Main Programme

Session Abstracts
(Except for Sessions A & D)
It is a truism that the selection of an arbitrator is one of the most significant decisions that a party can make in an arbitration. This selection has implications on the choice of the presiding arbitrator, how the arbitration would be organised and managed, the style of hearings, quality of the award and overall cost of the arbitration. Indeed, this decision has such wide-ranging implications that experienced arbitration users typically speak about being “strategic” when shortlisting and selecting arbitrators.

Against the backdrop of the new UNCITRAL Rules and other arbitration rules (many of which have also undergone relatively recent amendment), this presentation and the paper that follows will focus on several familiar but key choices and decisions surrounding the constitution of the arbitral tribunal.

1. How many arbitrators? When do you decide and who should decide? Is three necessarily better than one?

Conventional wisdom dictates that you should always specify the number of arbitrators in your arbitration agreement. But when is this not the case? When might it be an advantage to defer this decision and leave it to an appointing authority or arbitral institution? In this regard, how do arbitration rules differ in terms of the default number of arbitrators? For instance, the new UNCITRAL Rules provide that the default number is three. The rules of other leading arbitral institutions (such as the ICC and SIAC) stipulate that the default number is one, unless the dispute is such as to warrant three arbitrators. When does (or should) a dispute warrant three arbitrators? Do we take it for granted that three arbitrators are necessarily better than one?

2. What type of arbitrator do you want? Is the Sympathetic Arbitrator necessarily an advantage?

What checklist of qualities should parties consider when shortlisting and selecting arbitrators? How could these standards shift depending on case-specific “strategic” considerations?

3. Supplying the missing arbitrator: Appointing Authorities.

What factors should govern the choice of an Appointing Authority? Although only relevant under the UNCITRAL Rules, the choice of an Appointing Authority can have broad impact, particularly in light of the enhanced responsibilities it may exercise under the new UNCITRAL Rules. Moreover, since the criteria and method for selection of arbitrator could vary between Appointing Authorities, this choice is equally a “strategic” decision.

4. Independence and Impartiality: what is the difference? Do standards of impartiality differ?

What is the distinction between independence and impartiality? The “justifiable doubts” test under the UNCITRAL Rules (and other rules) and the arbitrators’ obligation of disclosure: should parties require written declarations of independence and impartiality? Do tests of impartiality differ between jurisdictions?
Most languages distinguish between the knowledge of a thing as such and the application of that knowledge to some practical end. In English, for instance, the term “science” denotes the theoretical understanding of something, whereas words such as “technique,” “practice,” or “art” refer to the use of that understanding in the real world. This same distinction applies to the UNCITRAL Arbitration Rules. The theoretical knowledge of their contents, purpose, and implications is a science; the use and application of the Rules in a particular case is a “technique” and frequently also an “art.”

This presentation is mostly concerned with the “artistic” side of the 2010 UNCITRAL Arbitration Rules. The emphasis is not so much on what they say, but rather on the tools, strategic opportunities, risks, and benefits they offer to the advocate, especially in the early stages of the case. The goal is not to exhaust all these issues, but rather to offer some thoughts on a few selected forensic matters.

First, the presentation considers the arbitration agreement’s formal requirements set out in the 2010 UNCITRAL Arbitration Rules—or rather the lack thereof. How do the 2010 Rules compare to other international arbitration rules in this regard? Can the parties really arbitrate in the UNCITRAL system without first agreed in writing to do so? Will the ensuing award be enforceable? More generally, what are the advantages and disadvantages of entering into an arbitration agreement that is not recorded in a traditional written format?

Second, the presentation considers some choices the parties can make in their arbitration clause. Specifically, does it make sense to have the clause address issues such as the number of arbitrators, the language of the arbitration, or the applicable law?

Third, the presentation touches on Article 16 of the 2010 Rules regarding arbitrator immunity. The rules from several international arbitral institutions contain comparable provisions. Yet, are arbitrators really “immune”? If so, what is the scope of that immunity and how does it affect the parties’ strategy in the case?

Fourth, the presentation discusses the arbitration notice. The respondent now has an opportunity to respond to it—see Article 4 of the 2010 Rules. Does this mean that practices formerly acceptable (such as submitting skeletal notices simply designating the parties, the arbitration agreement, and the contract) have become out of place? How detailed must the arbitration notice be? And when does it make sense to elect to treat the arbitration notice as the statement of claim? What lessons can be drawn from other rules containing similar provisions?

Lastly, the presentation reflects on whether the 2010 UNCITRAL Arbitration Rules on the institution of arbitral proceedings contribute indeed to improve time and cost efficiency in the overall settlement of disputes.
We can take it as a given that certain common practices exist that govern the conduct of procedural matters in international arbitration today. Reference is made here to a broad notion of international arbitration, which can be seen to include commercial arbitration between private parties, investor-State arbitration and, to a certain extent, inter-State arbitration. This is particularly apparent when it comes to certain aspects of arbitral procedure, such as, for instance, case management techniques, meant to promote the efficiency of proceedings and inspired by and large by a pragmatic approach, or general principles governing the tribunals’ inherent powers, including the taking of evidence, standards of proof, requests for production of documents and the issuance of interim measures.

However, international tribunals still maintain differences in approach when it comes to certain procedural practices. To give just two examples, this is true with regard to the standards of independence and impartiality for arbitrators, which are far from being uniform, and the practice relating to third-party intervention (when this type of intervention is admissible under the relevant rules). Thus, while it can be said that there are a number of accepted principles of international adjudication, it is difficult to conclude, at least for the time being, that there already exists a harmonized system of transnational procedural law that works across the board for all international tribunals.

Starting from this premise, this intervention will review selected examples drawn from the procedural practice of international tribunals, including permanent courts and tribunals in inter-State disputes, to look at some of the remaining differences in approaches and analyse whether the experience of inter-State arbitration can provide models that can be applied in an investor-State, or even an international commercial arbitration, context.

2. The First Example: Challenges of Arbitrators in Inter-State Arbitration

The recent challenge of the arbitrator appointed by the United Kingdom in the Annex VII arbitration in the Mauritius/U.K. dispute brought to the fore the question of whether the issue of arbitrators’ impartiality and independence is governed by general principles of international law and practice adopted generally by international courts and tribunals. This was the position taken by Mauritius in its challenge, but the arbitral tribunal was not convinced by its arguments, and particularly rejected the application of the IBA Guidelines finding that “Mauritius has not demonstrated that the rules adopted by non-governmental institutions such as the IBA have been expressly adopted by States, nor do they form part of a general practice accepted as law, nor fall within any other of the sources of international law enumerated in Article 38(1) of the Statute of the ICJ.”

The Rapporteur considers that the Tribunal’s conclusions are well-founded. Nonetheless, it is interesting to note that the Tribunal inter alia held that the rules developed in the international commercial context or in investor-State cases do not apply to inter-State disputes (paras. 165-168 of the Reasoned Decision on Challenge of 30 November 2011). The Tribunal’s reasoning in this case also raises the question of what would be the approach taken by an arbitral tribunal in a State-to-State dispute in the field of international investment and whether that approach would differ from the position taken by investment tribunals who routinely turn to the IBA Guidelines, if not as source of law, at least for guidance.
3. The Second Example: Document Production in Cases Involving State Parties

Document production is common in international arbitration. In investor-State proceedings – due to the involvement of sovereign States – objections to document production may be grounded on reasons of State secrets or privileged or politically sensitive information.¹ The solutions offered by these tribunals tend to be similar in adopting a fairly restrictive approach.

An interesting and novel contribution to the practice of document production was provided by the Tribunal established under Annex VII of the Law of the Sea Convention in the 2007 Guyana/Suriname arbitration. In that case, Guyana requested access to documents which were held in the archives of the Netherlands Ministry of Foreign Affairs. Suriname objected on the basis that the documents were not in the public record and that they covered many sensitive issues such as the national security of Suriname. The Tribunal’s solution was to appoint an independent expert competent in both the Dutch and English languages to conduct a review of the relevant documents and decide whether they should be made available to Guyana. Detailed terms of reference were adopted and Suriname was ordered to cooperate fully with the independent expert.

Arguably, this procedure could be applied in investor-State disputes or even in commercial arbitrations involving State parties, given the unique issues that the involvement of State parties may give rise to. Another aspect that will be considered concerns how a tribunal would react when confronted with a State’s refusal to produce documents on grounds of national security or State secrecy.

4. The Third Example: Is the Power of Revision Part of the Inherent Powers of Arbitral Tribunals?

The question of the inherent powers of arbitral tribunals is a particularly topical one. The International Commercial Arbitration Committee of the ILA is currently preparing a report on this very subject. Can it be said that the power of revision is amongst the implied or inherent powers of international tribunals? While the constitutive instruments of certain courts and tribunals, and some arbitration rules, expressly contemplate revision of previous judgments or awards, others do not. The practice of international courts and tribunals in this regard is inconsistent.

In a 2011 judgment in the B-61 case - a State-to-State dispute - the Iran-US Claims Tribunal - whose procedure is governed by a modified version of the UNCITRAL Rules – stressed that it “must be especially cautious in finding that it possesses inherent powers” (para. 63) and held in particular that it did not have the power to revise its previous judgments. Not only does this conclusion seem to run counter to previous decisions of the same tribunal, but it may have implications for disputes governed by the UNCITRAL Rules, to the extent that no express power of revision is foreseen by those Rules.

5. Conclusions

In recent years, international courts and tribunals have increasingly come to adopt similar approaches on the conduct of procedural matters. Nevertheless, differences remain, which cannot simply be explained by the different legal cultures of the arbitrators or the variety of applicable rules or constitutive statutes. They may be also be rooted on the particular features of each court and tribunal and in the characteristics of a given dispute. Thus, although there is indeed a gradual consolidation of accepted practices, it cannot confidently be said that a uniform system of international procedural law and practice exists at present.

¹ See, for instance, SD Myers v Canada (Procedural Order No 10 concerning Crown Privilege of 16 November 1999); Pope & Talbot v Canada (Decision on Crown Privilege and Solicitor-Client Privilege of 6 September 2000); ADF Group Inc v United States (ICSID Case No ARB(AF)/00/1, Procedural Order No 3 of 4 October 2001); United Parcel Services of America Inc. v Canada (Decision of the Tribunal relating to Canada’s Claim of Cabinet Privilege of 8 October 2004); Glamis Gold, Ltd v United States of America (Decision on Parties’ Requests for Production of Documents Withheld on Grounds of Privilege of 17 November 2005); and Merrill & Ring Forestry LP v Government of Canada (Order on Document Production of 18 July 2008); as well as claims under other BITs (Biwater Gauft [Tanzania] Ltd v United Republic of Tanzania (ICSID Case No ARB/05/22, Procedural Order No 2 of 24 May 2006)
**I. INTRODUCTION**

International arbitration (both commercial and investment arbitration) is governed by national legislations as well as international treaties. It has frequently been discussed to what extent rules of a transnational nature could be developed in international arbitration and if such transnational rules would be suitable for addressing the various problems related to the international arbitral process. This paper revisits this classic question in light of the new developments of international arbitration, and questions whether “transcending national legal orders” in the field of international arbitration is an appropriate approach in today’s legal environment.

**II. PROCEDURAL AND SUBSTANTIVE LEGAL ORDERS**

The notion of legal order has two dimensions. One can distinguish the legal order governing the **procedure**, namely the arbitral process, and the legal order governing the **substance**, namely the merits of the underlying rights in dispute.

Transcending the “substantive” legal orders has generated reflections in relation to the notion of a **lex mercatoria**. We will not deal here with lex mercatoria and other reflections concerning transnational (substantive) law, but rather focus on the procedural dimension of the concept of the legal orders in international arbitration.

**III. THE LAWS GOVERNING THE ARBITRAL PROCESS**

A. **Commercial Arbitration**

The arbitral process is governed by national legislations (e.g. Singapore Arbitration Act, English Arbitration Act, French Law on Arbitration (Art. 1442-1527 Code of Civil Procedure), Chapter 12 Swiss Private International Law Statute, Brazilian Arbitration Act, Arbitration Law of the People’s Republic of China, etc.) organising arbitration in a given jurisdiction. In addition, international treaties provide for uniform rules and principles. The most important treaty is the New York Convention. Uniform rules and principles mainly relate to the recognition and enforcement of foreign awards.

On a European level, the debate concerning the inclusion of international arbitration in the ambit of the Brussels Regulation/Lugano Convention is a sensitive and highly controversial issue.

B. **Investment Arbitration**

A major distinction must be made between ICSID and non-ICSID arbitrations.

ICSID arbitration is governed by the ICSID Convention, which is an international treaty providing for a uniform and fully autonomous framework for the arbitral process. The ICSID Convention has been described as a “self-contained system of arbitration”, which is independent of any national legal systems (including the law of the seat of the arbitration). The autonomy of the ICSID system extends in particular to the challenge of the awards, which directly follows from the ICSID Convention itself.

Non-ICSID arbitrations find their basis in an international treaty. However, the arbitral process itself is not governed by the treaty. It is rather governed by the legal system of the seat of the arbitration. In particular, the award is subject to court supervision at the seat of the arbitration, as this has been recognised expressly or impliedly by many courts. This also applies to arbitration subject to the ICSID Additional Facility Rules.

It follows from this that, from a procedural standpoint, commercial arbitration and non-ICSID (investment) arbitrations have more in common than ICSID and non-ICSID investment arbitrations.
IV. LEGAL THEORIES ADVOCATING THE CREATION OF AN AUTONOMOUS ARBITRAL LEGAL ORDER

Several legal theories have been proposed to explain the relationship between international arbitration and the national legal systems. Recently, Professor Emmanuel Gaillard has given a new impetus to these reflections by proposing three possible “representations” of international arbitration.

The first representation “assimilate the arbitrator to a national judge exercising his or her function within a single national legal order, that of the seat of the arbitration” (E. Gaillard, Legal Theory of International Arbitration, p. 15, para. 11). The second representation “considers that the source of juridicity of an award does not derive from a single legal order – that of the seat -, but rather from all legal orders that are willing, under certain conditions, to recognise the effectiveness of the award” (Gaillard, op.cit., p. 24, para. 23). The third representation of international arbitration “is that which accepts the idea that the juridicity of arbitration is routed in a distinct, transnational legal order, that could be labeled as the arbitral legal order, and not in a national legal system, be it that of the country of the seat or that of the place or places of enforcement” (Gaillard, op.cit., p. 35, para. 40).

Although some scholars see in the Putraballi decision of the French Cour de Cassation a possible recognition of the third “representation” (existence of an arbitral legal order), the critical passage of that decision is in fact ambiguous. It states that “an international arbitral order – which is not anchored to any national legal order – in an international judicial decision whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement is sought”. The sentence combines the second and the third “representation” developed by Professor Gaillard.

Be that as it may, the first representation appears to be clearly dominant in today's legal environment, it being understood that this first “representation” does not imply that an arbitrator is “assimilated” to a national judge. The arbitral process is anchored to the legal system of the seat of the arbitration, but the arbitrator has a special status, which implies that many rules applicable before the court at the place of the seat will not be applicable to private arbitrators. The arbitral process remains, however, regulated by the law of the seat of the arbitration and subject to the supervision of the courts of the seat.

V. NO NEED TO “TRANSCEDE” NATIONAL LEGAL ORDERS

It is submitted that there is no real need to transcend national legal orders (i.e. procedural legal orders) in international arbitration.

Most national legislations governing international arbitration contain developed and sophisticated rules, which are designed to organise the arbitral process in an efficient manner. They recognise the principle of party autonomy and limit the interference of the courts. The courts’ role is rather to assist the arbitral process.

In addition, there is almost a legislative “competition” leading some countries to improve their legislation with a view to attracting more arbitrations on their territory.

Under such conditions, one can question what more could be done and what improvement the creation of a new arbitral legal order would bring.

Transcending the national legal orders may also affect the principle of party autonomy. Parties regularly choose the seat of the arbitration and, by doing so, also the national legal framework governing the arbitral process. The concept of a transnational legal order could undermine the parties’ choice of the arbitration law. The Putraballi case is a striking example in that respect (the parties being deprived of the supervision of the English Courts that, arguably, they intended to have by choosing London as the place of arbitration).

Transcending national legal orders would also establish a legal regime, which would far from being as predictable as the existing legal orders and their important case law.

In any event, the international standards of the New York Convention would remain applicable, thereby diminishing the interest in establishing a transnational regime.
VI. THE PERCEIVED BENEFITS OF TRANSCENDING NATIONAL LEGAL ORDERS

The idea of transcending national legal orders has often been linked with the debate related to the enforcement of an award set aside at the place of origin.

It may effectively be argued that the international enforcement of the award could be facilitated if the importance of the law (and jurisdictions) of the seat diminish.

It is submitted that this is not a decisive, or even relevant, argument justifying transcending national legal orders.

First, the recognition and enforcement of arbitral awards is not a goal in itself (rather the recognition and enforcement of valid awards should be the goal).

Secondly, national legal orders can perfectly ensure the enforcement of an award, which has been set aside at the place of origin, if they deem it appropriate. This is for instance the approach taken by French law.

Finally, even under the classic recognition and enforcement regime of the New York Convention, enforcement courts have the discretion to disregard annulment decisions, which have been taken in an abusive manner.

Therefore, one can submit that transcending the national legal orders serves no real purpose with respect to the international recognition and enforcement regime of international awards.

It has also been argued that transcending national legal orders could be a tool in order to better resist anti-arbitration injunctions. Arbitrators would be “immune” from such injunctions if they operate and derive their powers from a transnational legal order (rather than from the legal system of the seat of the arbitration).

It is submitted that another approach can be advocated and is to be preferred. As the ICSID Tribunal stated in the Saipem case:

“The Tribunal considers that the Bangladeshi courts abused their supervisory jurisdiction over the arbitration process.

In conclusion, the Tribunal is of the opinion that the Bangladeshi courts exercised their supervisory jurisdiction for an end which was different from that for which it was instituted and thus violated the internationally accepted principle of prohibition of abuse of rights.”

Such an approach strikes the correct balance between the primary role of the legal system of the seat of the arbitration and the necessary restriction designed to avoid unfairness and abuses.

VII. UNIFORM RULES AND BEST PRACTICES

Uniform rules and best practice principle tend to develop in international arbitration. This is not the topic of today.

However, such uniform and best practice principles can already fully develop and flourish under the existing national legal orders, most of which recognise the principle of party autonomy in the conduct of the procedure and, for the rest, grant arbitrators a wide discretion to organise the procedure.

VIII. CONCLUSIONS

The various legal orders governing international arbitration can be improved and they are regularly modernised with a view to facilitating even further the arbitral process, sometimes for promotional reasons.

Transcending national legal orders does not appear to be a necessity or even desirable.

The real danger for arbitration today is twofold: (i) dissatisfaction of users; (ii) possible threats from States (for limiting the definition of arbitrability or increasing the control over the award). Transcending national legal orders would not address the real challenges of international arbitration in the future.
Breakout Session B2

The Arbitral Proceedings Commence, with an Introduction to E and I Arbitration.

Rapporteurs
Cavinder BULL, S.C (Singapore)
Dominic ROUGHTON (Japan)

Commencing the Arbitral Proceedings with an Introduction to E- and I- Arbitration

Plus ça change, plus c’est la même chose.

Whilst Alphonse Karr may have had in mind the US political scene of 1849, his words demonstrate a prescient anticipation of the international arbitration scene of the early 21st century, and in particular of its second decade.

Over the last two years or so, we have witnessed the revised UNCITRAL Arbitration Rules as well as the 4th edition of the SIAC Rules and the Rules of Arbitration of the ICC in force as from 1 January 2012. Regionally, the LCIA have introduced their LCIA India Rules with effect from 17 April 2010, the KLRCA have introduced their Fast Track Rules and Islamic Banking and Financial Services Rules, whilst CIETAC is considering its own changes. The list goes on.

But in the context of commencing the arbitral proceedings, there appears to be little real change: the revisions and amendments to arbitral rules all continue to presuppose that to commence an arbitration, a notice or request must, as before, be submitted to the relevant institution or sent to the Respondent.

There are of course important refinements intended to give recognition to the new era in which we operate and the new means by which we may arbitrate. With the opening of new offices comes recognition under the ICC Rules 2012 that the Request for Arbitration may be submitted “to the Secretariat at any of the offices specified in the Internal Rules” (Art 4.1) – in other words, that a Request for Arbitration may be sent to the ICC Secretariat in Paris or elsewhere, such as the Secretariat’s offices in Hong Kong. This has its attractions for an Asian disputant wishing to speak urgently with an institutional case worker.

Perhaps more importantly, the UNCITRAL Rules 2010 contemplate “Delivery by electronic means such as facsimile or email” (Article 2(2)), as do the SIAC Rules 2010 (Article 2.2) and the ICC Rules 2012 (Article 3(2)) – provided in each case that there is a record of the sending or delivery of the relevant notice or request (as well as a record of the relevant fee being paid). Yet modern technical innovations may still be trumped by traditional lawyerly caution: the difficulties involved in proving transmission by email and the risks associated with fax are such that more traditional means of sending may be preferred, particularly where limitation is an issue or in other cases of urgency.

Indeed, if there is change, its evidence is perhaps to be found from more subtle considerations of the new rules relating to emergency arbitrators. Both the SIAC and the ICC emergency arbitrator procedures contemplate that an application for “emergency interim relief” (SIAC) or “urgent interim or conservatory measures” (ICC) may be made prior to constitution of the arbitral tribunal to an emergency arbitrator. Whilst Schedule 1 of the SIAC Rules permits the application to be made “concurrent with or following the filing of a Notice of Arbitration”, by contrast, Appendix V of the ICC Rules contemplates termination of the emergency arbitrator proceedings “if a Request for Arbitration has not been received by the Secretariat within 10 days” of the application being made. In other words, filing of a Request for Arbitration appears not to be an essential pre-requisite to an application for relief from an ICC emergency arbitrator.
That said, given the questions over enforceability of an emergency arbitrator’s “order” (as opposed to his or her “award”) under the New York Convention, there must be questions as to whether or not an application to an emergency arbitrator can properly constitute the commencement of the arbitral proceedings. In such case, the filing of the Request for Arbitration would appear to remain the essential step to commencement of the arbitral proceedings. Nevertheless, it will be interesting to see how far emergency arbitrator procedures might serve to push the envelope for measures which traditionally tend to be triggered by the filing or receipt of a Request for Arbitration, such as litigation holds to preserve electronic and other evidence.

A different question regarding commencement arises from issues concerning whether and when arbitral proceedings have been commenced at all. This question emerges not from any new rules, but from national and international court and arbitral jurisprudence. It relates to the necessity of satisfying conditions imposed by the arbitration agreement prior to commencement of the arbitration. Common law jurisdictions have long been familiar with Scott v. Avery clauses but the increasing tendency for parties to negotiate multi-tiered clauses in their international contracts is starting to vary the arbitral dynamic across common and civil law jurisdictions.

Under common law principles, the line of cases following Cable & Wireless v. IBM have confirmed the view that objections to satisfaction of a prior procedure such as mediation are procedural not substantive, thus justifying a stay – although there is a growing difference of emphasis between the English courts and the courts of, for example, Hong Kong and certain Australian jurisdictions as to when to stay and when not to stay. In Singapore, the Court in Insignia Technology Co Ltd v Alstom Technology Ltd suggested that a stay could be ordered where the prior procedure amounted to a legally binding and enforceable requirement in parties’ contract.

As can be seen from the Paris Cour d’Appel decision in Nihon Plast v. Takata Petri, French jurisprudence appears to take a similar view to the English courts.

By comparison, there is an unresolved question before the Swiss courts arising from the Federal Supreme Court’s decision in Y. v X. Here, the question was whether failure to comply with an agreement to mediate prior to commencement of a WIPO arbitration constituted a procedural breach leading to the claim before the arbitrators being inadmissible (as in France and England), or whether it was a substantive breach of the clause. If the latter, the Federal Supreme Court postulated that breach would give rise to a claim in damages but without adverse consequences to the tribunal’s jurisdiction. In the event, it avoided the question, finding that there had been no breach on a true construction of the arbitration clause. The Swiss position thus remains open.

The different approaches of the various national courts could, in cases where parties’ arbitration clauses do not clearly stipulate the seat of their arbitration, provide additional strategic considerations when commencing arbitration proceedings.

Before international investment tribunals, however, there is a growing tendency against enforcing strict compliance with procedural preconditions. Two cases involving the Italy-Argentina BIT are instructive. In Impregilo v. Argentina, the investor was entitled to rely upon the MFN provisions of the BIT to circumvent a 6 month cooling off period prior to commencement of arbitration. And in Abaclat v. Argentina, a majority ICSID tribunal held that on a “weighing of interests”, the unfulfilled requirement under the same BIT for 18 months’ litigation in national courts did not bar the claimants from pursuing ICSID arbitration.

Cases like Cable & Wireless, Nihon Plast and Impregilo and Abaclat might suggest a divergence between the approach taken in commercial and investment claims in enforcing or condoning technical breaches of tiered dispute resolution clauses. It is submitted that this is a superficial reading of the cases. To the contrary, there is a common theme running through the jurisprudence of the importance of balancing contractual certainty against procedural efficiency. Put differently, the growing jurisprudential trend is to assess whether or not the pre-arbitral tier of negotiation or mediation will be productive or purely futile. As such, the cases suggest that a claimant should not be obstructed by the need to engage in pre-arbitral procedures that may be unnecessarily costly in time and treasure but should instead be encouraged in the interests of arbitral efficiency to commence proceedings.
In this regard, a party needs to give clear thought to how it commences its arbitration. Whilst plans of attack rarely survive first contact with the enemy, significant strategic advantages have traditionally been available to a clear-minded – and far-sighted – claimant team. That is because the well-advised and properly prepared claimant can buy for itself one essential luxury: time. It has time to formulate its case, time to prepare and secure the evidence – whether documentary, factual or expert – and time to identify the arbitrator most likely to view its claims favourably but least susceptible to challenge. In short, the time prior to commencement is the time that will most likely define the case.

One advantage to a claimant therefore will be the ability in all but the most urgent cases to consider its strategic options carefully before exercising them upon commencement. Advantages can be made from constructive ambiguities in the arbitration clause: where the clause is ambivalent or silent as to language or seat, a claimant can commence the arbitration in the language and at the seat of its choice. (Whether or not its choice is maintained by the Tribunal is of course not guaranteed but may be assisted by strategic nomination.) And even in the most urgent cases, the claimant can consider whether it wishes to seek relief from national courts or from the emergency arbitrator.

As arbitration has evolved, so have the choices and decisions required of a claimant and its team considering commencing an arbitration. Where there are treaty claims, not only may there be a choice of investment treaty, but often there will be a choice of forum within the treaty. Under the Energy Charter Treaty, for example, a claimant eschewing local remedies may choose between ICC, SCC and UNCITRAL arbitration, unless it prefers ICSID. But whereas ICSID may once have been viewed as the panacea to cure all Governmental ills, there are cases where a different form of arbitration may be preferable and some cases where it may not avail at all.

The gradual emergence of “e-arbitration” and “i-arbitration” (“e” is for “electronic” and “i” is for “interactive”) has added further dimensions to the legal, procedural and strategic considerations of where, when and how to commence proceedings. Some of the major institutions have created secure web-based platforms where (a) documents may be electronically filed, stored, and searched; (b) dedicated forums are provided for communications between parties, arbitrators and the institution; and (c) real-time case information, timetables and finances can be accessed around the clock.¹ Yet while statistics suggest that parties increasingly file their arbitrations online, including through institutional web-based platforms, one arbitral institution has reported that parties are nonetheless reluctant to conduct the entire proceedings this way.²

The choices available upon commencement are of signal importance to the tone and outcome of the case. Indeed, far from being the merely first step of many in the arbitral procedure, commencement, and the manner of commencement, will inform and influence the course that the case takes.


Breakout Session C2

The relationship between international arbitration and the national judge: both arbitral seat and enforcement; anti-suit and anti-arbitration injunctions; bad faith decisions under the New York Convention; state liability for interfering in the international arbitration process.

Rapporteur
Prof. José E. ALVAREZ (USA)

A New Enforcement Tool?

Prof. Alvarez will focus on a number of recent arbitral decisions, in ICSID and elsewhere, in which bilateral investment treaties (BITs) and investor-state dispute settlement are invoked in response to alleged interferences by state courts with the enforcement of commercial arbitral awards. These decisions include Saipem v. Bangladesh, Romak v. Uzbekistan, GEA and Ukraine, and White Industries v. India. These decisions raise legal questions concerning the interpretation of BITs and the meaning and purpose of the ICSID Convention. Among the specific questions that Prof. Alvarez will address are the meaning of “investment” and whether this term can include an arbitration award and the extent to which an interference with the commercial arbitral process may constitute an “expropriation,” a violation of the “fair and equitable treatment,” a denial of justice or other violation of the international minimum standard of treatment, or some other violation of the substantive investor rights contained in BITs. Prof. Alvarez will also consider the broader implications of this line of cases, including what these developments suggest about the relationship between national courts and investor-state arbitrations as well as the distinguishing features of commercial versus investment arbitration. More specifically, Prof. Alvarez will consider the implications of these cases for the common assumption that commercial arbitration is a species of “private” adjudication whereas investment arbitration is a type of “public” litigation.

Participants are urged to read the Saipem v. Bangladesh award (ICSID Case No. ARB/05/7, 30 June 2009) in particular to become familiar with the issues to be addressed.

Breakout Session C2

The relationship between international arbitration and the national judge: both arbitral seat and enforcement; anti-suit and anti-arbitration injunctions; bad faith decisions under the New York Convention; state liability for interfering in the international arbitration process.

Rapporteur
Adriana BRAGHETTA (Brazil)

Adriana Braghetta will address the theme focusing on international commercial arbitration.

The presentation will discuss the following issues:

(i) Foundation of the international arbitration system(s):
   a. Judicial control - is it necessary?
   b. What to do with awards that violate the arbitral agreement, due process and international public policy?
   c. What are the limits of supervisory jurisdiction?
   d. The need of coordination.

(ii) The need of an ongoing dialogue with the judiciary;

(iii) Diagnosis of the current judicial decisions in relation to commercial arbitration in Latin America and other countries. Judicial decisions in the arbitral seat and enforcement, anti-suit and anti-arbitration.

(iv) How do address the problem of bad faith decisions - the need to improve the dialogue with judicial courts.
Breakout Session B3

Evidence, Document Production, Witnesses, Experts and Hearings.

Rapporteurs
Nish SHETTY (Singapore)
Anne K. HOFFMANN (Germany / Switzerland)

This joint presentation aims to address the prevalent issues relating to the presentation of evidence, document production, the role of witnesses, the appointment of experts and oral hearings. Both rapporteurs will address various aspects of each of these issues.

Presentation of Evidence

The purpose of the presentation on this topic is to provide a detailed overview of the use, importance and types of evidence that may be relied upon for an arbitration (e.g. documents, witnesses, site visits and other non-documentary evidence) and the relevant standards of proof in civil and common law jurisdictions. Practical issues of documentary presentation, presentation of evidence in two or more languages and the Tribunal's regulation regarding introduction of evidence and producing evidence *sua sponte* will also be discussed.

Document Production

There are differing views on document production or "discovery"/"disclosure" in the context of international arbitration. The presentation will shed light on the position under civil law and common law and whether a certain unified standard has been achieved in the international arbitration world. Management of documentary requests with special emphasis on Redfern Schedules, IBA Rules and E-discovery will also be considered.

Related issues of importance which will be addressed are, inter alia: limiting the scope of requests; grounds of objection to produce; preserving confidentiality; claims of privilege; special problems created by divergent legal systems and practices; obtaining documents from third non-parties; issues posed by searches for and costs of electronic documents; intervention of national courts; pre-arbitration discovery and 2010 Ethical Rules on production of documents, will also be covered.

Witnesses

A good and credible witness can make or break a case. Therefore, the selection of the right witness is of critical importance. The presentation will cover the important issues regarding the selection of witnesses as well as witness preparation, including but not limited to, identification of witnesses, criteria to look for in a good witness, Tribunal's authority to order *sua sponte* appearance of persons for testimony or submission of a witness statement, sequestration of witness prior to testimony, consequence of witness non-appearance, examination via video conference.

Appointment of experts

Experts play a very important role in arbitration proceedings. Experts may be appointed by the parties to the arbitration or by the Tribunal. An expert may also be a joint expert appointed to act for both the parties. The presentation will address the importance of selection of an expert and the role of experts in arbitration proceedings.

Oral Hearings

Finally, the presentation will also deal with the issues that will need to be addressed in relation to oral hearings. The presentation will discuss the factors to be taken into consideration when deciding whether or not to have an oral hearing, such as whether such a hearing can only be held following a party's request or is it a matter for the discretion of the Tribunal? Can procedural issues be dealt with through an oral hearing and in what circumstances and can all substantive issues be dealt with purely through an oral hearing. Other important issues that will be considered include the location of the oral hearing (seat/venue), organizing logistics (e.g., booking of venue, transcriptions services, etc), practice regarding successive and non-consecutive separate hearings, whether the hearing is limited to the materials presented before it, can new materials be adduced, etc.
A strong theme in the evolution of law in the past few centuries has been the development of transparent and consistent legal standards as a check and balance on discretionary (and thus, possibly arbitrary) decision-making. International arbitration has adopted only the most general procedures, borrowing as needed from other systems, but has been slow to elaborate its own procedures as the nature of international arbitration has morphed and changed. Today, international arbitration encompasses disputes of all shapes and sizes, from the smallest and simplest commercial sales to enormously large and complex issues of infrastructure and governmental regulation. As the size and complexity of the disputes dealt with by international arbitration grows, the procedures employed must meet modern standards of law—transparent, consistent and reasonably predictable.

The development of the modern practice of both commercial and investor-State arbitration has largely been achieved by the cooperative effort of lawyers from all legal systems, promulgating harmonized rules of procedure, bridging the divide between the common law and civil legal traditions. One area of practice that has not been harmonized or clarified, however, concerns the ethical rules that create shared obligations of arbitration counsel in international proceedings. This paper submits that various and sometimes conflicting national codes of professional conduct are ill-suited to fulfill the necessary role in international arbitration, which transcends the rules of any given state.

The problem has become accentuated as lawyers increasingly practice in more than one jurisdiction in the context of national ethical rules that sometimes conflict and without the transparent application of any broadly-accepted code of ethics.

In the past few years, arbitral tribunals have been called upon to decide ethical issues, including those that implicate the conduct of counsel. Tribunals have found it necessary to accept such requests, relying on an asserted inherent authority to decide procedural questions in order to maintain fairness in the arbitral proceeding. In rejecting the application of national professional codes, tribunals have relied on general principles to decide such issues, despite the fact that existing ethical principles are not uniform across national systems.

This paper suggests that fairness in future proceedings can only be assured if there is greater transparency in the ethical rules applied by tribunals, and if the decision-making process over time aims toward a certain degree of uniformity. That is, the rules of ethics applied in international arbitration need to reflect the values of law—transparency, consistency and reasonable predictability—in order to assist all counsel, parties and tribunals in ascertaining the relevant obligations.

This paper examines the provisions of some of the current proposals and demonstrates that a consensus as to what constitutes proper counsel conduct is possible in international arbitration. The paper also tests some of the proposed rules against selected decisions and awards rendered in investor-State proceedings.

The paper concludes that a uniform code of ethics is a necessary underpinning of the international arbitral system in order to maintain public confidence. An ethics code in the short term would guide counsel on how they should conduct themselves, alert parties to the obligations of counsel, and convey customs and conventions to all arbitrators, including those with limited tribunal experience. In the longer term, such a code would contribute to uniformity in arbitral jurisprudence, improve the efficiency of proceedings, the fairness of outcomes, and above all, it would enhance the credibility and legitimacy of the international arbitration process as a whole.
The relationship between international arbitration and the regulator(s): the need for ethical codes, guidelines and the best practices for arbitration counsel, arbitrators, arbitral secretaries and arbitral institutions: the DB/MS Rio Code, the ILA Code and the CCBE draft Code.

Rapporteur
Toby T. LANDAU, Q.C (UK)

The Relationship Between International Arbitration and the Regulators: A Pause for Thought

One of the testaments of success of the modern practice of both commercial and investor-State arbitration is often said to be the emergence of globalised and harmonised standards. The most significant factor in this development has been the work of certain international organisations, such as UNCITRAL and the IBA, in formulating and promoting foundational norms. Whereas, historically, the regulation of arbitration was the preserve of national courts, and thus piecemeal and inconsistent, it has been international and transnational regulation, by such instruments as the New York Convention 1958, the Model Law of 1985, and the UNCITRAL Rules of 1976, that has been the key to success.

But as the frequency and reach of international arbitration increases, there has been a corresponding and exponential increase in regulatory activity in this field. More and more (often self-appointed) organisations are now busy compiling and publishing rules, codes, protocols, models, guidelines, interpretations, recommendations, notes, and best practices. The result is already a bewildering web of “soft law” norms, and yet the thirst for codification still seems unquenched. And as the practice of arbitration (and in particular investor-State arbitration) itself edges into ever-more politically sensitive areas, so the arbitral regulators are increasingly looking towards sensitive topics, such as ethics, which are imbued with issues of public policy and mandatory law (and, for some, which were consciously left untouched by instruments such as the New York Convention and the Model law).

This paper calls for a pause for thought. With specific focus on recent (and current) proposals for an international code of ethics in arbitration, the analysis presents an internal and external critique of the work of the regulators.

The internal critique questions the detailed provisions of current proposals, focusing upon their acceptability, coverage, coherence, and application in an international setting.

The external critique places current proposals in the broader (and historical) context of the debate on “soft law”, addressing the strengths and weaknesses of this type of norm-making process; the proper limits of harmonisation; the nature of “re-statement” and “pre-statement”; and the relationship with mandatory law and local norms.

On the basis of both critiques, it is suggested that attempts at international regulation, specifically in the field of ethics, seek to achieve too much, and in fact achieve too little. More generally, it is proposed that the time has now come to dampen down regulatory zeal in this field.

The paper concludes with a suggested alternative approach, specifically on the topic of ethics, focused upon regional and local regulation, and upon the role and inherent jurisdiction of arbitral tribunals themselves.
Breakout Session B4

The Tribunal Resolves the Dispute.

Rapporteurs
Jakob RAGNVALD (Sweden)
Minn Naing Oo (Singapore)

Enforcement of Arbitral Awards – How, What and When?

Proceedings to enforce an arbitral award often represent the last step available to a party in a commercial dispute to enforce its rights which it had fought for. Enforcement represents the need for support from a judicial authority to recognise and assist in ensuring the tribunal’s decision in an arbitral award sees fruition. This synopsis seeks to summarise issues for discussion in Session B 4 on 12 June 2012 at the ICCA Congress in Singapore.

New York Convention and Divergences

The UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the “New York Convention”) represents the bedrock of international commercial relationships. 146 countries have ratified and/or acceded to the New York Convention. The Convention provides comfort to parties entering into cross border contracts as to the enforceability of their rights, as adjudicated in arbitral proceedings.

The Convention imposes an obligation on contracting states to recognise arbitral awards as binding and enforce them subject to local rules of procedure. The Convention has simple procedural requirements. It requires a party seeking to enforce an arbitral award (that is rendered in a convention country), in another convention country, to make an application for recognition and enforcement of such an award along with a copy of the award and a copy of the arbitration agreement. Importantly, the Convention prescribes the limited grounds on which the recognition and enforcement of an arbitral award can be refused.

The grounds on which recognition and enforcement of an award can be refused are procedural in nature in that they relate to the process or lack thereof during the course of the arbitral proceedings. The additional ground of ‘public policy’ presents a substantive ground of refusal which is capable of subjective interpretation depending on the jurisdiction. It further raises issues of whether there must be a consistent standard or a concept of an ‘international public policy’ standard that must be applied while enforcing foreign arbitral awards in a particular jurisdiction.

Amongst the signatories to the New York Convention, different jurisdictions have adopted different measures in local legislations to give effect to the provisions of the New York Convention. Equally, local courts have read and interpreted such provisions in a varied manner. This has led to inconsistencies in practice.

Singapore and other Asia Pacific approaches

In keeping with its philosophy of supporting and assisting the arbitration process and minimal intervention, Singapore courts have consistently adopted a pro-enforcement approach. The Singapore High Court (in Aloe Vera) has taken the view that the process of enforcement was ‘mechanistic’ in nature. The Singapore Court of Appeal (in AJT v. AJU) took the view that the standard of public policy to be adopted must be the same for enforcement proceedings or proceedings to challenge an award. Moreover, the Court took the view that the legislative purpose of the [Singapore] International Arbitration Act was to treat all awards (falling within the ambit of that legislation) as having an ‘international focus’.

Another New York Convention jurisdiction, China, mandates that any decision to refuse enforcement of an award must be ratified by the Supreme People’s Court. Chinese law raises its own set of issues on the characterization of an award as domestic, foreign related or international. These raise interesting issues on choice of law, choice of institution and the seat of arbitration for Chinese and foreign parties. There are also additional issues on the validity of an arbitration agreement which merely prescribes the rules of an institution without naming the institution which is to administer the arbitration and issues concerning the enforceability of ad hoc arbitral tribunal awards in China.
India, on the other hand, codified the New York Convention grounds in its own legislation on arbitration. However, it only notified 45 countries as being reciprocal territories from which its courts would enforce awards under the New York Convention. There have also been interesting issues in relation to the jurisdiction of Indian courts in dealing with foreign awards, including a decision that they are competent to set aside foreign awards. These issues are the subject matter of a Supreme Court decision expected to be handed out in 2012. Statistically, however, India presents a different picture in that from 2000 to 2007, Indian courts recognised and enforced all foreign awards except one.

Indonesia is also a New York convention jurisdiction. Despite the passing of Regulation No. 1 by the Supreme Court to provide for enforceability of foreign awards and a new 1999 legislation, Indonesia continues to be viewed as being enforcement unfriendly. The *Karaha Bodas* decision is one example of the tendency of Indonesian courts to frequently penetrate arbitral proceedings by adjudicating cases subject to arbitration agreements, enjoining ongoing proceedings and reopening the merits of final awards. Practical issues also arise with enforcement of awards in Indonesia since its legislation requires that an award must be ‘delivered and registered by an arbitrator or his attorney-in-fact to the clerk of the District Court’ for it to be enforced.

Another New York Convention jurisdiction, Thailand enacted a new arbitration legislation in 2002 which incorporates the New York Convention grounds for refusal of enforcement of foreign awards. However, it raises specific questions of enforceability of arbitral awards in proceedings involving a government agency referred to as ‘administrative contracts’. The enforceability of such awards is subject to the exclusive jurisdiction of administrative courts under Thai law.

Different procedural requirements and limitations also apply for enforcement across such jurisdictions. These make for interesting comparisons and further examination.

**Role of the Tribunal and Institution**

These divergences have led to three important considerations:

(i) The need for parties to choose an appropriate jurisdiction for enforcement which must ideally:
   a. Be a New York Convention jurisdiction if the award was rendered in one;
   b. At the same time be a jurisdiction that is likely to, on the facts and circumstances of a particular case recognise and enforce the award; and
   c. Needless to say, be a jurisdiction in which the counterparty has assets;

(ii) The need for a tribunal to be alive to possible jurisdictions in which a particular award may require to be enforced; and

(iii) The necessity for an arbitral institution to be proactively aware of the jurisdiction in which an award may require to be enforced.

Hence, an important manner of dealing with varied jurisdicntional approaches is the provision for institutional control. Such measures can go a long way to ensuring enforceability of arbitral awards. For instance, the ICC’s International Court of Arbitration scrutinizes arbitral awards as to form. Similarly, the Singapore International Arbitration Centre’s (SIAC) Rules also provide for scrutiny of awards.

The scrutiny process adopted by the SIAC under its rules provide for the Registrar of the SIAC to suggest ‘modifications as to the form of the award’ and, without affecting the Tribunal’s liberty of decision also ‘draw attention to points of substance’. The SIAC Rules also impose an overarching responsibility on the Chairman, the Registrar and any Tribunal to make every reasonable effort to ensure the enforceability of the award. Apart from an examination of the draft award to avoid typographical, computational and clerical errors, the scrutiny process more importantly seeks to ensure consistency with the New York Convention through a rigorous process. This involves the SIAC Secretariat counsel in charge of the case going through the draft award carefully and cross-referencing with pleadings, issues stated and the evidence. The Registrar then reviews the draft. Thereafter, the Tribunal considers the comments and suggestions and finalises the award.
Issues also arise as to whether a court can choose to enforce an award that has been set aside in another jurisdiction in view of the non-mandatory language of Article V of the New York Convention. Further interesting issues arise in respect of awards from non-Convention countries and awards involving parties from non-Convention countries.

Other measures to ensure enforcement include efforts to raise international arbitration awareness amongst judiciary, practitioners and users and drafting arbitration agreements precisely and correctly.
With the entering into force of the Lisbon Treaty in December 2009, the EU has obtained exclusive competence for Foreign Direct Investment (FDI) - in addition to the exclusive competence it already had for the Common Commercial Policy (CCP). As result, the EU is currently developing its new Common European Investment Policy (CEIP) by inter alia negotiating investment agreements with third countries. In the short term, the EU intends to include investment chapters into the ongoing FTA negotiations with India, Canada and Singapore. This will be followed by FTA negotiations with many other countries. Subsequently, the EU also intends to conclude stand alone BITs with China for example.

Logically, the CEIP will be based on the best practice of the EU Member States, in particular based on the “Dutch gold standard”. Despite this well-known basis, new developments will inevitably lead to modifications of this model. One of the important new developments is the fact that the European Parliament has obtained co-decision powers when it comes to the ratification of future EU investment agreements. The European Parliament has already indicated that it wants a “re-balancing” of the EU investment policy as compared to the one developed by the Member States. A central aspect of this new “re-balancing” approach is to significantly expand the “public policy” exceptions by enhancing the “regulatory space” of the host state. This is in stark contrast with the “Dutch gold standard” model, which usually contains only the following provision:

Neither Contracting Party shall take any measures depriving, directly or indirectly, nationals of the other Contracting Party of their investments unless the following conditions are complied with:

a) The measures are taken in the public interest and under due process of law;

b) The measures are not discriminatory or contrary to any undertaking which the Contracting Party which takes such measures may have given;

c) The measures are taken against just compensation. Such compensation shall represent the genuine value of the investments affected, shall include interest at a normal commercial rate until the date of payment and shall, in order to be effective for the claimants, be paid and made transferable, without delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants.

In contrast, other approaches such as the NAFTA contain extensive “public policy” exceptions, including general exceptions and national security exceptions. In this context, the US experience will be used as a mirror to complement the EU discussion.

The session is split in two parts: (i) first, to give an overview of the state of play of the CEIP as it currently stands, and (ii) second, to zoom into the issues of “public policy” exceptions.

Thus, the purpose of this session is to actively discuss among the rapporteurs and the audience (rather than just give presentations) by raising the following questions:

- Why should the EU as a developed economy expand the “public policy” exceptions beyond those that are contained in the Member States’ BITs and which have served them so well?
- To what extent are “public policy” exceptions prone to abuse by host states?
- What about the relationship between post-crisis fragility of European economies and the increasing use of exceptions?
Legal and Arbitration Costs.

Rapporteur
Judith Gill, Q.C (UK)

What do we mean by legal and arbitration costs under the UNCITRAL Rules? Article 40.2 gives an exhaustive definition of the term "costs" and provides that it includes only (2010 changes in bold):

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;
(b) The reasonable travel and other expenses incurred by the arbitrators;
(c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;
(d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
(e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
(f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the PCA.

Other changes introduced by the 2010 revisions: Arts 40.1 (tribunal fix costs in the final award and, if it deems appropriate, in another decision); 40.3 (tribunal may only charge costs under (b) to (f) for interpretation, correction or completion of any award); 41.2 (tribunal to take into account a schedule or other particular method applied by appointing authority to determine arbitrators fees); new provisions to address amount of tribunal's fees under Art 41.3 and 4 provide for tribunal's proposal for and determination of fees subject to review by appointing authority or PCA (perhaps the most significant change in this part of the 2010 revision); and Art 42 deals with allocation of costs and remains largely unchanged i.e. still in principle to be borne by the unsuccessful party.

Changes represent a concerted effort not just to modernise the regime but also to ensure fees and expenses claimed by the Tribunal are reasonable and subject to independent verification if the parties are unhappy. Unlike institutional arbitration, where the fees and expenses of the Tribunal will be visible to, if not determined by, the institution in question, an alternative check mechanism is required.

What the rules do not grapple with in any detail is the question of what is reasonable. This is relevant to both arbitrators fees and the legal and other costs incurred by the parties in relation to the arbitration. On what criteria is reasonableness to be determined? Consider:

- Arbitrators from jurisdictions with very different economic climates. Should they receive equal fees?
- Should arbitrators who will charge according to an arbitration institution's scale rate be entitled to charge higher hourly rates for essentially an ad hoc appointment in a similar case?
- What yardstick should a tribunal apply to determine if counsel costs are reasonable? Does it require a detailed analysis of individual tasks? Or a review of hourly rates? Or assessment of the overall fee?

Is there a reluctance on the part of tribunals to grapple with the issue of costs at all in their awards? Note for example the tendency to avoid dealing with costs by a determination that each party shall bear its own legal costs and share equally the costs of the arbitration such as the Tribunal’s fees. That may be the simple and straightforward but can it really be said to do justice between the parties? Is such a ruling consistent with the many rules which mandate that costs follow the event?

Much discussion on the topic of legal and arbitration costs has centred on how to make arbitration cheaper and more efficient: see e.g. Report in 2007 by an ICC Task Force on Reducing Time and Costs in Arbitration which sought to suggest various techniques for controlling time and costs. Moreover there has been a plethora of guides, codes and ‘best practices’ for international arbitration aimed at making the process more efficient. Legitimate to ask whether they do in fact assist counsel and their clients and result in efficiencies or whether they simply give counsel more to argue about?
More generally, has the broader recognition of the issue which these initiatives are seeking to address had a material impact upon the way in which arbitrations are conducted? Focus on 3 areas:

1. **Trends being seen in the market**: Some clients are facing pressure on legal budgets and are looking for ways to reduce the cost of arbitration. This trend has continued since the GFC in 2008. At the same time many take a robust view of legal costs in the context of cases involving claims for substantial sums, or which are otherwise of particular significance. This is not limited to ‘bet the company’ cases.

   Arbitration practitioners need to understand - in a more nuanced way than ever before - their clients' commercial objectives and the level of service they expect and are prepared to pay for.

   Many major international commercial and investment treaty arbitrations are won by competitive tender requiring a fee cap based on assumptions. How rigidly are the caps applied? Do these assumptions or caveats make the figures meaningless? Is there a duty on lawyers to help clients understand what they are buying?

2. **The importance of case management and lawyer management**: How a case is run will have a substantial impact on costs. When considering the size of a team working on a case there is a trade off between managing costs and timing/service. Hourly rates may be a red herring - the number of hours charged will have far greater impact than minor variations in hourly rates. The use of sophisticated financial software and management processes can increase efficiency and reduce time spent and therefore costs. Should arbitration lawyers use mediation and other ADR techniques more?

3. **Innovation**: Are lawyers responding to and anticipating price pressures by innovating? E.g. development of ‘back office’ capability, working with IT specialists on techniques such as concept searching, third party funding etc.

**Conclusion**

These developments are a welcome response to an important issue. However, for all the progress made in recent years, it needs to be recognised that in most cases service delivery will be commensurate with what the client is willing to pay. Whilst fixed fees, caps, lowball rates, contingency arrangements and all sorts of other alternative fee proposals are available, and no doubt there are bargains to be had, ultimately these arrangements may well dictate the level and quality of the legal services provided. Controlling costs is important, but it may not be as important as meeting particular needs and expectations regarding the conduct of the case.

As Warren Buffet once said, “price is what you pay, value is what you get”. In the context of international arbitration, there is often a complex correlation between the two.
Legal and Arbitration Costs.  

Rapporteur  

Jean-Claude NAJAR (France)

Legal and Arbitration Costs the Users’ Point of View

Appropriate that this discussion comes after ICCA sessions on “Agreeing to/Initiating Arbitration”, “Arbitral Proceedings”, “Evidence, Document Production, Witnesses, Experts, and Hearings”, and “The Tribunal Resolves the Dispute”: cost the common factor at every stage

“The aim of international arbitration is to resolve business disputes, to find a solution that is sustainable and cost-efficient, without losing your business relation”, representative of Swedish Embassy at conference on “Freezing Those Costs: A Swedish – Rumanian Dialogue on Controlling Arbitration Costs”, Bucharest, 19 January 2012

Perception, particularly for ‘clients’, that cost has become the single biggest issue: Is perception reality?

Exhaustive definition of what the term “costs” includes in the new UNCITRAL Rules, Article 40.2, as highlighted by Judith Gill

UNCITRAL latest standard elaborated after years of travails in 2010

Note requirement of “reasonableness”

“Legal and other costs incurred by the parties in relation to the arbitration”, Article 40.2 (e)

“Parties” or the paradigm of users of arbitration: ‘The View from Within’

Corporate Counsel International Arbitration Group (CCIAG) admitted to travails as Observer to UNCITRAL meetings a year after its foundation (2006), regularly participated in all sessions; also in ICC Task Force on Decisions on Costs: Raison d’être of CCIAG

Categories of costs: see ‘exhaustive’ list of Article 40 (2) UNCITRAL Rules; as defined at 11th IFCAI Biennial Conference – Costs in Arbitration; but also discovery costs, parties’ internal costs, diverted time, lost productivity, missed opportunities…?


Early Case Assessment (ECA)

Early Dispute Resolution (EDR) and the emergence of tiered dispute resolution clauses, including mediation: A threat to arbitration or an opportunity to improve its effectiveness?

The importance of case management

Role of arbitrators

Role of arbitral institutions

Emergence of In-house litigation counsel and departments

“Lawyers” and “clients”: Interaction between law firm practitioners and in-house counsel

Streamlining the process: Role of in-house counsel, from drafting the arbitration clause to shaping the case

Control your Destiny or Someone Else Will”, Jack Welch, former CEO of General Electric Co. (GE): ‘Lessons in Mastering Change’

The latest initiative: the ICC Working Group on the Role of (Parties and) In-House Counsel in International Arbitration 2012
Some commentators have suggested that an alleged endemic lack of consistency in investment arbitration decisions, including those rendered by ICSID ad hoc committees, is damaging ICSID’s legitimacy to the point of endangering its future. In many respects, such criticisms are overstated and based on incorrect assumptions. Indeed, it is likely that ICSID will continue to develop a body of coherent jurisprudence and that it will maintain its status as a preferred forum for investor-State arbitration.

ICSID’s annulment mechanism does not appear to pose insurmountable challenges to ICSID’s future success. While many critics rightly observe that ad hoc annulment committees at times overreach and act as appellate bodies, the activism of these committees actually may promote consistency, rather than thwart it, as tribunals strive to prevent the eventual annulment of the awards they render. Lack of consistency among investment treaty awards, then, is a potential problem that is distinct from the criticisms that many have levied against ICSID ad hoc committees. In any event, it is unclear whether the far-reaching decisions recently rendered by annulment committees will have any long-term effect on the future of the investment arbitration system as a whole. Given the history of the annulment mechanism – and its initial rocky start with the Amco I and Klöckner I decisions – annulment jurisprudence may smooth itself out over time without the need for any institutional reforms or amendments to the Convention.

Over the last several years, commentators and practitioners have proposed a number of systemic reforms aimed at improving consistency and coherence in investment arbitration. One of the more controversial suggestions is that of an appeals mechanism. Even assuming that inconsistency were a threat to the survival of investment arbitration, however, there is no guarantee that instituting an appeals mechanism would eradicate inconsistency. The idea of an appeals mechanism for investment arbitration originated in the United States, and yet, inconsistency is accepted in U.S. jurisprudence. Rather than imposing consistency among all cases heard by the lower U.S. appellate and trial courts, the U.S. Supreme Court only hears a small fraction of the cases submitted to it and thus does not rectify many “incorrect” decisions. The Supreme Court, moreover, usually waits to see how jurisprudence evolves, reacting only after a pronounced split or conflict has emerged. Thus, the suggestion that appellate review is necessary to fix the investment arbitration system begs the question of why a certain level of inconsistency is acceptable within a domestic legal context, but not within international arbitration.

A certain level of inconsistency also may benefit the system. Without a jurisprudential hierarchy in place, tribunals need not blindly follow binding decisions without thoroughly analyzing the issues. Rather, they may take into account the surrounding debate among other tribunals, academics, and practitioners, and arguably reach better-reasoned decisions. Furthermore, there are significant challenges involved with instituting an appeals mechanism for investment arbitration, including the handling of delicate questions of its composition, balancing the converse relationship between the breadth of review of the appellate body and the ability to attract high-quality arbitrators for initial panels, and tackling the attendant increase in time and expense.
Several proposed alternatives to an appellate body may avoid some of these drawbacks. One option is the introduction of additional consolidation procedures, whether formal (where related cases are joined in one proceeding) or informal (where parties with related claims agree to have their claims heard by the same tribunal or arbitrators). While consolidation ensures consistency, its reach is more narrow than instituting an appellate mechanism, as it may only be applied to cases that are proceeding in parallel. Other options for increasing consistency involve the submission to tribunals of third-party interpretations. One version of this alternative, which would allow arbitral tribunals to suspend proceedings and request preliminary rulings on matters of law from a permanent body, has been proposed by several prominent practitioners. Although this reform likely would increase consistency among awards, it also faces some of the same vexing issues that arise in connection with the establishment of a permanent appeals body. Alternatively, existing mechanisms that allow State Parties to submit interpretations of the treaty to tribunals in pending cases could be expanded. This option also is not without disadvantages, including the practical difficulties of obtaining consensus among States on interpretive issues.

There have been many proposals in recent years that seek to make the decisions of ICSID tribunals and ad hoc annulment committees more consistent. Some of these proposals likely would enhance consistency to some degree, but many have significant drawbacks. At this point in time, the long-term survival of investment treaty arbitration and of ICSID, in particular, does not appear to be seriously threatened by a crisis of inconsistency or illegitimacy. Thus, while some modifications to the current system to enhance consistency may be welcome, a wholesale restructuring of the current system, which relies on ad hoc tribunals and limited review, does not appear warranted.
The Evolution of the ICSID System as an Indication of What the Future Might Hold

This paper focuses on the policy choices made by the drafters of the ICSID Convention when it came to the review of arbitral awards and discusses the limited recourse against arbitral awards in light of the Convention’s overall structure and content.

It notes that when those involved in formulating the Convention considered how ICSID jurisdiction might be seised in the future, the example most frequently discussed was that of a contract between the foreign investor and the host State in which the parties opted for ICSID arbitration rather than submitting all disputes to the host State’s courts. Thus, contracts, not treaties, were anticipated to be the primary means of conferring jurisdiction on ICSID tribunals. There are occasional comments made during the negotiations which indicate that some participants understood that ICSID arbitration could result from an investment treaty, but much of the discussion was focused more on an assumed relationship of contractual privity between investor and host State.

This has increasingly turned out not to be the case. Although contract claims formed the bulk of the first ICSID cases, investment treaties now account for approximately 75% of all ICSID cases. It did not take long to find that investment treaties raise more complex legal issues than contracts. The rise of BIT arbitration has spurred debates over the future of ICSID, whether there should be appeal for error of law, etc., but it is evident that, on analysis, such debates are directed more to investment treaty arbitration (and substantive legal doctrine) than to any shortcomings in the Convention.

There may well be arguments for providing for appellate review of investment treaty tribunals or for making other changes to the constitution or operation of such tribunals, but those arguments go more to such issues as the content and structure of investment treaties than to the Convention, the recurring nature of the legal questions arising in investment treaty arbitration, the interests of consistency and predictability, and so on.

One of the paper’s conclusions is that it makes little sense to discuss the idea of changing the ICSID Convention to provide for appeal or standing investment tribunals or the like. Many of the issues that have stimulated debate about ICSID arbitration are issues of international law arising out of investment treaties, not issues of law that arise out of the Convention itself.

The modern era of investment treaty arbitration is also notable for the fact that ICSID no longer has a monopoly over investment arbitration. A significant number of claims are now heard by ad hoc tribunals established outside the framework of the Convention. Since ICSID is not the only available forum under many treaties, these issues arise not only within the context of ICSID arbitration but also outside of it. Thus, to conceive of the issues as being “ICSID issues” which impel an “ICSID solution” is to misconceive the nature of present day multi-fora investment treaty arbitration.

The paper lists some of the reasons why the international community might want to consider changes to the review of investment treaty arbitration. But the point remains that it is in such treaties that changes, if deemed to be necessary, should be made. The problems, if there are any, do not lie in the Convention itself.
Breakout Session B6

The use of Arbitral Secretaries under the New UNCITRAL Arbitration Rules and Otherwise: Opportunities and Pitfalls.

Rapporteurs
Niousha BASSIRI (Iran)
Ulrike GANTENBERG (Germany)

Secretaries to the arbitral tribunal ("Arbitral Secretaries") are often used in complex international arbitrations. They are said to make the proceedings more efficient. At the same time, opposition to the use of the Arbitral Secretary is aired by counsel for fear of an (unqualified or under-qualified) fourth arbitrator. Thus, one of the most debated questions is to what extent the tasks of an arbitrator can be delegated to an Arbitral Secretary.

In preparation for the ICCA Congress, the speakers created a survey and disseminated it among counsel, in-house counsel, arbitrators, arbitral institutions, and lawyers frequently acting as Arbitral Secretaries, in order to assess the status quo of the role of Arbitral Secretaries and the need for Arbitral Secretaries in relation to their involvement in the arbitral proceedings (hereinafter the "Survey").

The Survey addressed the principal question of the use of Arbitral Secretaries, especially in ad hoc arbitrations for which the UNCITRAL Arbitration Rules are used. Furthermore, in terms of content, the Survey tackled the permissible tasks which may or may not be delegated to Arbitral Secretaries, such as the involvement in matters going beyond administrative services. Interesting insights were gained concerning the issue whether limitations should be strictly imposed when it comes to the involvement of the Arbitral Secretary in the decision-making process, a task which is mandated to the arbitrator. Arbitrators are appointed for their experience and know-how; they have an Intuitu Personae nature. The Survey aimed to give participants a floor to air their views and concerns in this respect.

The speakers will engage in a debate weighing the pros and cons of appointing Arbitral Secretaries, while focusing on "who, how and how much" of the use of Arbitral Secretaries is appropriate. In this connection, the speakers anticipate that the crux of the debate will centre on the following question: to what extent may Arbitral Secretaries be active in the drafting of procedural orders and arbitral awards?

Furthermore, the speakers will address the questions of transparency, liability and confidentiality in relation to the role and tasks of an Arbitral Secretary.

A particularly important issue for young lawyers will be whether serving as an Arbitral Secretary will help them further their career. The Survey gave some interesting insights to this question, which will be discussed and laid out during the debate.

The speakers’ goal is to encourage harmonized approaches with respect to the role and tasks of Arbitral Secretaries. Finding common ground as to the role and task of an Arbitral Secretary addresses concerns and uncertainties raised in this respect.

While there are already certain guiding notes or instructions dealing with this issue (see, for example, the UNCITRAL Notes on Organizing Arbitral Proceedings, the LCIA instructions in relation to the role and tasks of administrative secretaries, the Note from the Secretariat of the ICC Court Concerning the Appointment of Administrative Secretaries), there remains room for a common understanding of the role and tasks of an Arbitral Secretary.

The speakers will discuss the benefit of developing guidelines on the use of Arbitral Secretaries in international arbitration.
Breakout Session C6

General Lessons for the New Technological Age of International Arbitration: “Let not what happened to newspaper-owners, book publishers and candle-stick makers happen to arbitration practitioners....”

Rapporteur

Steve FLEMING (UK)

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Breakout Session C6

General Lessons for the New Technological Age of International Arbitration: “Let not what happened to newspaper-owners, book publishers and candle-stick makers happen to arbitration practitioners....”

Rapporteur
Dr. Mohamed S. ABDEL WAHAB* (Egypt)

Online Arbitration: Traditional Conceptions and Innovative Trends

The spread of ICTs, as a non-linear, asymmetric, and highly differentiated phenomenon, has intensified socio-cultural, political, economic, and legal interaction between diverse societies and systems. The technological revolution brought by the Internet has altered the scale according to which human affairs are being conducted and has fostered a new medium that has impacted well-established legal conceptions, especially with respect to dispute resolution. John Naisbit was indeed correct in stating that ‘instantaneous global communications have given us a window on the world through which can be seen both the wonder of it all and the things that make us wonder about it all’. † In cyberspace, there is rapid growth and deployment of new communication technologies, speed and mobility are increasing while costs and barriers to access are decreasing, Communication tools such as texting, electronic mail, message posting, electronic discussion groups, web-based conferencing, and videoconferencing, have made it possible for people to virtually communicate asynchronously and synchronously from almost anywhere.

The acceleration of change, the increasing complexity of relationships and transactions and the lowering of costs of publication and organization are all accompanied by disputes and, in response, there is a growing need for the kinds of creative technology-assisted dispute resolution processes. That said, Online Dispute Resolution (“ODR”) was initially thought of as a means of redress for disputes that arose online, disputes often between parties in different countries in which courts and face to face ADR were not feasible. Successes in those disputes led to the use of ODR in traditional offline disputes, sometimes to assist a mediator or arbitrator and sometimes to replace the third party altogether. ‡ Today, as ‘the digital world merges with the physical world’; § ODR appears to have spawned its own culture and identity to the extent that it secured an independent and distinguished existence from traditional dispute resolution processes.

It is in this context that online arbitration, as a prominent ODR scheme, is scrutinized to discern the gradual transmogrification and transition of arbitration from traditional conceptions, structures and framework to new innovative trends, approaches and applications.

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‡ The term ‘ODR’ is not subject to universal agreement over its meaning and scope. ODR is described by some as technology-assisted dispute resolution, by others as technology-facilitated dispute resolution, and by still others as technology based-dispute resolution schemes. See M. Abdel Wahab, E. Katsh, D. Rainey, Online Dispute Resolution Theory and Practice (2012), (Eleven International Publishing, the Hague) p.3
Taking arbitration online by utilizing state-of-the-art technologies, that are integrated and embedded into arbitral proceedings conducted wholly or substantially online, is a necessary evolutionary phase that matches the transition to a paperless world. In essence, e-arbitration entails sufficient utilization of ICT applications. It is submitted that for a process to qualify as e-arbitration, the ICTs employed should not be used as a simple assisting tool in the process, but should be integrated and embedded into the process itself and indispensable for its proper functioning and administration.

When discerning and/or scrutinizing the role of technology in arbitration, it is not uncommon to address issues pertaining to: (i) e-arbitration agreements such as the writing requirement, the doctrine of ‘functional equivalence’, e-agreements in business-to-consumer (“B2C”) or consumer-to-consumer (“C2C”) disputes, (ii) e-proceedings such as e-filing and e-management applications, e-hearings (audio and/or video conferencing), e-submissions e-production of documents/evidence, e-deliberations, e-communications and information security, e-platforms and legal seat of arbitration, and e-due process and virtual equality, and (iii) e-awards such as e-signature, e-notification, and e-enforcement/recognition.

Whilst the above issues merit due consideration and analysis owing to the legal and technical challenges and intricacies associated therewith, my presentation aims at focusing on three innovative and problematic areas where the interconnectedness between technology and arbitration is all the more heightened and augmented, these are: (a) the validity and enforceability of Automated Agent E-Arbitration Agreements (“AAEA”), (b) artificial intelligence (“AI”) and the e-arbitrator, and (c) e-exequatur, e-apostille and electronic cross border transfer of e-awards.

In a nutshell, the presentation aims at considering whether arbitration can be fully automated, conducted and concluded via innovative AI-non-human based intelligence. As anomalous and provocative this may sound, these are indeed valid concerns that merit due consideration, especially that the near future may hold prospects for such non-human based e-arbitral proceedings.

By and large, readers are invited to consider whether we should continue to deny, challenge and/or question what appears to be inevitable, or has the time come to reconsider traditional conceptions, structures, and principles in light of the immutability of the prevailing innovative applications and trends marking an irrevocable synthesis between ICTs/AI and dispute resolution?