly upheld a contract which an English court would not enforce on grounds of public policy.

158 Nevertheless, Waller LJ, who delivering the court’s judgment in *Soleimany* (his lordship was also the dissenting judge in the subsequent Court of Appeal decision in *Westacre*), went on to discuss how a court ought to approach an award which did *not* find any illegality underlying the parties’ contract:⁴²⁶

In our view, an enforcement judge, *if there is prima facie evidence from one side that the award is based on an illegal contract, should inquire further to some extent*. Is there evidence on the other side to the contrary? Has the arbitrator expressly found that the underlying contract was not illegal? Or is it a fair inference that he did reach that conclusion? Is there anything to suggest that the arbitrator was incompetent to conduct such an inquiry? May there have been collusion or bad faith, so as to procure an award despite illegality? Arbitrations are, after all, conducted in a wide variety of situations; not just before high-powered tribunals in international trade but in many other circumstances. *We do not for one moment suggest that the judge should conduct a full-scale trial of those matters in the first instance*. That would create the mischief which the arbitration was designed to avoid. *The judge has to decide whether it is proper to give full faith and credit to the arbitrator’s award. Only if he decided at the preliminary stage that he should not take that course does he need to embark on a more elaborate inquiry into the issue of illegality*. [emphasis added]

⁴²⁵ *Soleimany v Soleimany* [1998] 3 WLR 811 at 819.

⁴²⁶ *Soleimany v Soleimany* [1998] 3 WLR 811 at 824.

159 The above *dicta* set out a two-stage test for the review of an arbitral award. Under this approach, if there is “*prima facie* evidence” of illegality, the reviewing court should first conduct a preliminary enquiry (short of a “full scale trial”) to see if the award should be given “full faith and credit” (“Stage 1”).⁴²⁷ If so, then the award will be upheld by the court. If not, then the court should proceed to conduct a full scale enquiry to determine the issue of illegality (“Stage 2”).

160 Waller LJ made clear that in assessing whether there was illegality (under either Stage 1 or Stage 2), the court was not limited to considering fresh or new evidence; it may even consider evidence that had been put before the tribunal.⁴²⁸ While this liberal consideration of all evidence, even that which was examined by the tribunal, echoes the maximal standard of

⁴²⁷ Nelson Enonchong, “The Enforcement of Foreign Arbitral Awards Based on Illegal Contracts” [2000] LMCLQ 495 at 506.

⁴²⁸ This can be discerned from the departure of *Soleimany v Soleimany* [1998] 3 WLR 811 (“*Soleimany*”) from Colman J’s first instance judgment in *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1998] 3 WLR 770 (“*Westacre*”); issued before the Court of Appeal’s decision in *Soleimany*. In Colman J’s first instance *Westacre* judgment, the state of the authorities was summarised as standing for six propositions, the sixth of which was that (*Westacre* at 794–795):

If the party against whom the award was made then sought to challenge enforcement of the award on the grounds that, *on the basis of facts not placed before the arbitrators*, the contract was indeed illegal, the enforcement court would have to consider whether the public policy against the enforcement of illegal contracts outweighed the countervailing public policy in support of the finality of awards in general and of awards in respect of the same issue in particular. [emphasis added]

Waller LJ in *Soleimany* at 826 disapproved of Colman J’s sixth proposition as follows:

But, in an appropriate case [the court] may inquire, as we hold, into an issue of illegality even if an arbitrator had jurisdiction and has found that there was no illegality. We thus differ from Colman J, *who limited his sixth proposition to cases where there were relevant facts not put before the arbitrator*. [emphasis added]

review (as adopted in *Westman* and *Corvetina*), the conduct of a preliminary inquiry, instead of a full scale re-examination at first instance, demonstrates greater deference to the findings of the tribunal, in line with the minimal standard of review. The *Soleimany* approach is thus properly characterised as an intermediate contextual standard of review, which falls short of either the minimal or maximal standards of review.

161 The questions posed in the *Westacre* judgment⁴²⁹ are some of the matters to be considered at Stage 1, in order to determine whether the award should be subject to the full scale enquiry in Stage 2. These factors have been conveniently restated by Sayed as follows:⁴³⁰

- (1) Available evidence of legality and illegality;
- (2) The way the Arbitrator reached his or her conclusion of illegality;
- (3) The degree of competency of the Arbitrator;
- (4) The way arbitration was conducted. Care must be taken to verify whether the award was procured by fraud, collusion or bad faith.

Waller LJ took the opportunity of developing this list of factors further, holding in his subsequent dissenting judgment in *Westacre* that the court should also consider the “nature of the illegality” as a Stage 1 factor. In fact, this factor was considered by Colman J at first instance, but he did not find that it militated in favour of re-opening the tribunal’s findings of fact:⁴³¹

... the defendants ... seek to use the public policy doctrine to conduct a re-trial on the basis of additional evidence of illegality when it was open to them to adduce that evidence before the arbitrators. *Such an exercise would appear to be clearly in conflict with the principles of issue estoppel ... However, in deciding whether to permit enforcement of the award the court has to consider whether the public interest in preventing the enforcement of corrupt transactions outweighs the public interest in sustaining the principle of nemo debet bis vexari which underlies the issue*

⁴²⁹ See paras 158–160 above.

⁴³⁰ Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at p 415.

⁴³¹ *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1998] 3 WLR 770 at 798–800.

estoppel ... On the one hand there is the public policy of sustaining the finality of awards in international arbitration and on the other hand the public policy of discouraging corrupt trading ... In my judgment, it is relevant to this balancing exercise to take into account the fact that there is mounting international concern about the prevalence of corrupt trading practices ... However, although commercial corruption is deserving of strong judicial and governmental disapproval, few would consider that it stood in the scale of opprobrium quite at the level of drug-trafficking. On balance, I have come to the conclusion that the public policy of sustaining international arbitration awards on the facts of this case outweighs the public policy in discouraging international commercial corruption ... [emphasis added]

Waller LJ came to the opposite conclusion from Colman J. His lordship disagreed with Colman J's assessment of "the appropriate level of opprobrium at which to place commercial corruption", holding that:⁴³²

*the principle against enforcing a corrupt bargain of the nature of this agreement, if the facts in M.M.'s affidavit [i.e. the "Affidavit" not put before the tribunal, which Jugoimport attempted to introduce as evidence before the court] are correct, is within that bracket recognised by Phillips J in *Lemenda* ... as being based on public policy of the greatest importance and almost certainly recognised in most jurisdictions throughout the world. I believe it important that the English court is not seen to be turning a blind eye to corruption on this scale. [emphasis added]*

On this basis, Waller LJ held that Stage 1 review had shown that the award should *not* be given full faith and credit; therefore, review of the award should proceed to Stage 2.

162 Unsurprisingly, the majority in *Westacre* (which preferred the minimal review approach⁴³³) was not impressed with Waller LJ's two-stage test. Mantell LJ (with whom Sir David Hirst agreed) expressed significant reservations regarding the two-stage test, saying that "I have some

⁴³² *Westacre Investments Inc v Jugoimport-SDPR Holdings Co Ltd* [1999] 3 WLR 811 at 833–834.

⁴³³ See paras 128–131 above.

difficulty with the [two-stage test] and even greater concerns about its application in practice”.⁴³⁴ Their lordships did not elaborate on the reasons for their concerns, but in the more recent UK High Court case of *R v V*,⁴³⁵ Steel J followed the *Westacre* majority and had no difficulty explaining their reservations as follows:⁴³⁶

The difficulty with the concept of some form of preliminary inquiry is of course assessing *how far that inquiry has to go*. This must be all the more so where R does not seek to deploy any new evidence (let alone evidence not available at the time of the original reference). [emphasis added]

163 Notwithstanding their opposition to the two-stage test, perhaps in deference to their dissenting brother judge, Mantell LJ and Sir David Hirst proceeded to conduct a Stage 1 enquiry (*obiter*). Their lordships, however, did not regard Waller LJ’s consideration of the “nature of the illegality” at Stage 1 appropriate,⁴³⁷ but confined their Stage 1 evaluation to the factors listed in *Soleimany*, which did not include the “nature of the illegality”. They regarded the “nature of the illegality” as a Stage 2 factor “to be taken into account as part of the balancing exercise between the competing public policy considerations of finality and illegality”.⁴³⁸ These two versions of Stage 1 – one applied by Waller LJ in his dissenting *Westacre* judgment and the other by the *Westacre* majority – made a difference, as the majority came to the opposite conclusion from

⁴³⁴ *Westacre Investments Inc v Jugoimport-SDPR Holdings Co Ltd* [1999] 3 WLR 811 at 835.

⁴³⁵ [2008] EWHC 1531 (Comm).

⁴³⁶ *R v V* [2008] EWHC 1531 (Comm) at [30].

⁴³⁷ See para 161 above.

⁴³⁸ *Westacre Investments Inc v Jugoimport-SDPR Holdings Co Ltd* [1999] 3 WLR 811 at 835.

Waller LJ in their Stage 1 analysis.⁴³⁹ Applying Stage 1 of the *Soleimany* two-stage test, Mantell LJ observed that:⁴⁴⁰

First, there was evidence before the Tribunal that this was a straightforward, commercial contract. Secondly, the arbitrators specifically found that the underlying contract was not illegal. Thirdly, there is nothing to suggest incompetence on the part of the arbitrators. Finally, there is no reason to suspect collusion or bad faith in the obtaining of the award.

164 Accordingly, it was held that there was no justification to conduct a full scale enquiry under Stage 2, even if the two-stage test should be applied.

165 Which of the above approaches strikes the best balance between award finality and public policy? Before this question can be answered, the type of public policy violation required to trigger the public policy ground for setting aside and refusal of enforcement of awards must first be considered.

C. The public policy ground for setting aside or refusal to enforce a corruption-tainted arbitral award

166 After a reviewing national court has decided it ought to take the tribunal's findings at face value, or alternatively, has re-examined the tribunal's findings and come to its own conclusions on any illegality or corruption perpetrated by the parties, it must decide if upholding the award will give rise to such an egregious contravention of public policy, that it ought to set it aside or refuse enforcement on public policy grounds. So as to give due respect to the finality of arbitral awards, most leading arbitral jurisdictions construe the public policy exception narrowly, and recognise that it is only in cases where there has been a clear

⁴³⁹ Nelson Enonchong, "The Enforcement of Foreign Arbitral Awards Based on Illegal Contracts" [2000] LMCLQ 495 at 507.

⁴⁴⁰ *Westacre Investments Inc v Jugoimport-SDPR Holdings Co Ltd* [1999] 3 WLR 811 at 835. Steel J in *R v V* [2008] EWHC 1531 (Comm) adopted substantially similar reasoning in the case before him.

violation of *fundamental* rules of public policy that an award should be set aside or refused enforcement.⁴⁴¹ The distinction drawn between *international* and *domestic* public policy differentiates those cases where judicial intervention is warranted, from cases where the courts ought to uphold the award.

(1) *Two classes of public policy: Domestic public policy and international public policy*

167 The New York Convention and most national legislation simply refer to “public policy” as a ground for setting aside or refusing to enforce an award without qualifying or defining the term.⁴⁴² Public policy has been said to be notoriously difficult to define, although reference can be made to a number of broad formulations which have obtained international usage and currency. Public policy has been defined as including the “the forum state’s most basic notions of morality and justice”;⁴⁴³ “a rule which is basic to public or commercial life”;⁴⁴⁴ “some moral, social or economic principle so sacrosanct ... as to require its maintenance at all costs and without exception”;⁴⁴⁵ and.⁴⁴⁶

... the fundamental economic, legal, moral, political, religious and social standards of every State ... those principles and standards which are so sacrosanct as to require their maintenance at all costs and without exception.

⁴⁴¹ Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at p 2625.

⁴⁴² The International Law Association International Arbitration Committee’s Interim Report on *Public Policy as a Bar to Enforcement of International Arbitral Awards* (2000) at pp 11–12.

⁴⁴³ *Parsons & Whittemore Overseas Co Inc v Société Générale de l’Industrie du Papier (RAKTA)* 508 F 2d 969 (2nd Cir, 1974).

⁴⁴⁴ Bundesgerichtshof (12 July 1990), III ZR 174/89, NJW 1990 at p 3210.

⁴⁴⁵ Peter North & James Fawcett, *Cheshire and North’s Private International Law* (Butterworths, 13th Ed, 1999) at p 123.

⁴⁴⁶ Julian Lew, *Applicable Law in International Commercial Arbitration* (Oceana, 1978) at p 532.

The violation of public policy engender consequences which have been variously described as “injurious to the public, or against the public good”;⁴⁴⁷ “wholly offensive to the ordinary reasonable and fully informed member of the public”;⁴⁴⁸ or “contradict[ory] [to] the [forum’s] idea of justice in a fundamental way”.⁴⁴⁹

168 In order to resolve the tension between the finality of arbitral awards and public policy, many jurisdictions construe the public policy exception narrowly, requiring violation of *international* public policy to justify setting aside or refusal to enforce an award.⁴⁵⁰ In *Westacre*, for instance, the court referred to the distinction drawn in *Lemenda* between international public policy – “rules of public policy which if infringed will lead to non-enforcement by the English court whatever their proper law and wherever their place of performance” – and “English domestic public policy” and held that only violation of the former can justify interference with an award.⁴⁵¹ This explains why, in *Soleimany*,⁴⁵² the English Court

⁴⁴⁷ *Egerton v Brownlow* (1853) 4 HLC 1.

⁴⁴⁸ *Deutsche Schachtbau-und Tiefbohrergesellschaft mbh v Ras Al Khaimah National Oil Co* [1987] 2 Lloyd’s Rep 246 at 254.

⁴⁴⁹ Bundesgerichtshof (12 July 1990) III ZR 174/89, NJW 1990 at p 3210.

⁴⁵⁰ The International Law Association International Arbitration Committee’s Interim Report on *Public Policy as a Bar to Enforcement of International Arbitral Awards* (2000) at pp 13–14. See also Bernard Hanotiau & Olivier Caprasse, “Public Policy in International Commercial Arbitration” in *Enforcement of Arbitration Agreements and International Arbitral Awards* (Cameron May, 2008) at pp 789–791.

⁴⁵¹ *Westacre Investments Inc v Jugoimport-SDPR Holdings Co Ltd* [1999] 3 WLR 811 at 824 (“*Westacre*”). In *Westacre*, the majority agreed with the following passage in Waller LJ’s judgment, which observed a distinction between domestic public policy and international public policy, and held that only violation of the latter could justify interference with an award (*Westacre* at 824–825):

What in my view *Lemenda* decided was (1) *there are some rules of public policy which if infringed will lead to non-enforcement by the English court whatever their proper law and wherever their place of performance but others are based on considerations which are purely domestic* [see 459C]; (2) contracts for the purchase of influence are not

(continued on next page)

of Appeal refused to enforce the award upholding a contract for smuggling carpets out of Iran – such a contract contravened one of those rules of public policy, “which if infringed will lead to non-enforcement by the English court whatever their proper law and wherever their place of performance”. It did not matter that the contract was valid under its governing law, nor that award finality was sacrificed, since the fundamental public policy interests against enforcement of such a contract for illegal smuggling overrode any countervailing considerations. In contrast, in *Hilmarton*,⁴⁵³ the contract for the purchase of influence in Algeria, which was illegal under Algerian law (the law of the place of performance), but valid under the governing Swiss law, was nonetheless enforced by the English High Court, since such contracts at most violated English domestic public policy rather than international public policy.⁴⁵⁴

of the former category; thus (3) *contracts for the purchase of personal influence if to be performed in England would not be enforced as contrary to English domestic public policy ...*

... albeit the award is not isolated from the underlying contract [for the purchase of influence], it is relevant that the English court is considering the enforcement of an award, and not the underlying contract. The English court takes cognisance of the fact that *the underlying contract [for the purchase of influence], on the facts as they appear from the award and its reasons, does not infringe one of those rules of public policy where the English court would not enforce it whatever its proper law or place of performance ...* It is legitimate to conclude that there is nothing which offends English public policy if an Arbitral Tribunal enforces a contract [for the purchase of influence] which does not offend the domestic public policy under either the proper law of the contract or its curial law, even if English domestic public policy might have taken a different view.

[emphasis added]

⁴⁵² *Soleimany v Soleimany* [1998] 3 WLR 811.

⁴⁵³ See para 77 above.

⁴⁵⁴ See *Hilmarton Ltd v Omnium de Traitment et de Valorisation SA* [1999] 2 Lloyd's Rep 222 at 224–225.

169 It is important to clarify that international public policy is not a transnational principle. As mentioned above,⁴⁵⁵ truly transnational public policy is even more restrictively defined, “comprising fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by ... ‘civilised nations’”.⁴⁵⁶ In contrast, international public policy “is not more than public policy as applied to foreign awards and its content and application remains subjective to each State”.⁴⁵⁷ Gaillard and Savage thus refer to breach of “the *French* conception of international public policy or, in other words, the set of values a breach of which could not be tolerated by the *French* legal order, even *in international cases*”⁴⁵⁸ [emphasis added] as the basis for setting aside or refusing to enforce awards in France. The International Law Association similarly defines international public policy according to the enforcing state’s national interests:⁴⁵⁹

The international public policy of any State includes: (i) fundamental principles, pertaining to justice or morality, *that the State wishes to protect* even when it is not directly concerned; (ii) rules designed to serve the essential political, social or economic *interests of the State*, these being known as ‘*lois de police*’ or ‘public policy rules’; and

⁴⁵⁵ See para 92 above.

⁴⁵⁶ The International Law Association International Arbitration Committee’s Interim Report on *Public Policy as a Bar to Enforcement of International Arbitral Awards* (2000). See generally Bernard Hanotiau & Olivier Caprasse, “Public Policy in International Commercial Arbitration” in *Enforcement of Arbitration Agreements and International Arbitral Awards* (Cameron May, 2008) at pp 794–796.

⁴⁵⁷ The International Law Association International Arbitration Committee’s Interim Report on *Public Policy as a Bar to Enforcement of International Arbitral Awards* (2000).

⁴⁵⁸ Emmanuel Gaillard & John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) at para 1648.

⁴⁵⁹ Recommendation 1(e) of the International Law Association International Arbitration Committee’s Final Report on *Public Policy as a Bar to Enforcement of International Arbitral Awards* (2002).

(iii) the duty of the State to respect *its obligations towards other States or international organisations*. [emphasis added]

(2) *Whether corruption violates international public policy*

170 The international condemnation of corruption has never been more pronounced. The body of legal rules and authorities that have emerged over the past two decades make it almost inconceivable for any court to now deny that corruption contravenes international public policy, perhaps even transnational public policy.⁴⁶⁰ Already, in 1963, Judge Lagergren was (probably ahead of his time) ready to declare in ICC Case No 1110 (1963) that: “corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations”.⁴⁶¹ Three decades later, the Paris *Cour d’appel* in *Westman* recognised the then mounting international concern regarding corruption in international trade and commerce, with its pronouncement that:⁴⁶²

... [a] contract having as its aim and object a traffic in influence through the payment of bribes is ... contrary to French international public policy as well as to the ethics of international commerce as understood by the large majority of States in the international community.

⁴⁶⁰ See n 6 above; James Barratt & Hayley Ichilcik, “Bribery and International Arbitration” in *The European & Middle Eastern Arbitration Review 2011* (Law Business Research, 2010), at pp 10–11 and 38 International Law Association International Arbitration Committee’s Final Report on *Public Policy as a Bar to Enforcement of International Arbitral Awards* (2002); *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448 at 520; *Oscanyan v Arms Co* 103 US 261 at 277 (1880); Paris *Cour d’appel*’s judgment of 30 September 1993 (1995) XX YB Comm Arb 198.

The International Law Association International Arbitration Committee’s Interim Report on *Public Policy as a Bar to Enforcement of International Arbitral Awards* (2000) reviewed the development of the concept of public policy, and concluded that “it is arguable that there is an international consensus that corruption and bribery are contrary to international public policy”.

⁴⁶¹ ICC Case No 1110 at [20].

⁴⁶² Paris *Cour d’appel*’s judgment of 30 September 1993 (1995) XX YB Comm Arb 198 at para 6.

More recently, the tribunal in *World Duty Free* concluded its extensive discussion of international conventions and case law on corruption⁴⁶³ with the following observation:⁴⁶⁴

[I]n light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States.

171 It is, therefore, surprising that, notwithstanding the universal denunciation of corruption, the English courts have been reluctant to find that corruption contravenes *international* public policy. Such reticence can be discerned from Colman J's and Sir David Hirst's judgments in *Westacre*, which were followed by Steel J in *R v V*.⁴⁶⁵ As mentioned above,⁴⁶⁶ Colman J at first instance in *Westacre* held that the public policy of sustaining the finality of arbitral awards outweighs the public policy in discouraging corruption. It was impliedly suggested that this was because the latter did not fall within the category of international public policy, since "although commercial corruption is deserving of strong judicial and governmental disapproval, few would consider that it stood in the scale of opprobrium quite at the level of drug-trafficking".⁴⁶⁷ On this basis, Colman J did not permit re-examination of the tribunal's finding against corruption, in spite of new evidence indicating that the intermediary agreement contemplated the payment of bribes to Kuwaiti government officials. On appeal, Sir David Hirst (representing one half of the majority in *Westacre*) said that Colman J had attached the correct opprobrium to corrupt dealings and thus held that, even if the court were to re-examine the tribunal's findings and determined that the intermediary agreement was tainted by corruption, the court would still

⁴⁶³ *World Duty Free Co Ltd v Republic of Kenya* [Award] ICSID Case No ARB/00/7 (4 October 2006) at [138]–[157].

⁴⁶⁴ *World Duty Free Co Ltd v Republic of Kenya* [Award] ICSID Case No ARB/00/7 (4 October 2006) at [157].

⁴⁶⁵ *R v V* [2008] EWHC 1531 (Comm).

⁴⁶⁶ See paras 162–164 above.

⁴⁶⁷ *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1998] 3 WLR 770 at 798–800.

enforce the award, since corruption – not “[standing] in the scale of opprobrium quite at the level of drug-trafficking” – did not contravene international public policy.⁴⁶⁸ In *R v V*, a relatively recent case decided in 2008, Steel J held that he was bound to follow “the majority in *Westacre* [which had] accepted that Colman J had accorded ‘an appropriate level of opprobrium’ at which to place commercial corruption”⁴⁶⁹ and thus refused to uphold the public policy challenge to an award enforcing an intermediary agreement allegedly tainted by corruption. One may quibble with Steel J’s suggestion that *both* Mantell LJ and Sir David Hirst (in his words, “the majority in *Westacre*”) accepted that the appropriate level of opprobrium was attached to corruption, since Mantell LJ did not expressly comment on the matter in his judgment. However, even if we put aside Mantell LJ’s decision, the above-mentioned English case law demonstrates that there nevertheless stands two High Court judgments by Colman J and Steel J (in *Westacre* and *R v V* respectively) and a majority Court of Appeal opinion by Sir David Hirst (in *Westacre*), which suggest that even a finding of corruption is in itself an insufficient ground to sustain a challenge to an award.

172 The authors submit that if a similar case were to arise again before the English courts, they should decline to adopt the views expressed in these troubling precedents. As Waller LJ recognised in *Westacre*, “the principle against enforcing a corrupt bargain ... is ... based on public policy of the greatest importance and almost certainly recognised in most

⁴⁶⁸ Sir David Hirst held that (*Westacre Investments Inc v Jugoimport-SDPR Holdings Co Ltd* [1999] 3 WLR 811 at 835–836):

I also would dismiss this appeal for the reasons given by Mantell LJ ... I would only add that, had the second question [the question whether, in Mantell LJ’s words: ‘if successful in proving the assertions set out in the affidavit of Miodrag Milosavljevic, should the English court enforce the award?'] arisen, I would have answered it in favour of the plaintiff for the same reasons as those given by Colman J [1999] QB 740, 771D–773E. Colman J struck the correct balance, and, in doing so (contrary to Waller LJ’s view) gave ample weight to the opprobrium attaching to commercial corruption.

⁴⁶⁹ *R v V* [2008] EWHC 1531 (Comm) at [32].

jurisdictions throughout the world”⁴⁷⁰ and it is “important that the English court is not seen to be turning a blind eye to corruption on this scale”.⁴⁷¹ Especially in view of the recently enacted UK Bribery Act 2010, which signalled the UK Parliament’s intention to stamp out corrupt practices both at home and abroad, it is submitted that future case law is likely to vindicate Waller LJ’s dissenting judgment.⁴⁷²

(3) *Whether contracts for the sale of influence violate international public policy*

173 A more controversial issue is whether (and in what circumstances) intermediary agreements requiring the intermediary to exercise personal influence on third parties should be regarded as corrupt trading in influence and are thus contrary to international public policy. Differences between jurisdictions can be detected in this regard.

174 As mentioned above,⁴⁷³ at one end of the spectrum, some jurisdictions adopt a broad prophylactic rule prohibiting intermediary agreements, “under the assumption that such [agreements] conceal corruption”. In these jurisdictions, such intermediary agreements presumably violate national conceptions of international public policy.

175 However, other jurisdictions have concluded that holding contracts for the sale of influence (a) contravene public policy, without proof of impropriety; (b) would fly against the face of commercial reality; and (c) needlessly proscribe lobbying activities which do not undermine the transparency of public procurement procedures.⁴⁷⁴ The question is whether the parties intended for the intermediary to exercise some form

⁴⁷⁰ *Westacre Investments Inc v Jugoimport-SDPR Holdings Co Ltd* [1999] 3 WLR 811 at 833.

⁴⁷¹ *Westacre Investments Inc v Jugoimport-SDPR Holdings Co Ltd* [1999] 3 WLR 811 at 834.

⁴⁷² See generally Kyriaki Karadelis, “How should We Deal with Dishonest Behaviour in Arbitration?” *Global Arbitration Review* (7 May 2010).

⁴⁷³ See paras 57 above.

⁴⁷⁴ See paras 58–63 above.

of improper influence over public officials; it is only such intermediary agreements which are prohibited. One commentator thus observes that:⁴⁷⁵

Many countries do not ban contracts with such lobbyists, influence peddlers, or 'agents d'influence' as long as no money or other advantage flows directly or indirectly to a public official [and no improper influence is exercised over the public official]. In fact, it stands to reason that influence is the main stock in trade of any agent. Only a foolish principal would retain an agent without influence. Agents may have acquired influence as a result of longstanding professional experience, through the force of their personality, by their standing in society or through their respected expertise.

176 Differences between jurisdictions are nevertheless likely to arise as to the factors (as well as the relative weight to be attached to these factors) which taint an intermediary agreement with impropriety, with the result that it may be regarded as corrupt trading in influence and therefore contrary to international public policy.⁴⁷⁶

177 In view of these divergences between jurisdictions, it will be necessary to determine in each case – where an award upholding an alleged contract for corrupt trading in influence is challenged as being contrary to international public policy – whether the law of the reviewing national court prohibits intermediary agreements *per se*, or otherwise deems the necessary elements of impropriety to have been made out. In this regard, the anomaly is again to be found in English common law: even where an intermediary is engaged to “abuse” or “improperly” exercise his influence in the principal’s favour, such an intermediary agreement (as held in *Lemenda*) only contravenes English *domestic* public policy,⁴⁷⁷ which is an insufficient ground to set aside or refuse enforcement of an award. This position dovetails with the holding in *Westacre* that even

⁴⁷⁵ Matthias Scherer, “Circumstantial Evidence in Corruption Cases before International Arbitral Tribunals” (2002) 5 Int ALR 29 at 30.

⁴⁷⁶ See paras 58–63 above.

⁴⁷⁷ See *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448 (“*Lemenda*”) and Waller LJ’s observations on *Lemenda* in *Westacre Investments Inc v Jugoinport-SDPR Holdings Co Ltd* [1999] 3 WLR 811 (reproduced at n 468).

contracts providing for “hard” corruption through bribery of government officials do not contravene English international public policy.⁴⁷⁸ The authors submit that Article 18 of the UNCAC and other legal regimes’ prohibition of trading in influence⁴⁷⁹ provide a good case for arguing that contracts for the *abuse* of influence should have the same opprobrium attached to them as contracts for the payment of bribes and accordingly, in the present day and age (especially given the advent of the UK Bribery Act 2010), both should be regarded as corrupt contracts which contravene English international public policy.⁴⁸⁰

D. The appropriate standard of review

178 To conclude this part, the authors return to the earlier question posed: what should be the permissible extent of court review of a tribunal’s findings of fact and law? Does the maximal, minimal, or contextual standard of review strike the best balance between award

⁴⁷⁸ See para 171 above.

⁴⁷⁹ See paras 58–61 above.

⁴⁸⁰ Notwithstanding the UK’s reservation to Art 12 of the Council of Europe Criminal Law Convention on Corruption (Eur TS No 173) (27 January 1999; entry into force 1 July 2002) (which requires State parties to criminalise corrupt trading in influence), on the basis that:

The conduct referred to in Article 12 is covered by United Kingdom law *in so far as an agency relationship exists between the person who trades his influence and the person he influences*. However not all of the conduct referred to in Article 12 is criminal under United Kingdom law. Accordingly, in accordance with Article 37, paragraph 1, the United Kingdom reserves the right not to establish as a criminal offence all of the conduct referred to in Article 12. The law of the United Kingdom covers much of the conduct referred to in Article 12 but only in so far as an agent relationship exists between the “influence seller” and the person influenced. [emphasis added]

(See the UK’s reservations contained in a Note verbale dated 10 September 2007, available at <<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=173&CV=0&NA=37&PO=UK&CN=999&VL=1&CM=9&CL=ENG>> (accessed 12 April 2013).)

finality and public policy? If contextual review is to be preferred, should courts apply the *Soleimany/Westacre* majority two-stage test, or the modified two-stage test in Waller LJ's *Westacre* dissenting opinion?

(1) *The weakness of the minimal standard of review*

179 Some may scoff at the maximal standard of review, given its blatant disregard for the finality of arbitral awards and its underlying policy goals.⁴⁸¹ However, the minimal review approach can similarly be criticised for ignoring other fundamental public policy considerations, such as the public policy against enforcing morally repugnant contracts for corruption. This tension between arbitral award finality and anti-corruption public policy throws into stark relief the relative merits of the minimal and maximal review approaches, and no case illustrates this better than the “frigates-to-Taiwan” affair, which spawned the Swiss and French challenge proceedings in *Thomson-CSF v Frontier AG*. The contrasting judicial review approaches adopted and the attendant consequences of each approach demonstrate the pitfalls of minimal review.

180 It will be recalled that, applying minimal review, the award was initially upheld by the Swiss Federal Tribunal in 1997. However, after French criminal investigations revealed that the tribunal had been misled by the fraudulent scheme perpetrated by Sirven to conceal evidence of the corrupt intermediary agreement, the Federal Tribunal was forced to grant Thomson-CSF's petition for revision of the award in 2009.⁴⁸² The Federal Tribunal was thus put in the awkward position of having to set aside and remand the case back to the arbitral tribunal, almost 13 years after it had first dismissed Thomson-CSF's application to set aside the award.

181 It must be emphasised as part of the background context of this case that Thomson-CSF never had to satisfy the award rendered against it, notwithstanding its initial failure to set the award aside in Switzerland, and that this was purely fortuitous. It appears that Thomson-CSF's assets

⁴⁸¹ See paras 115–117 above.

⁴⁸² See para 140 above.

were in France, not Switzerland, so Frontier AG did not enforce the award in Switzerland, even after Thomson-CSF had failed in its bid to set aside the award. Furthermore, as can be seen from the above examination of French case law, the judicial attitude in France at the time was in favour of maximal review, hence the Paris *Cour d'appels* stay of enforcement proceedings pending the conclusion of criminal investigations, which prevented satisfaction of the award. Consequently, in these circumstances, contravention of Swiss international public policy against the enforcement of contracts for corrupt influence peddling effectively remained inchoate. This may explain why the Swiss Federal Tribunal seemed unagitated in setting aside the award so long after having initially declined to set it aside and did not find occasion to comment on the merits of minimal review.

182 However, one can postulate many cases in which the losing party will not be as fortunate as Thomson-CSF was and will be forced for legal and practical reasons to satisfy the award against it. Had such been the case in *Thomson-CSF v Frontier AG* (for instance, if Thomson-CSF had assets in Switzerland), the Swiss courts would have assisted Frontier AG in perfecting its claims brought upon the corrupt contract and the contravention of Swiss international public policy against corruption would have acquired a more real and tangible complexion. It may even have been irreversible, notwithstanding later discovery of the corrupt purpose of the contract and the Swiss Federal Tribunal's power of revision. For instance, if the award against Thomson-CSF had been enforced in Switzerland or France and Frontier AG later became insolvent in the 13-year interim period before release of the French criminal investigation's findings (in fact, Frontier AG was in liquidation at the time that Thomson-CSF's petition for revision was brought before the Swiss Federal Tribunal), revision before the Federal Tribunal would have come too late to alleviate the damage done to Swiss (and French) public policy and morality. Consequences such as these could perhaps have provoked a rethinking of the minimal review approach.

183 In contrast to the Swiss Federal Tribunal, the Paris *Cour d'appel* stayed its decision on the challenge to the award pending completion of criminal investigations into the facts, thus effectively allowing a maximal

de novo review of the merits.⁴⁸³ This decision was ultimately vindicated by the findings of the criminal investigations. As noted by Sayed:⁴⁸⁴

... full scrutiny in matters of corruption ... displaces the evaluation of corruption to the State which has the interest and the resources to pursue meaningful examination ... the State judge [applying a maximal review approach may] ultimately [be] better equipped to grasp duplicity and, for that matter, unmask it using the full potential of the State's investigatory resources.

184 This contrast between the French and Swiss courts' respective initial treatment of the *Thomson-CSF v Frontier AG* case highlights the fatal weakness of the minimal standard of review: barring the existence of fresh evidence of procedural fraud, which will usually be impossible for victims of corruption to procure, under almost no circumstances will an award be capable of review at the setting aside or enforcement stage, no matter how corrupt the services performed under the contract were in reality (as was the case in *Thomson-CSF v Frontier AG*), or how unreliable the tribunal's findings may have been.⁴⁸⁵ It should also be borne in mind that fraud and corruption are often intertwined – corrupt claimants are likely to commit perjury and may even fabricate evidence so as to conceal from the tribunal the true purpose of the corrupt contract, or its corrupt method of performance. Where such artifice is involved in the procurement of an award, it becomes even more unlikely that corruption will be caught by the coarse net cast by the minimal review approach. Admittedly, the maximal standard of review entails too much of a departure from the policy goals underlying award finality. However, the correct approach cannot be as *laissez-faire* as minimal review, which leaves courts open to shameless exploitation by wily and unscrupulous claimants seeking judicial assistance to enforce their corrupt schemes and other nefarious wrongdoing. As commentators correctly point out, “it

⁴⁸³ See para 146 above.

⁴⁸⁴ Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at pp 410–412.

⁴⁸⁵ There should, of course, be no condemnation of the tribunal's findings in *Thomson-CSF v Frontier AG* (1998) 16(1) ASA Bulletin 118, as the errors of fact made were the product of Sirven's skilful deception of the tribunal.

cannot be accepted that arbitration may be a means to circumvent [fundamental] public policy rules”,⁴⁸⁶ or that “arbitration [should] become an attractive means of circumventing public policy rules”.⁴⁸⁷ A better balance must thus be struck between award finality and fundamental public policy considerations than is provided under either the minimal or maximal standards of review.

(2) *The superiority of the contextual standard of review*

185 It naturally remains to consider Waller LJ’s two-stage contextual review, which the authors suggest best balances award finality with the forum’s fundamental public policy values. The argument that “arbitrations are, after all, conducted in a wide variety of situations; not just before high-powered tribunals in international trade but in many other circumstances”⁴⁸⁸ is persuasive. Examination of the available evidence of corruption, the way in which the arbitrators reached their conclusion of legality, their competence and the manner in which the arbitration was concluded is appropriate *on a summary enquiry basis* at Stage 1 to see if eyebrows should be raised. Stage 1 strikes a desirable balance between award finality and public policy. It does not unduly impinge on the finality of the tribunal’s findings by providing a half-way house between full-scale maximal review and almost non-existent minimal review. As Waller LJ pointed out in *Soleimany*:⁴⁸⁹

We do not for one moment suggest that the judge should conduct a full scale trial of those matters in the first instance. That would create the mischief which the arbitration was designed to avoid.

Yet, at the same time, suspicious circumstances that imply the existence of corruption are given due regard at Stage 1; if such circumstances are

⁴⁸⁶ Bernard Hanotiau & Olivier Caprassé, “Public Policy in International Commercial Arbitration” in *Enforcement of Arbitration Agreements and International Arbitral Awards* (Cameron May, 2008) at p 804.

⁴⁸⁷ Pierre Mayer, “The Second Look Doctrine: The European Perspective” (2010) 21 *Am Rev Int’l Arb* 201 at 207.

⁴⁸⁸ *Soleimany v Soleimany* [1998] 3 WLR 811 at 824, *per* Waller LJ.

⁴⁸⁹ *Soleimany v Soleimany* [1998] 3 WLR 811 at 824, *per* Waller LJ.

compelling enough, a progression to Stage 2 is then surely preferable to Nelsonian indifference.

186 Postulating how contextual review may have operated in a case like *Thomson-CSF v Frontier AG* illustrates its superiority. For instance, had assessment of the Stage 1 factors mentioned above led the Swiss Federal Tribunal to Stage 2, the fraud perpetrated on the arbitral tribunal by Sirven *could* have been discovered. Of course, it is possible that a Stage 1 review may have failed to detect Sirven's surreptitious and skilful deception of the tribunal (though even if Stage 1 review fails to uncover the alleged illegality, if such illegality is particularly serious, comprehensive Stage 2 review may nevertheless be justified⁴⁹⁰). After all, the enquiry at Stage 1 is only conducted on a summary basis and not with the same rigour as the French criminal inquiry or maximal review. However, the risk that fraud and corruption committed in cases like *Thomson-CSF v Frontier AG* will go undetected is a necessary evil, so that a *balance* can be struck between award finality and the forum's fundamental public policy values – the *raison d'être* of the contextual review approach – which must be preferable to prioritising one to the *complete* exclusion of the other. Moreover, contextual review presents a *significantly higher possibility* of uncovering fraud and corruption as compared to minimal review, if not in the same circumstances as in *Thomson-CSF v Frontier AG*, than at least in many other cases where the likelihood of detecting wrongdoing is greater. The minimal review approach is much more likely to leave partially-concealed wrongdoing, and possibly even palpable or near palpable wrongdoing, undetected, exposing courts to an unacceptably high risk of becoming unwitting accessories to corrupt dealings and other forms of illegality. Fundamental public policy values, including those as important as anti-corruption public policy, ought *not* to be sacrificed at the altar of arbitral award finality in this manner, as if award finality constitutes a super public policy value overshadowing all others. There is no doubt that the New York Convention's pro-enforcement policy is important, but that does not mean it trumps, for instance, the multitude of international conventions, national laws and commercial initiatives

⁴⁹⁰ This is discussed in greater detail at para 191 below.

committed to eradicating corruption in international trade and business. Award finality and fundamental public policy must be balanced and it is contextual review which is most consonant with this ethos.

187 One objection to the two-stage test raised by the *Westacre* majority and Steel J in *R v V* was that Stage 1 is difficult to apply in practice. As Steel J argued:⁴⁹¹

The difficulty with the concept of some form of preliminary inquiry is of course assessing *how far that inquiry has to go*. This must be all the more so where R does not seek to deploy any new evidence (let alone evidence not available at the time of the original reference) [emphasis added].

However, in the authors' opinion, this concern is overstated.

188 First, it is limited only to evidentiary matters. Other factors considered at Stage 1 will not be affected by the same ambiguity, such as the competence of the arbitrators and the existence or non-existence of procedural defects in the arbitration.

189 Second, and more important, a clear enough distinction can be drawn between the preliminary enquiry in Stage 1 and the full-scale review in Stage 2 to address Steel J's concern that Stage 1 may easily collapse into Stage 2. Clearly, for instance, the court should not at Stage 1 permit discovery in favour of the party alleging corruption as the New South Wales Supreme Court did in *Corvetina*.⁴⁹² The court should also avoid taking a fine-tooth comb through every single shred of evidence and analysis in the award. If suspicions regarding the veracity of the award cannot be raised except by lengthy submissions and complex argumentation, the court should accord full faith and credit to the award and not proceed to a full scale enquiry at Stage 2. In other words, if the award's lack of credibility cannot be reasonably easily perceived, *ie*, deep and elaborate analysis of the case is required to impugn the award, or the challenging party's submissions are susceptible to argument one way or the other, then Stage 2 should not be triggered. Broad guidelines such as

⁴⁹¹ *R v V* [2008] EWHC 1531 (Comm) at [30].

⁴⁹² See para 153 above.

these, coupled with a common-sense approach, should suffice to prevent Stage 1 from collapsing into Stage 2. It is neither possible nor desirable to establish more detailed rules governing the extent of inquiry at Stage 1 as they will only unduly fetter the court's discretion and prevent it from effectively balancing finality and public policy in the various factual matrices that may arise. Adopting this approach, fears that the more intrusive nature of contextual review (as compared to minimal review) will undermine the attractiveness of arbitration as a dispute resolution mechanism are not well founded. As one commentator notes^{493,494}

A reasonable review of arbitral awards does not make arbitration less attractive, or even less efficient. It only affects those whose sole motive for seeking arbitration is to circumvent public policy rules.

190 If courts are minded to adopt Waller LJ's two-stage test, certain miscellaneous details need to be worked out.

191 First, there are two versions of Waller LJ's two-stage test to choose from: one proposed in *Soleimany*, and the other in his dissenting judgment in *Westacre*. The authors think that the latter is superior. As his lordship argued in *Westacre*, because the court cannot be "seen to be turning a blind eye to corruption" of significant scale,⁴⁹⁵ the *nature* of the illegality should be added to the Stage 1 factors set out in *Soleimany*. No mischief would be caused by its consideration at Stage 1, in that even if the allegations of illegality are serious, they will not alone outweigh the other factors to be considered at Stage 1 and mandate a full re-hearing at Stage 2. If the tribunal was, for instance, conducted by "high calibre I.C.C. arbitrators and duly determined by them"⁴⁹⁶ (borrowing Colman J's words) and there is nothing to suggest collusion or bad faith

⁴⁹³ Not specifically with reference to contextual review, but the argument is nevertheless applicable.

⁴⁹⁴ Pierre Mayer, "The Second Look Doctrine: The European Perspective" (2010) 21 Am Rev Int'l Arb 201 at 207.

⁴⁹⁵ *Westacre Investments Inc v Jugoimport-SDPR Holdings Co Ltd* [1999] 3 WLR 811 at 834.

⁴⁹⁶ *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1998] 3 WLR 770 at 800.

by the parties, a court can and must reject any attempt to interfere with the award, no matter how serious the allegations of illegality are. Stage 2 will not come into play in such a case. The seriousness of illegality may, however, be a decisive factor in those cases where a summary Stage 1 review indicates that all other factors are evenly balanced. Where all may not have been right with the award, the egregiousness or non-egregiousness of the illegality is an appropriate factor to take into consideration in determining whether the balance ought to tip towards or away from a Stage 2 enquiry. If the alleged illegality is grave (such as in *Thomson-CSF v Frontier AG*, where it was alleged that the intermediary agreement involved corrupt influence peddling of massive scale targeting the French Foreign Minister, one of the most senior officials in the French government), but other factors are evenly balanced, a court should satisfy itself as to the absence of illegality before enforcing the award, in case the allegations of illegality or corruption are proven right at Stage 2. Conversely, there should be no warrant for a court to proceed to Stage 2 where the illegality is *not* grave, but other factors are evenly balanced – in such case, finality is respected, without an undue risk of condoning significant illegality.

192 There is a further practical argument for consideration of the nature of the alleged illegality at Stage 1. Nelson Enonchong rightly points out how doing so promotes procedural efficiency:⁴⁹⁷

... much time and effort will be saved if the seriousness of the illegality is determined at the stage of the preliminary enquiry rather than at the end of the second stage. Since enforcement would normally be refused only if the illegality [contravenes international public policy], it means that, under the majority approach in *Westacre*, the court could go through the whole process of the preliminary enquiry, allow the defendant to challenge the arbitrator's findings of fact on the issue of illegality, and conclude upon the evidence that the defendant has established that there was illegality, only to arrive in the end at the decision that the illegality established is not sufficiently offensive to warrant refusal to enforce the award

⁴⁹⁷ Nelson Enonchong, "The Enforcement of Foreign Arbitral Awards Based on Illegal Contracts" [2000] LMCLQ 495 at 509.

and that therefore the award will be enforced after all ... if it is decided early at the preliminary enquiry whether or not the alleged illegality is not sufficiently serious so that the award will be enforceable even if the illegality is established, there will be no point in going on to the second stage. The matter will end there. No time and effort will then be wasted going through the rest of the preliminary enquiry, much less the full enquiry.

Second, it may be questioned whether Waller LJ was correct to suggest that, in assessing whether there is illegality (under Stage 1 or Stage 2), the court is not limited to considering fresh or new evidence, and can even consider evidence that had been submitted to and ruled upon by the tribunal.⁴⁹⁸ Conversely, the majority in *Westacre* preferred to insist on *fresh* evidence as the only justification for interference with the award.⁴⁹⁹ The authors agree with Enonchong that Waller LJ's view is:⁵⁰⁰

... too extreme and threatens too much the principle of finality. Yet, if that view is to receive some rehabilitation so that more weight is given to finality, the correction ought not to go too far in the opposite direction.

Hence, in the spirit of balancing award finality and public policy, Colman J's intermediate approach of restricting the court's intervention to cases where "there is new, though not necessarily fresh, evidence" should be applied.⁵⁰¹

(3) *The standard of review applied by minimal review courts in reality: A hark back to contextual review?*

193 The authors conclude with some important observations on the minimal review approach adopted by certain courts. Paradoxically, despite some minimal review courts' mantra-like repetition of the award finality

⁴⁹⁸ See para 160 above.

⁴⁹⁹ See paras 129–131 above.

⁵⁰⁰ Nelson Enonchong, "The Enforcement of Foreign Arbitral Awards Based on Illegal Contracts" [2000] LMCLQ 495 at 510–511.

⁵⁰¹ Nelson Enonchong, "The Enforcement of Foreign Arbitral Awards Based on Illegal Contracts" [2000] LMCLQ 495 at 510.

principle (*eg*, “[findings made in an award] are binding on the parties and cannot be reopened except where there is fraud, breach of natural justice or some other recognised vitiating factors”⁵⁰²), their judgments often betray an unwillingness to whole-heartedly embrace it and relinquish control over the merits as required. For instance, when the Swiss Federal Tribunal first refused to set aside the award in *Thomson-CSF v Frontier AG*, it went through the evidence which the arbitral tribunal relied on (for its conclusion that the object of the intermediary agreement was to conduct legitimate lobbying activities to procure the sale of the frigates) and acquiesced with the tribunal’s evaluation of the evidence.⁵⁰³ This was in spite of the court holding that “it was not within its authority to review the facts of the case or the way the award proceeded in weighing evidence” since “a critique on the appreciation of evidence [by the arbitral tribunal] ... is a critique of purely appellate nature, that could not be admitted”.⁵⁰⁴ If the non-interference ethos of minimal review was respected in substance, instead of form, then all that the court should have been competent to express a view upon was the existence or non-existence of vitiating factors and errors of law relating to the interpretation of Swiss international public policy.

194 Seemingly taking a leaf out of the Swiss Federal Tribunal’s book, in *AJU v AJT*, the Singapore Court of Appeal saw fit to dedicate three substantial paragraphs to an examination of the composition and competence of the tribunal to determine the issue of illegality under Singapore law⁵⁰⁵ and the veracity of the tribunal’s construction of the allegedly corrupt Concluding Agreement (the court examined its language

⁵⁰² *AJU v AJT* [2011] 4 SLR 739 at [65].

⁵⁰³ See Sayed’s review of the case in Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at pp 399–400:

In effect, not only did the Court describe the way the award reached its conclusion, but it also acquiesced with the approach as well as with the conclusion drawn from the available evidence.

⁵⁰⁴ See para 126 above.

⁵⁰⁵ *AJU v AJT* [2011] 4 SLR 739 at [61].

and the surrounding factual circumstances),⁵⁰⁶ despite repeatedly exhorting thereafter the principle that an arbitral award's findings are not subject to review absent vitiating factors and error of law regarding Singapore's international public policy.⁵⁰⁷

195 The court justified its examination of these matters on the basis that it cannot ignore the sort of “palpable and indisputable illegality” present in the case of *Soleimany*.⁵⁰⁸ However, with respect, the court appears to have misunderstood the holding in *Soleimany* and, in particular, why there was “palpable and indisputable illegality” in that case. There was “palpable and indisputable illegality” in *Soleimany* because, as the English Court of Appeal held, it was “dealing with a[n] [award] *which finds as a fact that it was the common intention [of the contracting parties] to commit an illegal act, but enforces the contract*” [emphasis added].⁵⁰⁹ In

⁵⁰⁶ *AJU v AJT* [2011] 4 SLR 739 at [63] and [64].

⁵⁰⁷ *AJU v AJT* [2011] 4 SLR 739 at [65], [66] and [68]–[69].

⁵⁰⁸ *AJU v AJT* [2011] 4 SLR 739 at [64].

⁵⁰⁹ *Soleimany v Soleimany* [1998] 3 WLR 811 at 821 (“*Soleimany*”). Ironically, *AJU v AJT* [2011] 4 SLR 739 at [47] also cited this dictum from *Soleimany*, but appeared to overlook its significance in the subsequent critical portions of the judgment. See further Waller LJ's judgment in *Soleimany* at 815:

By the award made by the Beth Din on 23 March 1993, it is recited that ‘the plaintiff purchased quantities of carpets and exported them, illegally, out of Iran.’ There is further recognition of the illegal activities in Iran in other parts of the award. For example, in relation to quantum it is recognised that *‘By the very nature of the illicit enterprise, few records were kept ...’* In assessing profits the award disallows the full sum claimed by the plaintiff on the basis, *inter alia*, that no allowance has been made for *‘smugglers’ fees*. [emphasis in original in bold italics; emphasis added in italics]

and at 818–819:

we are dealing with a case where it is *apparent from the face of the award* that (i) the arbitrator rejected the plaintiff's case that he had exported carpets purchased by himself which had then been sold by his father on his behalf; and (ii) *the arbitrator was dealing with what he termed an illicit enterprise under which it was the joint intention that carpets would be smuggled out of Iran illegally*. [emphasis added]

those circumstances, there was no need for the English Court of Appeal to disturb or review the tribunal's findings in the award in order to justify refusal of enforcement. The tribunal had found as a fact that the contract was for the illegal smuggling of carpets out of Iran; therefore, the English Court of Appeal could simply (and did) rely on such finding to refuse enforcement of the award.⁵¹⁰ *In contrast*, the award challenged before the Singapore Court of Appeal in *AJU v AJT* found as a fact that there was *no* common intention under the Concluding Agreement to commit any kind of illegality. The court's argument that it was entitled under the minimal review approach to examine matters such as the tribunal's competence and construction of the Concluding Agreement in order to check for the sort of "palpable and indisputable illegality" present in *Soleimany* therefore appears somewhat contrived.

⁵¹⁰ See para 157 above; and *Soleimany v Soleimany* [1998] 3 WLR 811 at 823–824:

So we turn to the enforcement stage, on the basis (as we have already concluded), that the arbitrators had jurisdiction ... it is in our view inconceivable that an English court would enforce an award made on a joint venture agreement between bank robbers, any more than it would enforce an agreement between highwaymen ... Where public policy is involved, the interposition of an arbitration award does not isolate the successful party's claim from the illegality which gave rise to it ... The reason, in our judgment, is plain enough. The court declines to enforce an illegal contract ... The parties cannot override that concern by private agreement. They cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it ... It may be that the plaintiff can enforce it in some place outside England and Wales. But enforcement here is governed by the public policy of the *lex Pori*. *The difficulty arises when arbitrators have entered upon the topic of illegality, and have held that there was none ...* In such a case there is a tension between the public interest that the awards of arbitrators should be respected, so that there be an end to lawsuits, and the public interest that illegal contracts should not be enforced. *We do not propound a definitive solution to this problem, for it does not arise in the present case. So far from finding that the underlying contract was not illegal, the Dayan in the Beth Din found that it was.* [emphasis added]

196 The authors think that this was more likely once again a case of a minimal review court not quite accepting its own mantra that an award's findings are not subject to review on the merits.⁵¹¹ The court's conclusion that "this was *not an appropriate case* for the judge to reopen the Tribunal's finding that the Concluding Agreement was valid and enforceable" [emphasis added],⁵¹² *only after* having considered matters like the tribunal's competence, findings of fact and construction of the Concluding Agreement⁵¹³ is more reminiscent of Stage 1 of Waller LJ's two-stage test, rather than the minimal review approach in substance. As Waller LJ said in *Soleimany*, at Stage 1, the court should ask questions such as:⁵¹⁴

- (a) "[i]s there anything to suggest that the arbitrator was incompetent to conduct such an inquiry?" (Note *AJU v AJT*'s consideration of the tribunal's competence, for instance, the fact that "the Tribunal consisted of experienced members of the local [Singapore] Bar; and ... decided the issue of illegality according to Singapore law"⁵¹⁵);
- (b) "if there is *prima facie* evidence from one side that the award is based on an illegal contract ... [i]s there evidence on the other side to the contrary?" (Note *AJU v AJT*'s acquiescence to the tribunal's findings of fact regarding the absence of illegal intention underlying the Concluding Agreement⁵¹⁶); and
- (c) "[i]f the arbitrator expressly found that the underlying contract was not illegal ... is it a fair inference that he did reach that conclusion?"

⁵¹¹ In a different context, see Michael Hwang SC & Su Zihua, "Egregious Errors and Public Policy: Are the Singapore Courts too Arbitration Friendly?" in *SAL Conference 2011: Developments in Singapore Law between 2006 and 2010 – Trends and Perspectives* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu gen eds) (Academy Publishing, 2011).

⁵¹² *AJU v AJT* [2011] 4 SLR 739 at [64].

⁵¹³ *AJU v AJT* [2011] 4 SLR 739 at [62]–[64].

⁵¹⁴ *Soleimany v Soleimany* [1998] 3 WLR 811 at 824.

⁵¹⁵ *AJU v AJT* [2011] 4 SLR 739 at [61].

⁵¹⁶ *AJU v AJT* [2011] 4 SLR 739 at [63]–[64].

(Note *AJU v AJT*'s examination of, and agreement with, the tribunal's construction of the terms of the Concluding Agreement⁵¹⁷).

As should be evident from the above, all the matters considered by *AJU v AJT* fell within the Stage 1 factors which Waller LJ proposed *obiter* in *Soleimany*. Not only that, they were examined in the *manner* that a Stage 1 enquiry ought to be conducted, *ie*, on a summary review basis short of (in Waller LJ's words) a "full-scale trial of those matters in the first instance".⁵¹⁸

197 One can derive the:⁵¹⁹

... sense [from a reading of these judgments] that [some self-proclaimed minimal review courts may subscribe to the view that their version of] minimal judicial review ought to be backed by a supporting summary examination of the merits so as to show that placing full faith and credit in the challenged parts of the award would not be problematic from the point of view of the inference of facts or the application of the law.

This is, to the authors' minds, an implicit endorsement of contextual review, owing to an instinctual recognition of the need to preserve fundamental public policy values alongside the policy goals of respecting award finality. Some of these courts have perhaps not yet fully grasped all the implications of the minimal review approach, and if put to the test – *ie*, when a hard case arises where there are compelling circumstances suggesting that an award is tainted by serious illegality, but it cannot be set aside or refused enforcement under the minimal review approach (in the authors' view, neither *AJU v AJT* nor *Thomson-CSF v Frontier AG* were hard cases) – the authors suggest that their dedication to the minimal review cause will be sorely challenged. As Sayed astutely queries:⁵²⁰

⁵¹⁷ *AJU v AJT* [2011] 4 SLR 739 at [64].

⁵¹⁸ *Soleimany v Soleimany* [1998] 3 WLR 811 at 824.

⁵¹⁹ Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at p 404.

⁵²⁰ Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at p 404.

What if the policy of maintaining minimal judicial review was asserted in a case where the summary examination of the merits would suggest erroneous application of law or inference of facts? Would minimal judicial review be maintained or summary examination be sacrificed?

What if, for instance, in *AJU v AJT*, contrary to the court's conclusions on the matter, the tribunal's competence, findings of fact and construction of the Concluding Agreement were all suspect, and disclosed *the possibility of*, rather than "palpable and indisputable", corruption or illegality?

198 It will be interesting to observe how such a case is resolved by courts which claim to have adopted the minimal review approach. The authors think that some of these courts may well concede the merits of Waller LJ's two-stage test – whether explicitly, or under the guise of checking for "palpable and indisputable illegality" – and find that they have before them "an appropriate case" to re-open the tribunal's findings. Legal intuition, if nothing else, surely cannot accept that arbitral award finality reigns supreme to the exclusion of all other public policy values, nor can it allow the interposition of arbitration proceedings and awards to conceal and legitimise corruption or other reprehensible wrongdoing by parties.

VIII. Conclusion

199 The authors summarise their conclusions as follows:

- (a) *Sua sponte* investigations of corruption by a tribunal fall within its mandate or authority, if the existence of corruption is relevant to the resolution of the dispute submitted to it (which will almost always be the case).
- (b) The burden of proving corruption lies on the party alleging corruption. In order for a tribunal to make a finding of corruption, that party must discharge the balance of probabilities standard of proof. This evidentiary standard must be flexibly understood – in determining whether it has been discharged, factors such as the intrinsic difficulty of proving corruption and the inherent likelihood or unlikelihood of corruption in the specific circumstances of the case should be taken into account. Applying this evidentiary standard, tribunals may also consider various indicia and circumstantial

- evidence of corruption, and/or draw adverse inferences from an impugned party's failure to produce documents (when so ordered) or exculpatory evidence.
- (c) Choice of law analysis is usually required when dealing with intermediary agreement disputes. Where foreign mandatory laws or rules of public policy at the place of performance or seat of arbitration prohibit an intermediary agreement contrary to the parties' chosen law, whether they override the chosen law is a matter to be determined in accordance with the arbitral seat's national conflicts rules. However, any law deemed applicable to the parties' dispute under the arbitral seat's conflicts rules must yield to transnational public policy against corruption, to the extent of any incompatibility between the two.
 - (d) If a tribunal makes a finding of corruption, it nevertheless has jurisdiction over the parties' dispute and is entitled to adjudicate issues of corruption as they are arbitrable. Contracts *procured by* corruption must generally be set aside by the victim of corruption in order for it to avoid its obligations thereunder (it may lose its right to do so if it elects to keep the contract alive with knowledge of such corruption), whereas claims arising out of contracts *providing for* corruption are deemed unenforceable or inadmissible without parties having to set it aside. However, generally speaking, one party's unilateral intention to commit corrupt acts in performing a contract will not preclude the other innocent party from making claims arising out of the contract.
 - (e) National legislation (in particular, anti-money laundering legislation) may require arbitrators to report to the relevant authorities corruption which comes to their attention in the course of an arbitration. Such obligation overrides any express or implied duty of confidentiality. Even if an arbitrator is not subject to any such disclosure *obligation*, reporting of corrupt activities *on the arbitrator's own accord* may fall under the public interest or interests of justice exceptions to confidentiality.
 - (f) There are two aspects to the judicial scrutiny of (allegedly) corruption-tainted awards. First, it must be determined to what extent national courts ought to defer to tribunals' negative findings

of corruption. Should the court take a tribunal's findings at face value, or should it investigate further and come to its own conclusions on the existence of corruption, and if so, to what extent? There is no unanimity between jurisdictions on this issue. They can be split into three camps – the minimal, contextual and maximal review camps – maximal review courts having the greatest proclivity to interfere with an award's findings and minimal review courts having the least. The authors have argued that contextual review is superior as it strikes the best balance between award finality and other fundamental public policy values of the forum, such as anti-corruption public policy. The second aspect of judicial scrutiny of awards requires a court to determine whether, if the party/parties are guilty of corruption or other forms of impropriety (on the basis of the tribunal's or the court's findings, as the case may be), such conduct is egregious enough to warrant setting aside or refusal of enforcement of the award on public policy grounds. Most leading arbitral jurisdictions distinguish between *international* and *domestic* public policy. Only contravention of the former justifies the setting aside or refusal of enforcement of an award. With the exception of countries like the UK, there is near universal agreement that "hard" corruption violates international public policy, though the position is more complicated with respect to contracts for the sale of influence, since there is significant divergence between jurisdictions as to whether and in what circumstances such contracts amount to corrupt influence peddling.

200 This article has sought to demonstrate that, in international arbitration, there is much more than meets the eye to a simple allegation or evidentiary suggestion of corruption. The issues that arise are diverse, running the entire gamut of the arbitral process. Consequently, the law on these issues is immense. To make matters more complicated, they are not always easy to negotiate, partly because they give rise to tensions between weighty matters of public policy, which jostle with each other for primacy. For instance, one misstep in the tribunal's evidentiary or conflict of laws analysis can make a world of difference to the ultimate resolution of the parties' dispute at the primary tribunal level and this will have further knock-on effects at the setting aside and enforcement stages. To

put it bluntly, parties, as well as the broader interests of justice, will often pay dearly for tribunals' mistakes on issues of corruption, given the dispositive impact that a finding or non-finding of corruption will have on the merits and the fact that many aggrieved parties will not be fortunate enough to get a second chance for redress before national courts.

201 That said, the responsibility for just and effective adjudication of issues of corruption, within the context of the global fight against the scourge of corruption, cannot rest entirely with the tribunal. Parties have as important a role to play in ensuring that the tribunal is properly briefed on these issues and must make the correct tactical decisions in the prosecution of their case, with sensitivity for the way courts handle public policy challenges. For instance, any and all evidence of corruption which can reasonably be obtained, ought to be submitted to and highlighted before the tribunal, instead of being held back, for as seen above, some courts are unsympathetic to parties seeking to rely on stale evidence to substantiate their claims of corruption. In line with the ethos of balancing award finality with equally fundamental anti-corruption public policy values, courts should also consider intensifying, if they subscribe to minimal review, or de-intensifying, if they prefer maximal review, their respective approaches to the scrutiny of corruption-tainted awards.

202 It remains to conclude this article by teasing out what has been implicit in some of the authors' discussions: that the "reality" of judicial and arbitral practice relating to certain issues of corruption sometimes clashes incongruously with the theoretical disposition of the "law" on the subject. For example, there is the anomalous view in recent English decisions that corruption-tainted awards do not violate English international public policy, notwithstanding universal, and the common law's historical,⁵²¹ condemnation of corruption. Also, there is the sense that some "minimal" review courts, which purportedly accord maximum

⁵²¹ As held in *R v Charles Hildyards Thornton Whitaker* [1914] 3 KB 1283: "the common law ... abhors corruption". Similarly, in *Attorney-General for Hong Kong v Charles Warwick Reid* [1994] 1 AC 324 at 330, Lord Templeman observed that: "Bribery is an evil practice which threatens the foundation of any civilised society."

deference to the tribunal's findings, are in reality on the cusp of the more intrusive contextual review approach. The authors have suggested that in a difficult case, the present reality could transform into express positive law for future cases. Turning to arbitral practice, one may question whether, in a case where corruption has not been proven to the requisite legal standard of proof, an arbitrator with lingering doubts may in reality allow them to colour his or her conduct of and views on the parties' dispute. Special care must be taken by the arbitrator to avoid being consciously or unconsciously affected by rumours or innuendo; through the quality of their submissions, parties may also be able to play a part in tackling this problem. In addition, it is an open question to what extent law enforcement authorities have an interest in prosecuting arbitrators for failure to disclose suspicions of corruption, or whether it is even practically possible given the confidentiality that often shrouds arbitral proceedings, notwithstanding arguably clear anti-money laundering legislation, which may suggest that they are under such a duty of disclosure. The authors are unaware of any arbitrator coming forward to report to the authorities his or her suspicions of corruption aroused from hearing a case and this *status quo* looks set to continue, pending further guidance on this grey area.

Background to Essay 16

At an earlier stage of my career I practised Trust and Equity Law, so I became interested when the International Chamber of Commerce (“ICC”) Commission published a study on Arbitration for Trust Disputes. I gave a talk in Singapore to promote the model clause recommended by the ICC Commission and to explain to Trust Practitioners in Singapore the advantages and possibilities of Arbitration Clauses being introduced into their Trust Deeds. I subsequently reduced these thoughts into a short article for a legal directory.

I wish to extend my thanks to The Legal Media Group for kindly granting me permission to republish this article in this book.

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ARBITRATION FOR TRUST DISPUTES*

Michael HWANG SC

Contents

I.	Parties must have consented to arbitration	742
II.	The arbitration agreement should be valid and capable of performance	745
III.	All interested parties are properly represented (including minor, unborn and unascertained beneficiaries)	746
IV.	Notes	747

1 The confidential character of arbitration recommends it as a form of dispute resolution to settlors of a trust. To cater to settlors wishing to submit trust disputes to arbitration, the International Chamber of

* All footnotes to this article were added subsequent to the original publication date of the article.

Commerce (“ICC”) Court of Arbitration has recently introduced a new Arbitration Clause for Trust Disputes (“ICC Clause”),¹ to be inserted into the trust instrument.²

¹ International Chamber of Commerce Commission on Arbitration, “ICC Arbitration Clause for Trust Disputes” (2008) 19(2) ICC IC Arb Bull 9 (“ICC Clause”). Besides the ICC Clause, settlors can consider Lawrence Cohen QC’s “Guide to Features of Model Clause” in Lawrence Cohen QC & Joanna Poole, “Trust Arbitration – Is It Desirable and Does It Work?” (2012) 18(4) T&T 324 at 330–331.

² A preliminary question to be answered is the enforceability of arbitration clauses in trust instruments. In Executive Committee of the Trust Law Committee of England and Wales, “Arbitration of Trust Disputes” (2012) 18(4) T&T 296 at 300–301, the Executive Committee of the Trust Law Committee of England and Wales adopted the views of Messrs Wood, Brownbill and McCall (contained in their discussion paper to the Trust Law Committee) that legislation is necessary in order to enable the arbitration of trust disputes because the trust concept is a creature of the courts and so the legal rights of beneficiaries and trustees can be validly determined only by the courts. Poidevin QC has counter-argued that the enforceability of contracts is equally a creature of the courts, but no one has ever doubted that contractual rights could be arbitrated: see Nicholas Le Poidevin QC, “Arbitration and Trusts: Can It Be Done?” (2012) 18(4) T&T 307 at 307, fn 4.

Several states, such as Florida, Guernsey, Arizona, Malta and Bahamas have enacted legislation which expressly authorise the arbitration of internal trust disputes (except that in the case of Guernsey, the authorisation extends only to claims against the trustee(s) for breach of trust): see §731.041 of the 2012 Florida Statute; s 63 of The Trusts (Guernsey) Law 2007; §14-10205 of The 2012 Arizona Revised Statutes; s 15A of The Maltese Arbitration Act (Cap 387); and s 91A of the Bahamas Trustee Amendment Act 2011 respectively. For articles explaining the various pieces of legislation, see Anthony Cremona, “Successful Arbitration of Internal Trust Disputes the Maltese Way” (2012) 18(4) T&T 363; Nadia Taylor & David Brownbill QC, “Arbitration of Trust Disputes: The New Statutory Regime in Bahamas” (2012) 18(4) T&T 358; S I Strong, “Trust Arbitration in the United States: Recent Developments Showing Increasing Diversity as a Matter of Statutory and Common Law” (2012) 18(7) T&T 659 at 660–667.

2 The ICC Clause consists of four main paragraphs. Paragraph One is the standard ICC arbitration clause covering any “dispute arising out of or in connection with the trust created”. Under Paragraph Two, trustees agree to arbitration “by accepting to act under [the] trust”. Paragraph Three aims to bind beneficiaries by making their agreement to arbitration “a condition for ... receiving any benefit ... under the trust”. Paragraph Four details the procedure for joinder of arbitration proceedings.

3 The ICC Clause aims to apply to disputes internal to a trust (disputes between parties to a trust: trustees and beneficiaries, trustees *inter se* and beneficiaries *inter se*). It does not attempt to apply to disputes external to a trust (disputes between trust parties and outsiders to the trust: for example, attempts by the settler’s creditors to attack the validity of the trust and contractual disputes between trustees and investment advisers engaged for the trust).³

4 Settlers considering the ICC Clause should note the following:

I. Parties must have consented to arbitration

5 An arbitral tribunal’s jurisdiction over a dispute is founded on the consent of the parties to submit that dispute to arbitration. If consent to arbitration cannot be found, a tribunal will not have jurisdiction.

6 Most trust disputes are internal disputes. The primary difficulty with arbitrating such disputes is that the players among whom the disputes arise (namely, the trustees and beneficiaries) are generally not parties to an arbitration agreement and do not consent to arbitration. They are thus not bound to arbitrate.⁴

³ In England, pursuant to s 15(f) of the English Trustee Act 1925 (c 19), trustees have the same power as anyone else to submit external disputes to arbitration.

⁴ However, it has been noted that under English law, there are good grounds for stating that the court has an inherent jurisdiction to enforce an arbitration clause in a unilateral trust instrument by granting a stay of foreign court proceedings. Overseas decisions have enforced clauses in unilateral trust instruments conferring exclusive jurisdiction on a foreign court, and there is

7 With respect to trustees, this difficulty may be solved through the insertion of an arbitration clause in their contract of appointment. This option is not available with respect to beneficiaries who do not sign a contract to become beneficiaries. The ICC Clause aims to bind beneficiaries through the operation of the theory of deemed acquiescence, which is supported by common law jurisprudence.⁵ According to the theory of deemed acquiescence, parties who accept property under a will or trust impliedly agree to be bound by all of its terms as, being entitled to nothing as of right, beneficiaries of a trust may only take on the settlor's terms. Pursuant to this theory, a trust instrument can be drafted in such a way that claiming or accepting any benefit or interest under the trust would be deemed as an agreement to submit to arbitration.⁶

8 With this in mind, the ICC Clause provides that:

... as a condition for claiming, being entitled to or receiving any benefit, interest or right under the trust, any person shall be bound

no reason to believe that the English courts would take a different approach. Therefore the reverse, namely, courts enforcing an arbitration clause in a unilateral trust instrument, should be true: see Nicholas Le Poidevin QC, "Arbitration and Trusts: Can It Be Done?" (2012) 18(4) T&T 307 at 310–312.

⁵ See David Hayton, "Problems in Attaining Binding Determination of Trust Issues by Alternative Dispute Resolution" (papers of the International Academy of Estate and Trust Law, 2001) at p 18; Lawrence Cohen QC & Marcus Staff, "The Arbitration of Trust Disputes" (1999) 7(4) JTCP 221.

A similar approach has gained ground among Swiss authors: see Bruno Boesch, "The ICC Initiative" (2012) 18(4) T&T 316 at 319; Tetiana Bersheda, "Is Arbitration-friendly Switzerland also Trust-Arbitration-friendly?" (2012) 18(4) T&T 348 at 354–355; Tina Wüstemann, "Anglo-saxon Trusts and (Swiss) Arbitration: Alternative to Trust Litigation?" (2012) 18(4) T&T 341 at 344.

⁶ However, whether such drafting will effectively extend jurisdiction over the beneficiaries must be verified under the *lex arbitri* and under the *lex causae* (as far as the risk of parallel proceedings is concerned): see Bruno Boesch, "The ICC Initiative" (2012) 18(4) T&T 316 at 319, referring to explanatory note 7 of the International Chamber of Commerce Commission on Arbitration, "ICC Arbitration Clause for Trust Disputes" (2008) 19(2) ICC ICArb Bull 9.

by the provisions of this arbitration clause and ... deemed to have agreed to settle all disputes arising out of or in connection with the trust in accordance with this arbitration clause. [emphasis added]

Thus, a beneficiary who takes from the trust will be taken to have agreed to arbitrate all disputes “arising out of or in connection with” *the trust*, giving the requisite consent required for arbitration.

9 Apart from finding support in case law, the theory of deemed acquiescence is further supported by typical domestic arbitration legislation. For example, under section 82(2) of the English Arbitration Act 1996⁷, a party to an arbitration agreement includes any person claiming “under and through” such party. A trust beneficiary may only claim under or through the settlor, who is himself party to and bound by the arbitration clause. As the beneficiary can have no better title to the trust property than the settlor, he must be equally bound by the arbitration clause and taken to have acquiesced to the arbitration agreement.⁸ The ICC Clause is thus not without legislative and juridical foundation.

⁷ c 23 (UK).

⁸ See Lawrence Cohen QC & Joanna Poole, “Trust Arbitration – Is It Desirable and Does It Work?” (2012) 18(4) T&T 324 at 328, who also noted that the settlor’s intent and the basis on which the trustee agreed to accept office – namely that all disputes would be determined by arbitration – would be defeated if s 82(2) were to be construed narrowly so as to exclude beneficiaries from its scope. See also Nicholas Le Poidevin QC, “Arbitration and Trusts: Can It Be Done?” (2012) 18(4) T&T 307 at 309–310. Poidevin further observed at 310 that while “it is not altogether obvious that the right and duty to arbitrate pass to successors on the same side of the agreement [*ie*, successor beneficiaries or trustees] ... a broad construction of the 1996 Act would do the trick”.

On the other hand, various views have been propounded against the above view. The Trust Law Committee has opined that because the settlor has no rights under the trust, beneficiaries do not acquire rights from the settlor. Instead their interests derive from equity fastening on the trustee’s conscience: see Executive Committee of the Trust Law Committee of England and Wales, “Arbitration of Trust Disputes” (2012) 18(4) T&T 296 at 301. The editors of *Redfern and Hunter on International Arbitration* and

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II. The arbitration agreement should be valid and capable of performance

10 Settlers should ensure that formal and substantial validity requirements for a valid “arbitration agreement” are met for both the *lex arbitri* and the law governing the arbitration agreement. For instance, Article 7 of the 1985 United Nations Commission of International Trade Law Model Law on International Commercial Arbitration⁹ requires written assent to arbitration to be contained in a document signed by the parties, in an exchange of a means of telecommunication which provides a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. In this respect, the ICC Clause, which involves assent to arbitration by conduct, will not be sufficient. Separate written consent is required.¹⁰

Russell on Arbitration take the view that third parties are bound by an arbitration agreement in the trust instrument only in the context of assignments, the “group of companies” doctrine, agency and novation, the former on the basis that “questions of succession in international commercial arbitration arise most often in connection with companies rather than natural persons”: see Nigel Blackaby, Constantine Partasides with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration*, (Oxford University Press, 5th Ed, 2009) at para 2.29; *Russell on Arbitration*, (David St John Sutton, Judith Gill & Matthew Gearing eds) (Sweet & Maxwell, 23rd Ed, 2007) at para 3-016.

⁹ UN Doc A/40/17, annex I; UN Doc A/61/17, annex I (21 June 1985; amended 7 July 2006).

¹⁰ However, such written consent is unnecessary if the *lex arbitri* or the law governing the arbitration agreement is the 2006 United Nations Commission of International Trade Law Model Law on International Commercial Arbitration (UN Doc A/61/17) annex I (amended 7 July 2006) (“2006 Model Law”). Option 1 of Art 7 of the 2006 Model Law deems an arbitration agreement to be in writing if its content is recorded in any form, regardless of whether the arbitration agreement was concluded by, *inter alia*, conduct, while Option 2 of Art 7 dispenses with the requirement for a written arbitration agreement.

III. All interested parties are properly represented (including minor, unborn and unascertained beneficiaries)

11 One of the distinctive features of trusts is that the settlor may designate classes of beneficiaries who are minor or who are not yet born or unascertained. As an award may affect the interest of these beneficiaries and incapacity and inability to present one's case are grounds for refusal of enforcement under Articles V(1)(a) and V(1)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,¹¹ they need to be properly represented so as to ensure that all interested parties are bound by the arbitral award.¹² Where beneficiaries could include minor, unborn and unascertained persons, a settlor should include, in addition to the ICC Clause, a clause providing for adequate representation of those beneficiaries in event of arbitration.¹³

¹¹ 330 UNTS 3 (10 June 1958; entry into force 7 June 1959). Apart from the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the legislation of individual states may post additional risks to the effectiveness of arbitrating trust disputes if all interested parties to the trust are not properly represented. For instance, Art 63 of the Trusts (Guernsey) Law 2007 provides that if the trust instrument authorises trust disputes to be referred to arbitration, the arbitral award is binding only on all beneficiaries who are represented at the arbitration or who have been given notice of it and have a reasonable opportunity to be heard. In this regard, minor, unborn or unascertained beneficiaries must be certified by the arbitrator to have been independently represented.

¹² "The problem is how the minor is to become legally bound by the award and by what authority anyone acts on his behalf during the arbitral proceedings leading to the award": see Nicholas Le Poidevin QC, "Arbitration and Trusts: Can It Be Done?" (2012) 18(4) T&T 307 at 313.

¹³ An example is a clause conferring the trustees or a third party the right to appoint representatives to safeguard the rights of minor, unborn or unascertained beneficiaries, as well as providing that the representative may act in the arbitration on behalf of these classes of beneficiaries and that the award will be binding on these classes of beneficiaries: see Nicholas Le Poidevin QC, "Arbitration and Trusts: Can It Be Done?" (2012) 18(4) T&T 307 at 313; Lawrence Cohen QC & Joanna Poole, "Trust Arbitration – Is It Desirable and Does It Work?" (2012) 18(4) T&T 324 at 328–329. Such a

(continued on next page)

IV. Notes¹⁴

12 Unlike the common law trust, which is fundamentally the same between different common law jurisdictions, the character of a civil law

clause is valid as the settlor is entitled to specify how and under what conditions the settled property is to be applied: see Nicholas Le Poidevin QC, "Arbitration and Trusts: Can It Be Done?" (2012) 18(4) T&T 307 at 313–314. However, settlors must take care that the appointment does not violate national laws mandating court approval of the representative (see Andrew Vergunst & Lawrence Grabau, "Arbitrating Trust Disputes" *STEP Journal* (January 2011), <<http://www.step.org/arbitrating-trust-disputes>> (accessed 24 July 2013); Tina Wüstemann, "Anglo-Saxon Trusts and (Swiss) Arbitration: Alternative to Trust Litigation?" (2012) 18(4) T&T 341 at 346) by, for instance, adding the requirement that the representative be approved by the court where the applicable law requires this. Further, to avoid a situation where proper representation is hampered by the lack of funding, the settlor may consider specifying that the trustees are authorised to fund the representation: see Nicholas Le Poidevin QC, "Arbitration and Trusts: Can It Be Done?" (2012) 18(4) T&T 307 at 314.

¹⁴ Another consideration the settlor should take into account (where relevant) is the implications of Art 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedom (Eur TS No 5, 312 UNTS 221, 1953 UKTS No 71) (4 November 1950; entry into force 3 September 1953), which is not merely an onshore problem because the European Convention of Human Rights and accompanying Protocols have been ratified in most leading offshore jurisdictions such as Bermuda, British Virgin Islands, Cayman Islands, Cyprus, Jersey, Gibraltar, Guernsey, Isle of Man and Switzerland. Article 6(1) provides that in the determination of his civil rights and obligations, everyone is entitled to a fair and *public* hearing. The Trust Law Committee has concluded that Art 6(1) necessitates the adoption of procedural rules which require arbitrations that are determinative of the rights or obligations of any beneficiary under a trust to be held in public unless (a) the interests of one or more children are involved; (b) all parties, being of full capacity, agree to the contrary; or (c) the court directs the contrary: See Executive Committee of the Trust Law Committee of England and Wales, "Arbitration of Trust Disputes" (2012) 18(4) T&T 296 at 304; and Tony Molloy QC & Toby Graham, "Arbitration of Trust and Estate Disputes" (2012) 18(4) T&T 279 at 290.

“trust” is country-specific as divergent approaches are used to create a civil law “trust”. For instance, “trusts” in Liechtenstein are contractual while Austrian “trusts” operate through foundations. The ICC Clause may potentially be adopted for various civil law “trusts”. The ICC Clause should be used and adapted with care. Issues such as whether the tribunal has jurisdiction over beneficiaries or whether assent to the ICC Clause must be written and representation for minor, unborn or unascertained beneficiaries will require country-specific attention.

REVIEWS IN LEGAL DIRECTORIES

Rankings in Legal Directories are a controversial subject. There are those who say that they are completely irrelevant (except to those who actually appear in the rankings). I have a healthy scepticism for any survey that purports to rank me against other arbitrators, and I make no claim to be being among the top tier of international arbitrators when I know so many arbitrators of comparable ability who are not ranked simply because of the need for directories to have geographical diversity in their rankings. Nevertheless, for what is worth as a matter of record, I list mentions that I have earned in various international legal directories. Of perhaps greater value are the opinions expressed by the directory researchers based on actual quotations from their respondents in their interviews which provide some qualitative assessment of my (perceived) strengths.

Listed in (among others) the *Euromoney Guide to the World's Leading Experts in Commercial Arbitration*, *Euromoney Guide to the World's Leading Litigation Lawyers*, *Chambers Global*, *AsiaLaw's Leading Lawyers*, *AsiaLaw Profiles*, *The Asia Pacific Legal 500*, *World Dispute-Resolution Contacts*, *The IFLR 1000*, *International Who's Who Legal*, *The International Who's Who of Business Lawyers*, *PLC Cross Border Dispute Resolution Handbook*, *Global Counsel's Dispute Resolution Handbook*, *Guide to the World's Leading Litigation Lawyers*, *Global Counsel 3000* and *Best of the Best*.

The International Who's Who of Commercial Arbitrators, 2005:

"Singapore's leading lawyer for commercial arbitration expertise"

"Mr Hwang received more nominations from clients and peers in the course of the research than any other commercial arbitration specialist in the country, and was described as 'sharp with a good mind' and 'number one' by respondents"

Global Arbitration Review, 2006:

Ranked as Asia's top arbitrator out of a list of 25.

Chambers Global 2007 – The Client's Guide:

"well respected and praised specifically for his presentation skills as both counsel and arbitrator ... utterly dependable ... an expert's touch when administering procedures"

The Asia Pacific Legal 500 (2007/2008):

"one of the finest arbitrators in Singapore"

PLC Which Lawyer? Yearbook 2008:

"Sole practitioner Michael Hwang is another pre-eminent expert, especially in arbitration, where he competes with some of the best-known local and international firms for instructions"

Who's Who Legal 2008:

"the most highly nominated individual in (its Singapore) research"

"[a] quite outstanding lawyer ... [who has] a practical sense and a wealth of knowledge"

Chambers Asia 2008:

"a brilliant world class arbitrator ... [who is] popular, prominent, incisive and decisive"

Asia Pacific Legal 500 2008/9:

"in terms of diversity of cases and sheer academic prowess, there is no finer Senior Counsel working in Singapore today"

The Guide to the World's Leading Commercial Arbitration Experts (2009):

Described as having received personal nominations for inclusion placing him in the world's top 15 in this field.

Who's Who Legal – Commercial Arbitration 2010:

“very meticulous, versatile and a household name”

Chambers Asia 2010

Ranked in Band No 1 for arbitrators in Asia.

“he put Singapore on the arbitration map – he is a doyen of the scene, with tremendous breadth of knowledge and a sensible, reliable and innovative approach”

Chambers Asia-Pacific 2011:

Ranked as a “Star Individuals” Arbitrator (above Band 1).

“He has a formidable reputation and is regarded as an ‘extraordinary, standout arbitrator’ with a controlled approach to arbitration which ‘gets everybody working together rather than against each other and makes things much better from the perspective of getting the right result’. He is widely praised for his exceptional knowledge and incisive and innovative approach to legal issues ... ‘On matters of law his reputation and analysis are unparalleled. He has the ability to see the nub of the issue, and his experience enables him to accurately forecast how it might be resolved.’ He is a highly respected figure in the [litigation] market, praised by market sources as ‘one of the brightest, most brilliant minds in Singapore”

Asia Pacific Legal 500 2010/2011:

“Sole practitioner Michael Hwang SC has an international reputation as co-arbitrator and sole arbitrator in prominent ICC, UNCITRAL and SIAC disputes”

Chambers Asia Pacific 2012:

Listed as one of the three “Star Individuals” in the International Section of “Most in Demand Arbitrators”.

“undoubtedly a star and in the A-League for arbitrators ... he put Singapore on the map for arbitration and his practice crosses the globe ... he wins universal acclaim for the precision of his legal

analysis ... he is very efficient and very clear in identifying the issues and keeping to sensible hearing times ... he is rightly viewed above the rest; when you are before him, you always need to be prepared for intellectual questions which go beyond the immediate issues"

Chambers Global Guide 2013:

Listed as one of the two "Star Individuals" in the Singapore Section of "Most in Demand Arbitrators".

"a venerated arbitrator in Asia ... always sound and absolutely steeped in the knowledge of the law ... There's no area of the law that he doesn't know, and he very much deserves his star status. He brings to the market not only formidable experience but also impressive cross-border capabilities."

The Best of the Best 2013:

Named as one of the top 38 commercial arbitration practitioners in the world.

This book is a record of profound scholarship with insight into the important issues in international arbitration. Its collection of essays, written by Michael Hwang S.C. over the years, on a wide range of topics in international arbitration will undoubtedly enjoy broad appeal to past, present and future generations of students and practitioners.

“This book is a potpourri of important issues of arbitration law and procedure. It is written by one of the masters in the field.

Michael Hwang is an institution in arbitration, but more than that, he is an accomplished lawyer, advocate, judge and diplomat as well as arbitrator.”

Dr Michael Pryles, President, SIAC Court of Arbitration

“Michael’s work is always elegant, scholarly and marked by the thoroughness that is a sign of conviction. Yet his essays are also commendably down to earth. They are full of innovative and ‘real life’ ideas and provocations.

It has been my great privilege to have the opportunity to sit with Michael in a number of cases over the years. Each encounter has been a masterclass in the practice of the arbitrator’s art. He is careful, polite, learned and principled. Once he has formed his views, having looked at the problem from various vantage points, he is firm in his convictions but never dogmatic.”

Dr Michael J Moser, Honorary Chairman, Hong Kong International Arbitration Centre

“My overwhelming impression of Michael is one of perseverance to the task before him and an abiding love of the law. Michael can ferret out legal points of which no one else has dreamed. He has become one of the leading arbitrators of his generation, a prolific author, an inspiring teacher and a frequent speaker.

This collection of articles is, I suspect, just the tip of the iceberg. It covers a wide range of topics and is evidence of his love of the law which he is so generous in sharing.”

Neil Kaplan CBE, QC, SBS, International Arbitrator

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