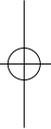


PART I

**PROCEDURAL EVOLUTION IN
BUSINESS ARBITRATION**





THREE STUDIES IN CHANGE*

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* Noel Coward complained that reading footnotes is like having to go downstairs to answer the doorbell while making love. In a similar vein, some lawyers consider footnotes as annoying detours, to be used only for source citations. Not all agree, however. Footnotes that address substantive topics often serve as helpful intellectual visitors, permitting introduction of useful auxiliary information without disrupting the flow of text. Readers wishing to ignore the doorbell are free to do so. Portions of this essay have been adapted from the Clayton Utz Lecture, delivered at the University of Sydney in August 2004. For comments on earlier drafts, thanks are due to Laurie Craig, Karyl Nairn, and Gary Sampliner. Helpful research assistance came from Katie Besson, Brenna Casey, Christina Spiller, and Carolyn Wright.

Introduction: The Type of Change We Call Progress

In 1891, a Dutch doctor named Eugene Dubois unearthed in Java a skull fragment with a low forehead, buried only a few metres from where a human thigh bone was later found. Concluding (incorrectly) that both fossils came from the same creature, he announced discovery of evolution's missing link, an extinct primate called *Pithecanthropus erectus* that was neither fully ape nor fully human.¹

The evolution of ideas also implicates a search for connections and missing links. Sometimes the hunt yields only dead ends, like Dr. Dubois's hypothetical primate. Sometimes, however, the quest supplies clues to advance knowledge about the type of change we call progress.

While change is inevitable (today is not yesterday), not all change is positive. A cannibal who learns to use a knife and a fork remains a cannibal. Moreover, some things are better left alone. The familiar configuration of keyboard letters endures through generations because the costs of innovation (including the time to learn something new) outweigh potential benefits.²

The evolution of business arbitration remains of critical importance to international economic cooperation. Without reliable ways to resolve cross-border disputes, many wealth-creating transactions either will remain unconsummated, or will be concluded at higher costs to reflect the absence of adequate mechanisms to vindicate contract rights. Arbitration of business disputes thus provides net benefits from the perspective of both national welfare and the shared interests of the global commercial community.

Three case studies in change provide springboards for inquiry. The first looks at judicial review of commercial awards under national arbitration statutes. The second addresses the treaty foundations of arbitral power over international investment disputes. The final one examines norms governing the conduct of the arbitral proceedings themselves.

Like prisms, these examples of progress separate the threads of several dilemmas that have nipped at the heels of business arbitration for decades. All three implicate a fine-tuning in the counterpoise of fairness and efficiency. Revealing only fragments of truth

¹ See generally, Richard Leakey & Roger Lewin, *Origins Reconsidered* (1992), at 47–54; Alan Walker & Pat Shipman, *The Wisdom of the Bones: In Search of Human Origins* (1996), at 30–53. Dubois was influenced by Ernst Haeckel, a German professor at the University of Jena, whose biological theories were later used by Nazi propagandists as justifications for racism. More recently, American and British scientists working in Kenya discovered a skull fragment of an early tool-making creature from a million years ago who, they believe, fills a gap in the human family tree. *Boston Globe*, 3 July 2004, at A-6. The find south-east of Nairobi was announced by the director of the Human Origins Program at the Smithsonian Institute in Washington.

² Keyboards designed for use by Anglophones traditionally use what is called the “QWERTY” configuration, so named for the order of letters at the top left of the computer. Similar path dependency arises in the law, where an amended statute means that old expertise becomes obsolete, lawyers must learn new things, and words that drew meaning from years of application now invite novel interpretations. On path dependency in the law, see S.J. Liebowitz & Stephen Margolis, *Path Dependence, Lock-In and History*, 11 *J.L. & Econ. Org.* 205 (1995). On legal evolution, see Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 *Harv. Law Rev.* 641 (1996); Peter Stein, *Legal Evolution* (1980); E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 *Columbia Law Rev.* 38 (1985).

(the most one can expect this side of eternity), the tentative conclusions on these issues are presented here as an aperitif to more substantial conversations about the direction of arbitration.

Fifty years of movement

The past half century has brought an *embarras de richesse* in the evolution of arbitration's procedural architecture. Much of the change has been directed at enhancing the reliability of the arbitral process. Although arbitration is consensual, enforcement is not. To give global currency to commercial awards, the United Nations in 1958 adopted the New York Arbitration Convention.³ Seven years later, the Washington Convention on Investment Disputes was concluded, providing a structure for arbitration between host states and foreign investors that has since been pressed into service through a multiplicity of free trade agreements and investment treaties.⁴

Legislatures got involved, promoting arbitral progress through statutory reform. In 1979, England fired the starting gun with a new act designed to reduce challenges to awards.⁵ Arbitration reform blossomed during the next two decades, with new laws in France,⁶ Belgium,⁷ Italy,⁸ the Netherlands,⁹ and Switzerland,¹⁰ as well as another round of reform in

³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 38, 21 U.S.T. 2517, T.I.A.S. No. 6997 (1958), now ratified by 137 countries. See generally Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (1981); W. Laurence Craig, William W. Park, & Jan Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, 2000), Ch. 37; William W. Park, *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, in B. Barin (ed), *Handbook of International Dispute Resolution* (1999), 519. The immediate stimulus for the New York Convention was a report by the International Chamber of Commerce underscoring the need to make arbitrators' decisions transportable across national boundaries. See ICC, *Enforcement of International Arbitral Awards*, Report and Preliminary Draft Convention, ICC Brochure No. 174 (1953), reprinted in U.N. Doc. E/C.2/373 and in 9 ICC Bull. 32 (May 1998). The 1923 Geneva Protocol and the 1927 Geneva Convention provided limited but inadequate enforcement of foreign awards, due to the burdensome "double exequatur" requirement of judicial recognition orders in both the country or origin and the enforcement forum. The European Convention on International Commercial Arbitration (Geneva 1961) supplements the New York Arbitration Convention in relationships between parties resident in European Convention states. The Inter-American Arbitration Convention (Panama 1975) mirrors much of the New York Convention, but provides that award recognition "may" be ordered by courts, rather than the mandatory "shall" recognize awards found in the New York Convention.

⁴ The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965 (ratified by 140 nations) established the International Center for Investment Disputes (ICSID) to hear disputes between Convention states and investors from another party to the Convention. See generally Emmanuel Gaillard, *La Jurisprudence du CIRDI* (2004); Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* (1995); Abby Cohen Smutny, *Arbitration before the International Centre for Investment Disputes*, 3 Bus. Law Int'l 367 (September 2002).

⁵ Arbitration Act 1979, c. 42, effective 1 August 1979, Stat. Inst. No. 750 (1979).

⁶ See N.C.P.C. Articles 1442–1491 (enacted in 1980 for domestic arbitration) and N.C.P.C. Articles 1492–1507 (enacted in 1981 for international arbitration).

⁷ *Loi du 19 mai 1998*, modifying Article 1717(4), *Code judiciaire*, discussed *infra*.

⁸ Law No. 25/94 (5 January 1994), amending Articles 806–831 and adding Articles 832–840, Code of Civil Procedure, Book IV, Chapter VIII (*Dell'arbitrato*). See generally Vincenzo Vigoriti, *A Common Law of Arbitration: Arbitral Awards and Appeals*, 6 Am. Rev. Int'l Arb. 29 (1995).

⁹ Act of 2 July 1986, translated in A. J. van den Berg, R. van Delden & H. J. Snijders, *Netherlands Arbitration Law* (1993).

¹⁰ *Loi fédérale sur le droit international privé/ Bundesgesetz über das internationale Privatrecht*, Chapter 12, Articles 176–95, effective 1 January 1989. See generally Pierre Lalive *et al.*, *Le droit de l'arbitrage interne et international en Suisse* (1989).

England.¹¹ In 1985, the United Nations sponsored a Model Law on International Commercial Arbitration (the UNCITRAL Model)¹² which has been enacted in forty countries.¹³

A parallel explosion occurred worldwide in the procedural rules which litigants adopt to guide their arbitration. Since 1975, there have been three revisions of arbitration rules by the International Chamber of Commerce,¹⁴ two by the London Court of International Arbitration,¹⁵ and at least four by the American Arbitration Association.¹⁶ The United Nations in 1976 promulgated rules for unsupervised arbitration,¹⁷ and in 1994 the World Intellectual Property Organization created its own framework for arbitration of patent, copyright, and trademark disputes.¹⁸ During the late 1990s, specialized rules were developed to permit arbitration of mass claims related to Holocaust era insurance policies and bank accounts.¹⁹ Rules have been promulgated or revised by regional organizations in Sweden,²⁰ China,²¹ Finland,²² and Switzerland.²³

During this time, neither academia nor the bar remained idle. Tenure hungry professors and eager practitioners churned out treatises (on both domestic²⁴ and

¹¹ Arbitration Act 1996, c. 23, applicable to proceedings commenced on or after 31 January 1997. Schedule 2, Statutory Instrument No. 3146 (c. 96).

¹² Drafted by the U.N. Commission for International Trade Law (UNCITRAL), the Model Law on International Commercial Arbitration received General Assembly approval on 11 December 1985. See U.N. General Resolution 40/72, 40 GAOR Supp. No. 53, A/40/53, at 308. See generally Howard M. Holtzmann & Joseph E. Neuhaus, *Guide to the UNCITRAL Model Law on International Commercial Arbitration* (1989); Henri C. Alvarez, Neil Kaplan, & David W. Rivkin, *Model Law Decisions* (2003); Pieter Sanders, *The World of UNCITRAL Arbitration and Conciliation* (2nd edn, 2004).

¹³ The geographically and culturally diverse countries that have adopted the UNCITRAL Model Law include Australia, Canada, Egypt, Germany, Hong Kong, India, Iran, Mexico, Nigeria, Russia, Scotland, Singapore, Spain, and New Zealand. Within the United States, California, Connecticut, Oregon, and Texas have adopted the Model Law.

¹⁴ The 1955 rules were revised in 1975. Subsequent revisions were done in 1988 and 1998.

¹⁵ LCIA Arbitration rules were modified in 1985 and 1998.

¹⁶ In addition to the 1997 and 2003 versions of the AAA International Arbitration Rules, the Commercial Arbitration Rules (revised in 2003) often applies to international arbitration in conjunction with the 1999 Supplementary Procedures for International Commercial Arbitration.

¹⁷ UNCITRAL Arbitration Rules, Adopted by General Assembly Resolution 31/98, U.N. Publication E.93.V.6.

¹⁸ World Intellectual Property Organization, *WIPO Arbitration Rules*, WIPO Publication No. 446.

¹⁹ See discussion *infra* concerning Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT) and International Commission for Holocaust Era Insurance Claims (ICHEIC).

²⁰ Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (*Stockholms Handelskammarens Skiljedomsinstitut*), 1 April 1999, reprinted in 1999 Stockholm Arbitration Report 79.

²¹ Arbitration Rules of China International Economic and Trade Arbitration Commission (CIETAC), discussed *infra* in Cheng Dejun, Michael J. Moser, & Wang Shengchang, *International Arbitration in the People's Republic of China* (2nd edn, 2000).

²² Arbitration Rules, The Arbitration Institute of the Central Chamber of Commerce of Finland (*Keskuskauppakamarin välityslautakunta*), 1 January 1993.

²³ Effective in January 2004, chambers of commerce throughout the Helvetic Confederation put into effect a single set of arbitration rules to replace the prior patchwork of cantonal provisions. See *Swiss Rules of International Arbitration*, Chambers of Commerce and Industry of Basel, Bern, Geneva, Lausanne, Lugano, and Zürich.

²⁴ See e.g. Aldo Berlinguer, *La Compromettibilità Per Arbitri: Studio di Diritto Italiano e Comparato* (1999); Mathieu de Boisseson, *Droit français de l'arbitrage Interne et International* (1990); Michael J. Mustill & Stewart C. Boyd, *The Law and Practice of Commercial Arbitration in England* (1989); Peter Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (1989), at § 556.

international²⁵ arbitration) and casebooks²⁶ at a pace that made arbitral scholarship a veritable industry. Journals, yearbooks, conferences, and courses on the topic have multiplied to the point where few mortals can keep current with the literature.²⁷

Explaining change

Making sense of the changes in arbitration's rich procedural tapestry is not always easy. As discussed below, however, some springboard for discussion might be taken from analogies in the worlds of culture and biology.

Saris and catsuits

Not too long ago, *National Geographic Magazine* ran a cover story called "Global Culture" which explored the interaction of people and ideas from different places.²⁸ The lead photo, intended to show the meeting of starkly different styles, featured a mother and daughter in India. The mother wore a traditional red and gold sari, while her daughter sported a skin-tight polyvinyl black catsuit.

In business arbitration, however, different cultures often meet in a way similar to a combination of the top half of the sari and the bottom of the catsuit. Rather than stark contrasts, procedural evolution in arbitration has led to homogenization, hybrids, and amalgam.²⁹

The resulting legal culture may appear more *non*-national than *inter*-national. For example, written witness statements³⁰ are often combined with some measure of oral

²⁵ Recent treatises on international arbitration have been authored by (i) Klaus-Peter Berger, (ii) Gary Born, (iii) Jack Coe, (iv) W. Laurence Craig, William W. Park, & Jan Paulsson, (v) Yves Derains & Eric Schwartz, (vi) Philippe Fouchard, Emmanuel Gaillard, & Berthold Goldman, (vii) Julian Lew, Loukas Mistelis, & Stefan Kröll, (viii) Jean-François Poudret & Sébastien Besson, (ix) Andreas Lowenfeld, and (x) Alan Redfern & Martin Hunter (with Nigel Blackaby & Constantine Partisides).

²⁶ Casebooks on international arbitration include works edited by (i) Thomas Carbonneau, (ii) Christopher Drahozal, (iii) Tibor Varady, John Barcelo, & Arthur von Mehren, (iv) Andreas Lowenfeld, (v) Russell Weintraub, and (vi) W. Michael Reisman, W. Lawrence Craig, William W. Park, & Jan Paulsson.

²⁷ Frequently cited periodicals include *Revue de l'arbitrage*, *ADR Journal* (ABA), *American Review of International Arbitration*, *Arbitration International*, *Journal of International Arbitration*, *Bulletin de l'Association Suisse de l'Arbitrage*, *Schieds VZ* (*Zeitschrift für Schiedsverfahren*), and *Yearbook of the International Council for Commercial Arbitration*.

²⁸ *National Geographic* (August 1999), at 10.

²⁹ For a provocative account of instances in which arbitration law follows a path of peculiarity and divergence, rather than increasingly shared expectations, see Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 *Texas Int'l Law J.* 449 (2005).

³⁰ Sometimes justified as a way to save hearing time, pre-filed direct testimony can also serve to provide counsel sufficient time to reflect on the other side's arguments and evidence, thus providing an arguably fairer hearing by reducing the prospect of trial by ambush. See Anne-Véronique Schlaepfer, *Witness Statements*, in L. Lévy & V. V. Veeder (eds), *Arbitration and Oral Evidence* (Dossiers, ICC Institute of World Business Law (2005)). For recent comment on the "regulation" of witness statements, see Laurent Lévy, *Witness Statements* in A. Héritier Lachat & L. Hirsch (eds), *De Lege Ferenda: Etudes pour le professeur Alain Hirsch* (2004), at 95 noting with approval how commercial practice has been codified and strengthened by the IBA Rules of Evidence, discussed *infra*. Emphasizing law as a bridge from one culture to another, Dr. Lévy cites an introduction to the first French Civil Code: "On raisonne trop souvent comme si le genre humain finissait et commençait à chaque instant, sans aucune forme de communication entre une génération et celle qui la remplace." ("We too often reason as if the human race ended and began in each instant, without any form of communication between a generation and that which replaces it.") *Discours préliminaire du premier projet de Code civil français* (Firmin-Didot, Paris, 1805), at xxxiii.

testimony.³¹ As lawyers from different countries find themselves on opposite sides of the same case, a shared legal culture tends to develop on at least some of the cross-border procedural questions that arise during the arbitration.

Intellectual cross-pollination

Change frequently arrives through intellectual cross-pollination, a metaphor evoking images of lawyers as worker bees, buzzing with news of different ways to resolve disputes.³² Exchanges occur among divergent legal traditions (exemplified by the international cooperation in drafting the UNCITRAL Model Arbitration Law³³) and between different types of dispute resolution, as when commercial practices influence investment arbitration.³⁴

Cross-pollination is not always well received. In particular, one frequently hears complaints about the “Americanization” of arbitration,³⁵ usually related to aggressive litigation tactics that include hefty boxes of unmanageable exhibits, costly pre-trial discovery, and disruptive objections to evidence.³⁶

Procedural change involves not only the Americanization of international arbitration, but also the internationalization of American dispute resolution, as reflected in greater use of

³¹ The relative merits of written as contrasted with oral testimony vary depending on how the particular arbitrators assimilate information. Some people are better with their ears than their eyes. Some process data more efficiently by reading. Many do best with a combination of both listening and reading.

³² Early in 2004, one such colloquium was held in Cambridge, where Lord Mustill convened a diverse assemblage of arbitration buffs to address interrelationships between different forms of dispute resolution. See proceedings of “International Economic Disputes: A Wider Perspective,” 1–3 April 2004, Centre for Corporate and Commercial Law, St. John’s College, Cambridge, forthcoming in *Arbitration International*. Conference participants discussed the interplay among various types of arbitration, as well as among different judicial systems.

³³ See discussion *supra*.

³⁴ For example, in its early stages, arbitration of expropriation claims was conducted in relatively confidential proceedings, mimicking the practice in commercial arbitration. However, after the American backlash against NAFTA investment arbitration there has been an increasing call for more “transparency” in arbitration, with proceedings publicly accessible. See discussion *infra*. On confidentiality in commercial arbitration, see generally François Dessemontet, *Arbitration and Confidentiality*, 7 *Am. Rev. Int’l Arb.* 299 (1996); Christoph Müller, *La Confidentialité en arbitrage commercial international: un trompe-l’oeil?*, 23 *Asa Bull.* 216 (2005); Hans Smit, *Confidentiality in Arbitration*, 11 *Arb. Int’l* (1995); Sir Patrick Neill, *Confidentiality in Arbitration*, 12 *Arb. Int’l* 287 (1996); Jan Paulsson & Nigel Rawding, *The Trouble with Confidentiality*, 11 *Arb. Int’l* 303 (1995); Michael Collins, *Privacy and Confidentiality in Arbitration Proceedings*, 30 *Texas Int’l Law J.* 121 (1995); Yves Fortier, *The Occasionally Unwarranted Assumption of Confidentiality*, 15 *Arb. Int’l* 131 (1999); Sigvard Jarvin & Gregory Reid, *Jurisprudence étrangère, Cour Suprême de Suède, 27 octobre 2000, Bulgarian Foreign Trade Bank Ltd. c. A.I. Trade Finance Inc.*, 2001 *Rev. Arb.* 821 (2001); *Eso v. Plowman* [1995] 128 *Australian LR* 391; *U.S. v. Panhandle Eastern Corp.*, 118 *F.R.D.* 346 *D. Del* (1988); *Government of Moscow v. Bankers Trust* [2004] *EWCA Civ.* 314 (Court of Appeal).

³⁵ See e.g. Roger Alford, *The American Influence on International Arbitration*, 19 *Ohio State J. Disp. Resol.* 69 (2003). This article forms part of a symposium issue, *The Americanization of International Dispute Resolution*, that includes contributions by Susan Karamanian, Elena Helmer, and Cesare Romano. The wider influence of American law has also been noted by Bernard Audit, in *L’Américanisation du droit*, 45 *Arch. philosophie du droit* 7 (2001).

³⁶ Not all American practices evoke disapproval, however. In a provocative article sub-titled “Why civil law arbitrators apply common law procedures,” an eminent Zürich attorney studied the way some Continental lawyers can be reborn to an appreciation of Anglo-American litigation techniques such as cross examination and document production. See Markus Wirth, *Ihr Zeuge, Herr Rechtsanwalt! Weshalb Civil-Law-Schiedsrichter Common-Law-Verfahrensrecht anwenden*, 1 *Schieds VZ (Zeitschrift für Schiedsverfahren/ German Arbitration Journal)* (Jan.–Feb. 2003).

written testimony and reasoned awards.³⁷ Evolution in ethical standards for arbitrators presents another striking example of internationalization.³⁸ Traditionally, American practice presumed party-nominated arbitrators to be partisan, and thus permitted *ex parte* communication with their appointers.³⁹ By 2004, however, most arbitration in the United States was brought into line with global standards,⁴⁰ requiring independence for all arbitrators.⁴¹ While doctrinal predisposition may still be relevant (investors claiming for asset expropriation would hardly appoint a left-wing professor who supported uncompensated confiscation), bias is no longer permitted.⁴²

Accident or design?

Progress in arbitration law sometimes happens by accident, and sometimes through purposeful attempts by determined goal-oriented individuals. Without pushing the comparison too far, one might suggest analogies (albeit imperfect) to two different explanations for biological evolution. One model holds that random variations survive simply by accident, while the competing paradigm rejects chance as a suitable explanation for how life developed.

³⁷ See Paul D. Friedland & Ank Santens, *The Internationalization of American Arbitration*, 18(2) News & Notes, Inst. Transnat'l Arb. 1 (Spring 2004).

³⁸ See generally Ben H. Sheppard, *A New Era of Arbitrator Ethics in the United States*, 21 Arb. Int'l 91 (2005); Ben H. Sheppard, *A New Era of Arbitration Ethics: The 2004 Revision to the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes*, 18(2) News & Notes, Inst. Transnat'l Arb. 1 (Spring 2004); Paul D. Friedland & John M. Townsend, *Commentary on Changes to the Commercial Arbitration Rules of the American Arbitration Association*, 58 Disp. Res. J. 8 (Nov. 2003–Jan. 2004); Bruce Meyerson & John M. Townsend, *Revised Code of Ethics for Commercial Arbitrators Explained*, 59 Disp. Res. J. 10 (Feb.–Apr. 2004); David Branson, *American Party-Appointed Partisan Arbitrators – Not The Three Monkeys*, 30 U. Dayton Law Rev. 1 (2004).

³⁹ In domestic (rather than international) arbitration, it was presumed that arbitrators nominated by one of the parties were partisan unless explicitly agreed otherwise. See Canon VII, 1977 ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes. For a critique of the practice, see Seth Lieberman, *Something's Rotten in the State of Party-Appointed Arbitration: Healing ADR's Black Eye That Is Non-neutral Neutrals*, 5 Cardozo J. Conflict Res. 215 (2004).

⁴⁰ The general alignment of American and global standards does not mean that all peculiarities in ethical practices cease to exist, either among institutions or among states. See e.g. *Crédit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119 (9th Cir. 2005), involving the broad and controversial California Ethical Standards for Neutral Arbitrators. In the case at bar, arising under the rules of the National Association of Securities Dealers, the California standards were found to be preempted by the 1934 Securities Exchange Act.

⁴¹ Under the 2004 Arbitral Code of Ethics, adopted jointly by the American Bar Association and the American Arbitration Association, a party-nominated arbitrator may be non-neutral only if so provided by the parties' agreement, the arbitration rules or applicable law. See Preamble ("Note on Neutrality") and Canon X, 2004 ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes. See generally *Report to ABA House of Delegates*, 4(1) Int'l Arb. News (Winter 2003–2004). This development reinforced a change in the American Arbitration Association domestic commercial arbitration rules, effective July 2003, which established a presumption of neutrality for all arbitrators. Rule 18 (applicable unless there has been agreement otherwise) prohibits parties from communicating *ex parte* with an arbitrator, except that for party-nominated (rather than presiding) arbitrators there may be communication (i) to advise a candidate of the nature of the controversy or (ii) to discuss selection of a presiding arbitrator. Under Rule 12(b), party-nominated arbitrators must meet general standards of impartiality and independence unless there has been agreement otherwise, as permitted by Rule 17(a)(iii).

⁴² Sometimes it is said that a party-nominated arbitrator should possess maximum predisposition and minimum bias. In international arbitration, the party-nominee often plays a special role in assisting the presiding arbitrator to understand arguments which may otherwise be less accessible, due to differences in legal culture.

According to Darwinist⁴³ and neo-Darwinist⁴⁴ views, if a billion monkeys banging on keyboards for a billion years might write *Hamlet*, then billions of mutations might arguably create an eye, ear, or brain by accident. Evolution combines both chance and necessity, with chance evident in genetic variations, and necessity present in the selection of the mutations that survive.⁴⁵

By contrast, a competing school of thought sees evidence that evolution involves some purposeful design.⁴⁶ Accident is not adequate, say these scholars,⁴⁷ to explain the irreducible complexity of life.⁴⁸ Something more than blind chance is required, even if the nature of that “something more” remains uncertain and challenges scientific orthodoxy.⁴⁹

Explaining arbitration by the first model posits a business community that accidentally stumbles across laws that seems to work. The alternative view sees design as the leitmotiv,

⁴³ Classic Darwinism posits the survival of those accidental mutations which fit their environment. First published in 1859, the *On the Origin of Species* later assumed its fuller (and more problematic) title. By publication of the 6th edition in 1876, a change conceived by Darwin four years earlier resulted in the work being called *On the Origin of Species by Means of Natural Selection or the Preservation of Favoured Races in the Struggle for Life*. In 1871 Darwin elaborated his theories in *The Descent of Man*. See generally, Charles Darwin, *The Origin of Species*, in Paul H. Barrett & R.B. Freeman (eds), *Works of Charles Darwin* (1988), vol.16 and Charles Darwin, *The Descent of Man*, in Paul H. Barrett & R.B. Freeman (eds), *Works of Charles Darwin* (1988), vol. 21. For an accessible and recent account of Darwinian doctrine, see David Quammen, *Was Darwin Wrong?* 206(5) Nat'l Geographic Mag. 2 (Nov. 2004).

⁴⁴ Examples of neo-Darwinism include the work of Stephen Jay Gould and Richard Dawkins. See e.g. Stephen Jay Gould, *Ever Since Darwin: Reflections in Natural History* (1980); Richard Dawkins, *The Devil's Chaplain: Reflections on Hope, Lies, Science and Love* (2003). For a thoughtful review of the latter work, see Stephen M. Barr, *The Devil's Chaplain Confounded*, 25 (145) First Things (Aug.–Sept. 2004), suggesting problematic consequences of social Darwinism's fatalism, and questioning Dawkins' attack on religion and failure to see that any impulse (not just the religious) can be distorted.

⁴⁵ See Stephen Jay Gould, *supra*, at 12. Another fundamental element of Gould's world-view is that “variation must be random, or at least not preferentially inclined toward adaptation.” *Ibid*.

⁴⁶ Some intelligent-design theorists challenge the extent to which mainstream science presents theories about life's origins based less on empirical data than on unsupported assumptions. See Philip E. Johnson, *The Wedge of Truth* (2000); Thomas Woodward, *Doubts about Darwin* (2003); William W. Dembski, *Intelligent Design* (1999). See generally Ernst Mayr, *One Long Argument: Charles Darwin and the Genesis of Modern Evolutionary Thought* (1991); Kenneth R. Miller, *Finding Darwin's God* (1999). Precursors to “intelligent design theory” include the work of French paleontologist Pierre Teilhard de Chardin, a Jesuit priest who early in the twentieth century proposed a marriage of theology and science. Relationships were not always easy with his own church authorities, who often saw his work as approaching pantheism. De Chardin's works (some published posthumously) include *L'Apparition de l'homme* (1956) and *Le Milieu divin* (1957).

⁴⁷ Critics of intelligent design often load the dice by drawing on stereotypes and fictionalized accounts of the 1925 Scopes Trial, where “creationists” were depicted as asserting a world made in six days of twenty-four hours each. The 1960 film *Inherit the Wind* cast Spencer Tracy as Clarence Darrow and Frederic March as William Jennings Bryan. In its 1999 remake, Jack Lemmon played Darrow and George C. Scott portrayed Bryan.

⁴⁸ It has been noted that even a relatively simple process like the coagulation of blood involves a cascade of two dozen proteins that must activate one another in a precise sequence, with the slightest mix-up ending in death either by bleeding (because clots did not form) or through blocked circulation (because blood had turned solid). See Michael J. Behe, *Darwin's Black Box: The Biochemical Challenge to Evolution* (1996), at 74–87.

⁴⁹ For perspectives on the teaching of both evolution and intelligent design, see Francis J. Beckwith, *Law, Darwinism, and Public Education: The Establishment Clause and the Challenge of Intelligent Design* (2003); Kent Greenawalt, *Intelligent Design: Scientific Theory or Religious Conviction*, 45 J. Church and State 237 (2003); Jay Wexler, *The Scopes Trope*, 93 Georgetown Law J. 1693 (2005); Casey Luskin, *Alternative Viewpoints about Biological Origins as Taught in Public Schools*, 47 J. Church and State 583 (2003). On the political sensitivity of intelligent design discussion in the United States, see Jodi Wilgoren, *Politicized Scholars Put Evolution on the Defensive*, New York Times, 21 August 2005.

emphasizing purposeful efforts of scholars and legislators in instruments such as the UNCITRAL Model Arbitration Law, the New York Convention, and the various professional guidelines for arbitral procedure. As the following discussion hopes to show, the more robust explanations of arbitral progress rely on both models.

I. Arbitration and the Courts: The Scope of Judicial Oversight

The emergence of *laissez-faire* judicial review

Competing models of judicial review

Today, most arbitration statutes recognize that commercial arbitration should neither be subject to a system of full judicial appeal, nor free from all recourse against aberrant decisions. Rather, court scrutiny exists to promote the integrity of arbitration by ensuring that arbitrators follow a modicum of procedural fairness and remain within the limits of their mission.⁵⁰

Such has not always been the case, however. Until well into the twentieth century in many countries, an unhappy litigant could challenge an arbitrator's decision under an "appellate model" of judicial review. Judges were permitted to consider not only the integrity of the arbitral process, but also alleged mistakes on points of law.⁵¹

By contrast, consensus has emerged on what might be called the *laissez-faire* model of judicial review. Under this paradigm, courts intervene *only* to monitor arbitration's basic procedural integrity, by assuring (i) the basic procedural fairness of an arbitration (lack of bias, right to be heard, and equality of arms) and (ii) respect for limits of arbitral jurisdiction.

The *laissez-faire* model means that arbitration sometimes results in a looser approximation of legal rights than found in court litigation, tolerating occasional uncorrected mistakes in the interpretation of law and contract language. However, the *laissez-faire* standards usually comport with commercial expectations.⁵² Normally, the arbitrator's award is supposed to

⁵⁰ See generally, William W. Park, *Why Courts Review Arbitral Awards*, in R. Briner, L. Y. Fortier, K.-P. Berger, & J. Bredow (eds), *Recht der Internationalen Wirtschaft und Streiterledigung im 21. Jahrhundert: Liber Amicorum Karl-Heinz Böckstiegel* (2001) 595; reprinted in 16 Int'l Arb. Rep. 27 (Nov. 2001).

⁵¹ One school of thought supports mandatory judicial review of a dispute's legal merits as a way to fertilize the development of substantive legal principles, at least when disputes implicate interpretation of the forum's substantive law. Court cases create precedents that provide behavioral rules to guide business conduct outside a particular dispute. Likewise, review of the merits of an award creates a publicly available "legal capital" of new rules to meet changing commercial circumstances. On the model of litigation which focuses on cases that guide future transactions of non-litigants, see Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy between Dispute Resolution and Public Law Models of Litigation*, 75 B. U. L. Rev. 1273 (1995). While arbitration also creates precedent when arbitrators write reasoned awards that are subsequently published, such *lex mercatoria* is less accessible given the duty of confidentiality covering much arbitration.

⁵² See *Am. Almond Prods. v. Consol. Pecan Sales*, 144 F. 2d 448, 451 (2nd Cir. 1944) (Hand J.) (confirming award for breach of contract in sale of pecans where arbitrators awarded damages without evidence on market price).

be the end rather than the beginning of dispute resolution – something other than mere foreplay to litigation.

In international arbitration, such *laissez-faire* standards clearly represent the trend for review at the “seat of arbitration,”⁵³ an expression that increasingly serves to designate the country to which the parties have pegged their international arbitration, notwithstanding that the hearings and deliberations take place elsewhere.⁵⁴ *Laissez-faire* review standards have found its way into the law of countries that have adopted the UNCITRAL Model Arbitration Law, as well as most major arbitral centers (including England, France, and Switzerland) whose laws have evolved more independently.⁵⁵ In contrast to domestic arbitration, where appellate review on matters of law has sometimes been considered appropriate, international arbitration has long been driven by an understandable need for greater autonomy from national court supervision.⁵⁶ For cross-border transactions, arbitration serves above all as a means to reduce the prospect of litigation in courts that apply unfamiliar procedures in a foreign language. For international disputes, arbitration justifies itself not so much by considerations of cost and speed, but rather as a politically and procedurally neutral forum that helps foreclose access to the disruption of competing lawsuits in multiple litigation venues.⁵⁷

⁵³ The arbitration seat is less a matter of real geography than a link to the legal order of the place whose curial law will govern many aspects of the proceedings. See Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, 2004, with Nigel Blackaby & Constantine Partisides). See also Francis A. Mann, *Where Is an Award “Made”?*, 1 *Arb. Int’l* 107 (1985).

⁵⁴ For a Swedish case rejecting the effect of an arbitral seat deemed a fiction, see *Titan v. Alcatel CIT*, Svea Court of Appeal (29 March 2005), reproduced in 20 *Int’l Arb. Rep. A-1* (July 2005), with insightful commentary by Sigvard Jarvin & Carroll S. Dorgan, *Are Foreign Parties Still Welcome in Stockholm?*, 20 *Int’l Arb. Rep. 42* (July 2005). The court held it had no jurisdiction to hear a challenge to an award, notwithstanding that the place of arbitration chosen by the parties’ arbitration clause was Stockholm. With the parties’ consent, the sole arbitrator had conducted hearings in Paris and London. The Court decided that a “Swedish judicial interest” must exist as a prerequisite for judicial review.

⁵⁵ For a recent example of this “hands-off” approach in Canada (where all provinces have adopted the Model Law), see the decision of the Canadian Supreme Court in the so-called “Caillou” case, named after the comic strip character at the center of a copyright dispute between authors and publishers. *Desputeaux v. Éditions Chouette (1987) Inc.* [2003] 1 SCR 17; 2003 Carswell Quebec 342. The Supreme Court made clear that arbitrators might well make mistakes without review on the merits under the Québec Civil Code.

⁵⁶ For a more extreme paradigm of arbitral autonomy, see Philippe Fouchard, *La Portée internationale de l’annulation de la sentence arbitrale dans son pays d’origine*, Rev. Arb. 329 (1997), suggesting no judicial review at the arbitral situs except in the context of an enforcement action.

⁵⁷ Several criteria might be used to distinguish domestic and international arbitration. A party-oriented standard, which looks to the residence of the litigants, has been adopted in Belgium and Switzerland. An approach that asks whether a transaction implicates “international commercial interests” has been adopted by the French. The UNCITRAL Model Arbitration Law bringing within its scope arbitrations in which parties have places of business in different countries, as well as when the place of contract performance or arbitration is outside the parties’ home country. Of these various standards, a residence-based test seems most sensible. The linguistic and procedural differences that justify a separate arbitration regime for international transactions are most likely to arise when a resident of one country seeks to avoid being hauled into foreign courts by residents of another. For a recent comment on the need to distinguish domestic and international arbitration, see Pierre Mayer, *Faut-il distinguer arbitrage interne et arbitrage international?*, Rev. Arb. (2005) 361. On the French notion of “international commercial interests” see Philippe Leboulanger, *La Notion d’intérêts du commerce international*, Rev. Arb. 487 (2005).

Prior to 1979, London arbitration meant judicial review of substantive legal issues under the so-called “case stated” procedure.⁵⁸ The perceived result was that arbitrations were crossing the Channel to the more hospitable environment of Paris, with a loss of what were sometimes called “invisible exports,” a euphemism for fees paid to arbitrators, lawyers, and expert witnesses.⁵⁹ It seemed that the users of arbitration services no longer wanted high-priced barristers arguing lengthy appeals.

So England adapted to the new environment by permitting parties to international contracts to exclude review on questions of law.⁶⁰ The effect was felt principally in commercial cases subject to the rules of institutions such as the International Chamber of Commerce (ICC), which incorporated automatic exclusion of appeal.⁶¹

The reforms did not go all the way, however. Exclusion of appeal was generally not allowed in so-called “special category” disputes related to admiralty, commodities, and insurance.⁶² In these areas, the pre-eminence of English law was thought to require fertilization by judgments covering novel controversies. Not until the 1996 Act did England subject all commercial arbitration to the same level playing field.

Independently, off in Vienna, a United Nations Working Group was drafting its model arbitration statute, which would incarnate a similar approach to judicial review (inspired by Article V of the New York Arbitration Convention), but with a very different motivation. This UNCITRAL Model Arbitration Law represents a careful attempt to promote more harmonious economic relations through a uniform law that minimizes transaction costs from idiosyncratic national statutes.

Some countries have shown additional levels of intelligent design by filling gaps in the UNCITRAL Model Arbitration Law in a way consistent with its goals.⁶³ For example, in

⁵⁸ On the “case stated procedure” by which questions of law were submitted for determination by the High Court. Cites, see William W. Park, *Judicial Supervision of Transnational Commercial Arbitration*, 21 Harv. Int'l Law. J. 87 (1980). Relics of merits review still exist for points of English law, although appeal may, of course, be excluded by contract. See Section 69, English Arbitration Act 1996. Vestiges of merits appeal remain in some domestic arbitral regimes. See e.g. Section 38 of Australia's uniform state arbitration Commercial Arbitration Act 1984, Act No. 160, 1984, which grants limited appeal rights on points of law.

⁵⁹ Rightly or wrongly, one member of the House of Lords estimated that a more relaxed approach to judicial review would generate about £500 million of “invisible exports” in the form of fees to arbitrators, barristers, solicitors, and expert witnesses. See comments by Lord Cullen of Ashborne, at 392 Parl. Deb., H.L. (5th ser.) 89 (1978) at 99. The Lord Chancellor later erroneously refers to Lord Cockfield as the source of this figure (*ibid.* at 113), which was subsequently noted in the Commercial Court Committee, *Report On Arbitration*, Cmnd. No. 7284 (1978) at 7.

⁶⁰ Ten years later, for the same reasons, Switzerland adopted a federal statute that similarly limits review of awards. Enacted in 1987 and adopted as of 1 January 1989, the new regime (Swiss LDIP/IPRG Chapter 12) pre-empts cantonal law which opened the door to excessive judicial review for awards said to constitute a “manifest violation of law or equity.”

⁶¹ For example, under Article 28 of the current version of the ICC Arbitration Rules, the parties waive “any form of recourse [against the award] insofar as such waiver can validly be made.” Such waivers were interpreted to constitute exclusion agreements. See *Arab African Energy Corp. Ltd. (Arafenco) v. Olieprodukten Nederland B.V.*, 2 Lloyd's Rep. 419 (QB 1983). Similar results would obtain under the 1996 Arbitration Act.

⁶² Arbitration Act 1979 § 4 (abrogated in 1996) allowed waiver of appeal on “points of law” only if the contract was governed by a law other than that of England and Wales or if the waiver was made after commencement of the arbitrations.

⁶³ Not all adaptations of the Model Law, however, represent improvements. One national statute provided for vacatur if an award “fails to apply the law agreed by the parties” to the merits of the case, language that

Australia⁶⁴ and Scotland⁶⁵ awards may be set aside in the event of fraud, a ground for vacatur not explicit in the Model Law.⁶⁶

These changes in the framework for judicial review reflect a growing deference to party autonomy. For international transactions, New Zealand permits parties to elect review on the substantive merits of an award, with a more laissez-faire regime applying as the default rule.⁶⁷ England, Switzerland, and Belgium recognize, in differing measures, liberty of contract with respect to award finality.⁶⁸ In Australia and Singapore, parties can by contract exclude application of the UNCITRAL Model Arbitration Law altogether,⁶⁹ although the results of exclusion vary between the two countries.⁷⁰

invites judicial meddling with an arbitrator's decisions as happened in the now famous *Chromalloy* case. See Article 53(1)(d), Egyptian Law on Arbitration of 1994; *Chromalloy Aeroservices v. Egypt*, 939 F. Supp. 907, 911 (D.D.C. 1996).

⁶⁴ Australian International Arbitration Act 1974, Act No. 136, 1974, adopting the Model Law at Part III (Sections 16–21), which in Section 19 provides for the avoidance of doubt that an award can be vacated for violation of public policy if induced by fraud or made in breach of rules of natural justice.

⁶⁵ Law Reform (Misc. Provision) (Scotland) Act 1990, c. 40, Schedule 7, Article 34(2)(a)(v), allowing vacatur of an award “procured by fraud, bribery or corruption.” In Scots domestic arbitration, a late seventeenth-century statute (Articles of Regulation 1695) contains similar grounds for review, providing in Article 25, “The for the cutting off of groundless and expensive pleas and processes in time coming, the Lords of Session sustain no reduction [old Scots for annulment] of any decret arbitral [old Scots for arbitral award] that shall be pronounced hereafter on a subscribed submission at the instance of the parties submitters, upon any cause whatever, unless that of corruption, bribery or falsehood to be alleged against the judges arbitrators who pronounced the same.” Many thanks to Ian Murray, Lord Dervaird, for this gem.

⁶⁶ These defects could, of course, be subsumed under “inability to present one's case” and “violation of public policy” a defense to award enforcement under the New York Convention and the UNCITRAL Model Law. See e.g. Albert Jan van den Berg, *The New York Convention of 1958* (1981), 302, 306, 331, 377–382 (addressing the scope of Articles V(1)(b) (inability to present his case) and Article V(2)(b) (violation of public policy)); Pierre Lalive, Jean-François Poudret, & Claude Reymond, *Le Droit de l'arbitrage interne et International En Suisse* (1989) 430, (insisting that *ordre public* has a procedural, as well as substantive, aspect capable of rectifying abusive arbitrator behavior). It is hard to understand, however, why such an important matter should be left simply to implication and interpretation.

⁶⁷ The 1996 New Zealand Arbitration (Clause 5 of Schedule 2) allows appeal on point of law with leave of court. Section 6 says that Schedule 2 applies to domestic arbitration if there has been no agreement otherwise (i.e., no opt-out) and to international arbitration only if the parties so agree (i.e., opt in). See generally David A.R. Williams, *The New Zealand Experience with the UNCITRAL Model Law*, 7 LCIA News 4 (Aug. 2002).

⁶⁸ Section 69 of the English Arbitration Act 1996 provides for appeal on questions of English law unless “otherwise agreed” by the parties. Absent agreement by the parties, leave to appeal is not automatic, but remains subject to the court being satisfied that the tribunal's decision is either “obviously wrong” or implicates a question of “general public importance.” Article 192 of the Swiss *Loi fédérale sur le droit international privé (LDIP)* allows exclusion of all actions to set aside an award in Switzerland when arbitrations are completely between or among non-Swiss parties. A similar right of exclusion is permitted under Article 1717 of the Belgian *Code judiciaire*, discussed *infra*.

⁶⁹ Australian International Arbitration Act, Section 21 provides that “If the parties to an arbitration agreement have . . . agreed that any dispute . . . is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply . . .” Section 15 of the Singapore International Arbitration Act originally read as did the Australian statute, but has been amended to state that on agreement that the Model Law shall not apply, “the Arbitration Act 2001 [domestic arbitration] shall apply to that arbitration.”

⁷⁰ See *Eisenwerk Hensel Bayreuth v. Australian Granites Ltd* (Queensland Court of Appeal, Case 5998, 2 July 1999 [2001] 1 Qd R 461, 1999 WL 33268640) (Australia) and *Coop Intl' Pte v. Ebe. SA* [1998] 3 SLR 670 (Singapore), each holding that a reference to institutional arbitration rules constitutes an implicit opt-out from the Model Law. See Jonathan Kay Hoyle, *Cobabitation: Do Arbitral Rules and Arbitral Statutes Go Together? Implied Opting Out of the Model Law in Singapore and Australia and What It Might Mean*, Int'l Construct. Law Rev. 692 (2001). In *Eisenwerk* the opt-out meant application of the residual parts of the International Arbitration Act, while in *Coop* the domestic arbitration act applied. Singapore has since added

The public policy wrinkle

Some statutes (such as the UNCITRAL Model Arbitration Law and the arbitration acts in France and Switzerland) also include “public policy” as a ground for judicial review,⁷¹ albeit with a more limited scope (*ordre public international*) when applied to international transactions.⁷² Public policy (which should rightly be considered a plural rather than singular noun) implicates a cluster of chameleon-like notions whose unifying essence lies in overriding societal interests that constrain how arbitrators decide cases.⁷³ Some relate to procedure (minimum fairness in the conduct of an arbitration) while others relate to the content of the award as it reflects substantive merits of the dispute.⁷⁴

The malleability of public policy notions make them problematic in its implementation,⁷⁵ principally because such a chameleon-like concepts risks misapplication when refracted

Section 15(2) to its International Act to confirm that “a provision in an arbitration agreement referring to or adopting any rules of arbitration shall not of itself be sufficient to exclude the application of the Model Law.” Both the Australian and Singapore courts perceived inconsistency between the ICC Rules and the Model Law. For example, in *Eisenwerk* the court saw conflict between Model Law Article 16 (arbitrators rule on their own jurisdiction) and ICC Rules Article 8 (now Article 6(2) in the 1998 Rules) (ICC determines *prima facie* validity of the agreement to arbitrate). What this analysis missed, of course, is that statutes and institutional rules operate in different spheres. An ICC decision on jurisdiction is only a preliminary administrative action subject to final determination by the arbitrators and review by the appropriate court. Compare *American Diagnostica Inc. v. Gradipore Ltd.*, Supreme Court of New South Wales (No. 51224-1997), 26 March 1998, reported in 13 Int’l Arb. Rep. 3 (Apr. 1998), applying the New South Wales Commercial Arbitration Act to an UNCITRAL Rules arbitration between Connecticut and Australian companies, with the result that leave to appeal the award could not be excluded.

⁷¹ Public policy can be invoked at the outset of the case if one side argues that a subject matter (for example tax) is too politically sensitive to permit binding determination by arbitrators. Public policy might also have a jurisdictional element, as when courts declare themselves unable to enforce awards against foreign sovereigns lacking a sufficient connection with the forum. See discussion *infra* of *Monégasque de Reassurance* and *Glencore*. Swiss courts will generally not enforce arbitral awards against foreign governments absent a showing that the dispute has an “internal connection” (*Binnenbeziehung*) between the sovereign act and Switzerland. See *Circulaire du Département fédéral de justice et police*, 26 November 1979, reprinted in *Jurisprudence des Autorités Administratives de la Confédération* 224 (1980).

⁷² See e.g. French NCPC Article 1502 (5). See generally Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, in P. Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (ICC Congress Series No. 3) (1987).

⁷³ Professor Lalive seminal work on the topic was presented at ICCA’s New York Congress in May 1986. See Pierre Lalive, *supra* n. 72.

⁷⁴ For example, an arbitrator might violate *ordre public* either by taking a bribe or by making an award that enforced the sale of nuclear bombs to known terrorists.

⁷⁵ For an exploration of how public policy interacts with error of law, see Michael Hwang & Amy Lai, *Do Egregious Errors Amount to a Breach of Public Policy?*, 71 *Arbitration* 1 (Feb. 2005). Special issues arise when an alleged violation of public policy by an arbitrator is not readily apparent from the face of the award. See e.g. *Corvetina Tech. Ltd. v. Clough Engineering Ltd.*, Supreme Court of New South Wales (29 July 2004), 2004 WL 1775922 [2004] NSWSC 700. After a BVI company was successful in a Singapore arbitration against an Australian respondent, the award was attacked for illegality. The BVI company moved for an interlocutory determination as a preliminary question of whether the award could be attacked notwithstanding the arbitrator’s finding that the contract was legal under the governing law. In denying the motion, the court exposed the case to full-scale discovery. The next month the matter settled. For other cases of illegality, see *Westacre Investments v. Jugoimport* [2000] QB 288 (award enforced with respect to consultancy to assist Yugoslavia in selling military equipment to Kuwait) and *Soleimany v. Soleimany* [1998] 3 WLR 811 (refusal to enforce Beth Din award giving effect to smuggling operation by family carpet business). See generally, Shai Wade, *Westacre v. Soleimany: What Policy? Which Public?*, 3 Int’l Arb. Law Rev. 97 (1999). Compare the approach of the Second Circuit in *Hoelt*, discussed *infra*, where the court refused to allow arbitrators to be deposed to determine whether there was “manifest disregard of the law.” While understandable in its context (accounting in stock purchase agreement), the decision may be open to question when there are allegations of illegality, for example sale of chemical weapons to a dictator.

through parochial cultural lenses.⁷⁶ This does not mean that international public policy has no role to play in the resolution of cross-border disputes, but simply that the concept must be approached humbly and cautiously.⁷⁷

The French influence and “delocalization”

To a large extent, *laissez-faire* judicial review remains the legacy of two great French thinkers, Professors Berthold Goldman and Philippe Fouchard, who during the 1960s began to explore notions of “delocalized” arbitration autonomous from national law.⁷⁸ Their ideas have since been invoked (sometimes thoughtfully and sometimes less so) with respect to both procedural⁷⁹ and substantive⁸⁰ legal norms.

First and foremost, “delocalization” suggests minimal judicial intervention by judges at the arbitral situs. The aim is to safeguard an arbitration’s procedural integrity, but not to engage in what Americans might call “Monday morning quarterbacking” on the correctness of an arbitrator’s decision. For international transactions, this is an idea whose time has clearly arrived in most major arbitral centers.

Second, theories of “non-national” arbitration have sometimes been invoked to justify enforcement of awards vacated at the place of arbitration. According to one view, the country where a losing party has assets might recognize an award even if it had been set aside where

⁷⁶ See e.g. *Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*, 484 F. Supp. 1063, 1068–69 (ND Ga. 1980), vacating an award that applied a French interest rate to international contract.

⁷⁷ For an example of the application of international public policy in connection with a claim arising from Iraqi conversion of Kuwait aircraft, see the decision of the British House of Lords in *Kuwait Airways Corp. v. Iraqi Airways Co.* [2002] HL 19, [2002] 2 AC 883, particularly paragraph 115, citing French and Swiss scholarship in the elaboration of “l’ordre public véritablement international.”

⁷⁸ See Berthold Goldman, *Les Conflits de lois dans l’arbitrage international de droit privé*, 109 II Recueil des cours 347, 379–380, 479–480 (1963) (“Unless one adopts the irrational and unjustifiable system of attaching the arbitral process to its seat . . . any search for a way of grounding the arbitration in some system leads one unavoidably to the need for an autonomous non-national system.”); see also Philippe Fouchard, *L’Arbitrage commercial international* (1965), Sections 499–500 at 321–22; Philippe Fouchard, Emmanuel Gaillard, & Berthold Goldman, *Traité de l’arbitrage commercial international* (1996), Sections 1172–92 at 650–662.36. For recent comments on the influence of French doctrine on international law, see Dominique Hascher, *L’Influence de la doctrine sur la jurisprudence française en matière d’arbitrage*, 392 (2005) Rev. Arb.; Eduardo Silva Romero, *Les Apports de la doctrine et de la jurisprudence françaises à l’arbitrage de la chambre de commerce internationale*, Rev. Arb. 421 (2005).

⁷⁹ See Georgios Petrochilos, *Procedural Law in International Arbitration* (2004). The thesis for this magisterial study is set forth in its preface, where Dr. Petrochilos suggests that parties to international arbitration “should be free to establish the rules of procedure that suit the particular circumstances of their case.” *Ibid.* at vii.

⁸⁰ When used to describe decision-making according to “supra national” substantive norms, delocalization is often associated with *lex mercatoria*. See Michael Mustill, *The New Lex Mercatoria*, in M. Bos & I. Brownlie (eds), *Liber Amicorum for Lord Wilberforce* (1987) 149, reprinted 4 Arb. Int. 89 (1988); Luke Nottage, *The Vicissitudes of Transnational Commercial Arbitration and the Lex Mercatoria: A View From the Periphery*, 16 Arb. Int’l 53 (2000); William W. Park, *Control Mechanisms in the Development of a Modern Lex Mercatoria*, in T. Carbonneau (ed), *Lex Mercatoria and Arbitration* (1990, rev. edn, 1998) 143, 165–66. On *lex mercatoria*, Francis Mann once observed, “No merchant of any experience would ever be prepared to submit to the unforeseeable consequences which arise from application of undefined and undefinable standards described as rules of a *lex* of unknown origin.” F. A. Mann, Introduction, 1990 edn of *Lex Mercatoria and Arbitration*, *ibid.* at xxi. See also Otto Sandrock, *To Continue Nationalizing or to De-Nationalize? That is Now the Question In International Arbitration*, 12 Am. Rev. Int’l Arb. 301 (2001); Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 Notre Dame Law Rev. 523 (2005).

made.⁸¹ In one well-known case an award annulled in Geneva was nevertheless recognized in Paris.⁸²

Outside of France, such resurrection of dead awards has received a less enthusiastic reception, again illustrating intelligent design. The English judiciary quite sensibly refused to enforce vacated awards,⁸³ and American courts are divided.⁸⁴ In this regard one sees the shadow of another great internationalist, Dr. Francis Mann, who argued forcefully for some control of awards by the law of the arbitral situs, which he called the *lex loci arbitri*.⁸⁵ Given the complexity of the topic, it is likely that the debate's final round is yet to be heard.⁸⁶

The Belgian experiment

On occasion the evolutionary pendulum has swung wildly out of control, producing self-destructive mutants. Twenty years ago, Belgium conducted a failed experiment in

⁸¹ Philippe Fouchard, *La Portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine*, Rev. Arb. 329 (1997).

⁸² *Hilmarton v. OTV*, Rev. Arb. 376 (1997), note Ph. Fouchard. See generally Philippe Fouchard, *ibid.*; Jean-François Poudret, *Quelle solution pour en finir avec l'affaire Hilmarton?*, Rev. Arb. 7 (1998); Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment*, 9 ICC Bull. 14 (May 1998); Eric Schwartz, *French Supreme Court Renders Final Judgment in the Hilmarton Case*, Int'l Arb. Law R. 45 (1997). For an earlier decision along these lines, see *Pabalk v. Norsolor*, *Cour de cassation*, 9 October 1984, Rev. Arb. 431 (1985), note B. Goldman; 112 J. Dr. Int'l 679 (1985), note Ph. Kahn (award vacated in Austria qualified for enforcement in France; vacating court in Vienna subsequently reversed on appeal).

⁸³ *Omnium de Traitement et de Valorisation SA (OTV) v. Hilmarton Ltd* [1999] 2 All ER (Comm) 146 [1999], 2 Lloyd's Rep. 222, 1999 WL 477773 (QB Division, Commercial Court, 24 May 1999), reprinted in 14 Int'l Arb. Rep. §A (June 1999).

⁸⁴ Compare *Chromalloy Aeroservices v. Egypt*, *supra* n. 63 (award annulled in Egypt granted enforcement) with *Baker Marine Ltd. v. Chevron Ltd.*, 191 F.3d 194 (2nd Cir. 1999) (award annulled in Nigeria refused enforcement). See generally Richard Hulbert, *Further Observations on Chromalloy: A Contract Misconstrued, a Law Misapplied and an Opportunity Foregone*, 13 ICSID Rev. 124 (1998); Gary Sampliner, *Enforcement of Nullified Foreign Arbitral Awards – Chromalloy Revisited*, 14 J. Int'l Arb. 141 (1997).

⁸⁵ See Francis Mann, *Lex Facit Arbitrum*, in P. Sanders (ed), *Liber Amicorum for Martin Domke* (1967), 157, reprinted in 2 Arb. Int'l 241 (1986); Michael Kerr, *Arbitration and the Courts: The UNCITRAL Model Law*, 34 Int'l and Comp. Law Q. 1, 15 (1985) ("No one having the power to make legally binding decisions . . . should be altogether outside and immune from [the legal] system."). For an American perspective, see William W. Park, *Duty and Discretion in International Arbitration*, 93 Am. J. Int'l Law 805 (1999); William W. Park, *Lex Loci Arbitri and International Commercial Arbitration*, 32 Int'l and Comp. Law Q. 21 (1983); William W. Park, *National Law and Commercial Justice*, 63 Tulane Law Rev. 647 (1989).

⁸⁶ For an intriguing wrinkle on award annulment, see *International Bechtel Co. v. Department of Civil Aviation of Dubai*, 300 F. Supp. 2d 112 (D.D.C. 2004) and 360 F. Supp. 2d 136 (D.D.C. 2005). In an arbitration conducted in Dubai, the sole arbitrator (a distinguished Swiss lawyer from Zürich) heard testimony without the form of oath required by Dubai law, namely "I swear by the Almighty to tell the truth and nothing but the truth." The award in favor of Bechtel was vacated by a Dubai court due to this failure to administer the oath. When presented for confirmation in the United States, a federal court (which described the oath requirement as "the hypertechanical fringe of what Americans would call justice") stayed its decision pending appeal of the Dubai judgment. After the Dubai Court of Cassation confirmed the lower court decision, the American court dismissed the confirmation request on other grounds. Since the United States applies the New York Arbitration Convention on the basis of reciprocity, and Dubai was not party to the Convention, Chapter 2 of the Federal Arbitration Act did not apply. This left only Chapter 1 of the Act, which (unfortunately for Bechtel) requires parties to conclude agreement for entry of judgment on the award – a stipulation lacking in the instant case. The Paris *Cour d'appel* reached a different result and authorized the award's exequatur.

arbitral anarchy by eliminating all right to have awards vacated in disputes between foreign parties.⁸⁷ Contrary to what was expected, this created more anxiety than comfort. There were no custodians to guard the custodians.⁸⁸ Few business managers wanted an arbitral pig-in-a-poke, with no recourse at the place of proceedings against gross procedural irregularity. While arbitration might mean assuming the risk that arbitrators get it wrong on the facts or the law, it would not normally constitute a bargain for fraud, bias, or excess of authority. So the Belgians had to try again, and ultimately amended their law to provide a safety net of judicial review unless the parties expressly chose otherwise.⁸⁹

American exceptionalism

Manifest disregard of the law

Not all countries accept that courts should review international business awards only on matters of procedural fairness. In the United States, most awards may be vacated for “manifest disregard of the law,” a vague term subject to varying interpretations, some of which permit judicial tinkering in the substantive merits of a case,⁹⁰ and can imply a subjective element in the arbitrator’s intent to deviate from (disregard) his or her duty.⁹¹

In giving substance “manifest disregard” some courts take a restrictive view. Building on notions of excess of authority, they apply the principle to awards that ignore contract language⁹² or violate fundamental public policy.⁹³ Other courts, however, take a more expansive view, including mistakes of law⁹⁴ and moving well beyond a

⁸⁷ See Article 1717(4) of Belgian *Code judiciaire* as enacted in 1985, before amendment of 19 May 1998, effective 17 August 1998.

⁸⁸ See Bernard Hanotiau & Guy Block, *La Loi du 19 mai 1998 modifiant la législation belge relative à l'arbitrage*, 16 ASA Bull. 528, 532 (1998).

⁸⁹ Effective 17 August 1998, Article 1717 (4) of the Belgian *Code judiciaire* provides that challenge to awards must be *made* through an explicit statement: “Les parties peuvent, par une déclaration expresse dans la convention d'arbitrage ou par une convention ultérieure, exclure tout recours en annulation d'une sentence arbitrale lorsqu'aucune d'elles n'est soit une personne physique ayant la nationalité belge ou une résidence en Belgique, soit une personne morale ayant en Belgique son principal établissement ou y ayant une succursale.” The new Belgian law shows the influence of Swiss conflicts of law principles. See *LDIP* Article 192.

⁹⁰ See *Wilko v. Swan*, 346 U.S. 427 (1953). See generally Noah Rubins, “*Manifest Disregard of the Law*” and *Vacatur of Arbitral Awards in the United States*, 12 Am. Rev. Int'l Arb. 363 (2002). For recent proposals to limit the effect of “manifest disregard” on international arbitration in the United States, see *Rescuing the FAA*, Chapter 4 of Part II, Section B of the present volume.

⁹¹ Analogies to “manifest disregard” exist in administrative law, but without the subjective element. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984), announcing a two-step standard of review. In step one a court determines whether statutory language is clear. If it is, the court must reject alternative agency interpretation. If statute is ambiguous, then in step two a court must accept any reasonable agency interpretation.

⁹² See e.g. *Advest, Inc. v. McCarthy*, 914 F. 2d 6, 10–11 (1st Cir. 1990) (Selya J.), holding that vacatur requires a decision “contrary to the plain language” of the agreement or an indication that the arbitrator “recognized the applicable law and then ignored it.”

⁹³ See *Watt v. Tiffany & Co.*, 248 F. 3d 577, 580 (7th Cir. 2001) (Easterbrook J.), seeming to align “manifest disregard” with awards that break the law.

⁹⁴ See *Halligan v. Piper Jaffray*, 148 F. 3d 197, 203–04 (2nd Cir. 1998), cert. denied, 526 U.S. 1034 (1999), reversing decision that refused to vacate award denying age discrimination claim.

consumer or employment context.⁹⁵ Yet another approach has been taken by the Fifth Circuit:⁹⁶ a two-prong inquiry determining first whether it was manifest that the arbitrators disregarded applicable law, and then whether the award would result in “significant injustice” under the circumstances.⁹⁷

While judicial review for legal error⁹⁸ exists in other countries,⁹⁹ its effect is usually restricted to domestic cases¹⁰⁰ or subject to waiver by the parties in non-consumer transactions.¹⁰¹ By contrast, in the United States most courts have determined that

⁹⁵ See *Westerbeke v. Daihatsu*, 304 F. 3d 200 (2nd Cir. 2002). However, recent Second Circuit cases seem to retreat from the prior approach. See *Wallace v. Buttar*, 378 F. 3d 182 (2nd Cir. 2004) (NASD arbitration arising from investment advice) reversing a district court decision that had vacated an award against investment advisers; *Hoefi v. MVL Group, Inc.*, 343 F. 3d 255 (2nd Cir. 2003) (arbitration under stock purchase agreement), reversing district court decision that had vacated award and allowed arbitrator to be deposed on the ground of his decision; *Duferco Int’l Steel Trading v. T. Klaveness Shipping A/S*, 333 F. 3d 383, 389 (2nd Cir. 2003) (charter party and claim of issue preclusion related to prior award in London), confirming district court decision that failed to find “manifest disregard.” For an earlier Second Circuit application of the doctrine, see *Merrill Lynch, Pierce, Fenner & Smith v. Bobker*, 808 F. 2d 930 (2nd Cir. 1986) (broker–customer dispute over investment transaction), stating that the error must be obvious and the arbitrator must have appreciated but intentionally ignored the relevant legal principle. See also *New York Telephone Co. v. Communication Workers of America*, 256 F. 3d 89 (2nd Cir. 2001), vacating award for “manifest disregard.”

⁹⁶ See *Williams v. CIGNA Financial Advisors Inc.*, 197 F. 3d 752, 760–61 (5th Cir. 1999), old-age discrimination employment case arbitrated under NASD rules; *Bridas S.A.P.I. C. v. Government of Turkmenistan*, 345 F. 3d 347 (5th Cir. 2003), Argentinean corporation sought to confirm an ICC award rendered in Houston.

⁹⁷ See generally Alan Scott Rau, *The New York Convention in American Courts*, 7 Am. Rev. Int’l Arb. 214, 238 (1996); Noah Rubins, *supra* n. 90.

⁹⁸ See e.g. South African Arbitration Act (Act 42 of 1965), which provides in Section 31(1)(b) that an award may be set aside when “an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings,” which has been interpreted to include “errors of law . . . which illustrate circumstances in which the decision-maker misconceives the whole nature of the inquiry.” See *Telkom SA v. Anthony Boswood, ICC and Telcordia Technologies*, High Court of South Africa (Transvaal Provincial Division), Case No. 30633/02, 27 November 2003 (De Villiers J.), at paragraph 10.23, vacating an award in favor of an American company. Quite surprisingly, the judge bypassed the parties’ agreement to the rules of the International Chamber of Commerce, instead directing that the remanded case be heard by three South Africans proposed by the South African respondent that had just had the award set aside.

⁹⁹ See *Anaconda Operations Pty Ltd & Anor v. Fluor Australia Pty Ltd* [2003] VSC 275 (28 July 2003) (2003 WL 21945694) and [2003] VSC 276 (2003 WL 21945916), in which the Supreme Court of Victoria considered setting aside an interim award for “manifest error of law on the face of the award” under § 38(5)(b) of the Commercial Arbitration Act 1984 (Vic), a uniform arbitration statute adopted at the state level permitting review on legal issues whose determination “may add . . . substantially to the certainty of commercial law.” The statute applies to domestic (rather than international) arbitrations, as was the case in *Anaconda v. Fluor*, where both parties were incorporated in Australia. In connection with a nickel and cobalt extraction plant, Anaconda sought damages of approximately \$1.3 billion Australian dollars, alleging that Fluor failed to perform under an Engineering Procurement and Construction (EPC) Contract. In the first case, the court considered, *inter alia*, the measure of damages awarded for the cost to build the project according to contract requirements. Finding manifest error of law (damages inconsistent with finding of a breach of warranty for extraction capacity), the court granted the appeal and remitted the award to the tribunal for reconsideration. In the second case, the court denied the appeal, which had challenged principles of interpretation used in analyzing limitation of liability provisions. Ultimately, the parties settled before a new award was rendered.

¹⁰⁰ See Australia’s Commercial Arbitration Act 1984 (Section 38) and New Zealand’s 1996 Arbitration Act (Clause 5 of Schedule 2), both discussed *supra*. See also Swiss Inter cantonal Arbitration Concordat, Article 36(f), permitting judicial vacatur of awards for “arbitrariness.” Plans are now underway to federalize Swiss procedural law, including arbitration provisions.

¹⁰¹ See § 69, English Arbitration Act 1996.

“manifest disregard” cannot be excluded by contract.¹⁰² Some courts,¹⁰³ but not all,¹⁰⁴ apply the notion even in international arbitrations. From the perspective of both statutory text and arbitral policy, the better view is that “manifest disregard” has no place in review of foreign awards enforceable under the New York Convention.¹⁰⁵

The problematic nature of “manifest disregard” lies in its potential for mischief in large international cases, when zealous litigators may be tempted to press the doctrine into service as a proxy for attack on the substantive merits of an award. It is hard to imagine meaningful review of legal error in a complex case without substantial time to understand facts.¹⁰⁶ Even if costly appellate briefing and argument yields a happy ending for the arbitration’s prevailing party, the very existence of “manifest disregard” hangs like the sword of Damocles to be grasped by award debtors who understandably seek relief from costly damages. Outside consumer disputes, “manifest disregard” is often the right doctrine aimed at the wrong target, creating the prospect of judicial meddling that can only alarm foreign enterprises that have expressly agreed to arbitration in the hope of keeping out of national courts.

Consumers and employees

Why the persistence of “manifest disregard” as a ground for vacatur in the United States? At least one explanation might lie in the absence of any comprehensive statutory regime to

¹⁰² See e.g. *Hoefl v. MVL Group, Inc.*, 343 F. 3d 255 (2nd Cir. 2003) (federal court not deprived of power to review award due to parties’ agreement that award “shall not be subject to any type of review or appeal whatsoever”). See also *M & C Corp. v. Erwin Behr GmbH*, 87 F. 3d 844 (6th Cir. 1996) at 847, holding that a contract purporting to waive judicial review reflected only a “contractual intent that the issues joined and resolved in the arbitration may not be tried *de novo* in any court.” France has taken a similar approach. Attempts to waive grounds for review under NCPC Article 1504 have been rejected as contrary to *ordre public* in *Disenno v. Société Mendes, Cour d’Appel de Paris*, 24 October 1994, Rev. Arb. 263 (1995). See generally Philippe Fouchard, Emmanuel Gaillard, & Berthold Goldman, *Traité de l’Arbitrage commercial international* § 1597, at 931 nn.142–46 (1996). Only one American decision has suggested (in ill-reasoned dictum) that there exists a right to discard minimum statutory grounds for vacatur. See *Roadway Package System, Inc. v. Kayser*, 257 F. 3d 287, 293 (3rd Cir. 2001).

¹⁰³ See *Yusuf Ahmed Alghanim & Sons v. Toys ‘R’ Us, Inc.*, 126 F. 3d 15, 23–25 (2nd Cir. 1997). Drawing a distinction between motions to confirm and motions to vacate awards, and notwithstanding the language of FAA § 207 (confirmation of New York Convention awards required absent a finding of grounds for non-recognition under Convention Article V), the Court found that a “non-domestic” award made in the United States would be subject to vacatur “in accordance with its domestic arbitration law and its full panoply of express and implied grounds for relief” including “manifest disregard of the law.”

¹⁰⁴ Compare *Industrial Risk Insurance v. M.A.N. Gutehoffnungshutte GmbH*, 141 F. 3d 1434 (11th Cir. 1998); *Four Seasons Hotels and Resorts B.V. v. Consorcio Barr S.A.*, 267 F. Supp. 2d 1335 (S.D. Fla. 2003), vacated and remanded on other grounds 377 F. 3d 1164 (11th Cir. 2004); *Lummus Global Amazonas v. Aguaytra Energy de Peru*, 2002 WL 31401996 (S.D. Tex. 2002).

¹⁰⁵ See *M & C Corp. v. Erwin Behr GmbH*, *supra* n. 102, refusing to find that “manifest disregard” could be pigeonholed into the “violation of public policy” category of New York Convention Article V(2)(b). *Ibid.* at 851, note 2. This multifaceted case (involving a sales representative’s claim for commissions on wood paneling used in automobiles) went through several other incarnations, including *M & C Corp. v. Erwin Behr GmbH*, 143 F. 3d 1033 (6th Cir. 1998) (*Behr I*); *M & C Corp. v. Erwin Behr GmbH*, 326 F. 3d 772 (6th Cir. 2003) (*Behr III*); and *M & C Corp. v. Erwin Behr GmbH*, 2005 WL 1413132 (6th Cir. 2005) (*Behr IV*). The last stage of these cases seemed to disregard the spirit of the court’s earliest holding to the effect that awards should not be subject to judicial meddling on the merit. In *Behr IV* the court went far beyond interpreting the arbitral award, and purported to interpret the relevant contract itself, substituting its own judgment on entitlement of sales commissions (the substance of the dispute) for that of the arbitrator who had just rendered a clarification of his award.

¹⁰⁶ See *Anaconda v. Fluor*, *supra* n. 99.

safeguard the procedural integrity of consumer and employment arbitration. The value of even-handed adjudication, which commends arbitration among sophisticated business managers, sometimes gets lost when form contracts are imposed on ill-informed individuals by manufacturers or employers with grossly disproportionate bargaining power. The result may be a distant forum of uncertain integrity.¹⁰⁷

The special status of consumer and employment disputes is well established in Europe, where statutes of general application safeguard against abusive arbitration¹⁰⁸ and other “unfair” contract terms.¹⁰⁹ In England consumer protection regulations are expressly applicable to arbitration agreements,¹¹⁰ regardless of whether they cover present or future disputes and regardless of what law is applicable to the arbitration agreement.¹¹¹ Arbitration agreements will be considered unfair (thus presumptively invalid) if they relate to claims below an administratively fixed amount.¹¹² France has long made a distinction between the pre-dispute *clause compromissoire* and the post-dispute *compromis*, the former being valid only in contracts between merchants (*commerçants*) or persons contracting with respect to a professional activity.¹¹³ Moreover, French employment disputes are subject to

¹⁰⁷ For a critique of consumer arbitration, see Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 *Stanford Law Rev.* 1631 (2005).

¹⁰⁸ See e.g. European Council Directive 93/13/EEC (5 April 1993), 1993 (L 95) 29. The New South Wales Industrial Relations Act, which covers modestly remunerated employees for claims not exceeding AS \$85,400. Contract Review Acts in Queensland, Victoria, and Western Australia do the same for consumers transactions with limits of AS \$10,000 in Queensland and AS \$25,000 in Victoria. See generally William W. Park, *Amending the Federal Arbitration Act*, 13 *Am. Rev. Int'l Arb.* 75 (2002), at 130–33.

¹⁰⁹ Article 6 of Council Directive 93/13/EEC provides that such “unfair” terms “shall not be binding.” 1993 (L 95) 31. Article 3(3) refers to an Annex of unfair terms, which gives examples of unfairness, one of which (in § 1(q)) includes terms that hinder consumers’ rights “to take legal action” or “to take disputes exclusively to arbitration not covered by legal provisions.”

¹¹⁰ Arbitration Act §§ 89–91 extends application of the Unfair Terms in Consumer Contracts Regulations of 1994, which implement European Council Directive 93/13/EEC. Arbitration Act 1996, §§ 89–91 (Eng.). These sections cover Scotland as well as England and Wales, while the rest of the Act applies only in England and Wales.

¹¹¹ These regulations invalidate “unfair” contract terms causing “significant imbalance in the parties’ rights and obligations” to the consumer’s detriment. See Consumer Contract Regulations §§ 3, 4. Consumers include individuals acting for purposes outside their business. *Ibid.* § 2. One schedule to the accompanying Consumer Contract Regulations contains an illustrative list of terms that may be regarded as unfair, and therefore non-binding. These examples of unfairness include terms that require consumers to “take disputes exclusively to arbitration not covered by legal provisions.” Unfair Terms in Consumer Contracts Regulations, 1994, Schedule 3, § 1(q).

¹¹² The current floor on presumptive unfair claims is £5000, fixed for England, Wales, and Scotland by the Secretary of State, and for Northern Ireland by the Department of Economic Development. Arbitration Act § 91 and Unfair Arbitration Agreements (Specified Amount) Order 1999, 1999 No. 2167, brought into force on 1 January 2000. On consumer arbitration in Britain, see M. J. Chapman, *Commercial and Consumer Arbitration* (1997).

¹¹³ See C. Civ. art. 2061 (Fr.) (recently liberalized by Law No. 2001–420 of 15 May 2001, Article 126, J.O., 16 May 2001, at 7776 (*Loi sur les nouvelles relations économiques*, Article 126), to provide that “la clause compromissoire est valable dans les contrats conclus à raison d’une activité professionnelle” (“a pre-dispute arbitration clause is valid in contracts concluded with respect to professional activity”). Pre-dispute clauses are now allowed among members of the so-called liberal professions (such as lawyers, doctors, and architects), tradesmen (*artisans*) and farmers (*agriculteurs*), as well as in professional partnerships agreements. See generally Philippe Fouchard, *La Laborieuse Réforme de la clause compromissoire par la loi du 15 mai 2001*, 2001 *Rev. Arb.* 397 (2001); C. Com. Article 631 (Fr.) (covering merchants).

the exclusive jurisdiction of a special labor court (*conseil de prud'hommes*)¹¹⁴ except in international cases.¹¹⁵ In Germany, both parties must sign consumer arbitration agreements, which must either be contained in a separate document or have notarial certification.¹¹⁶

Such protective regimes have been generally neglected in American arbitration, at least on the federal level, where a “one-size-fits-all” federal arbitration statute pre-empts state law that tries to protect weaker members of society.¹¹⁷ The Federal Arbitration Act (FAA) can apply equally to a billion-dollar construction contract and a consumer’s purchase of fifty dollars’ worth of software. The statutory scope can cover both disputes over a CEO’s multi-million dollar golden parachute or an action for unfair dismissal of a filing clerk.¹¹⁸

The problematic nature of American arbitration in consumer and employment contexts has not gone unnoticed.¹¹⁹ In such an environment, award vacatur for “manifest disregard” serves as a less than optimum safety valve against abuse, as does invalidation of arbitration clauses on the basis of “unconscionability,”¹²⁰ whether labeled procedural (weaker party has

¹¹⁴ *Code du travail*, Article 511-1 (alinéa 6), which provides: “*Les conseils de prud'hommes sont seuls compétents, quel que soit le chiffre de la demande, pour connaître des différends visés au présent article. Toute convention dérogatoire est réputée non écrite . . .*” (“Arbitration is possible, however, for disputes ancillary to an employment agreement (such as a non-competition agreement) which do not implicate the validity of the employment relationship itself”). See *Cour d'appel de Paris* (1ère Ch.), 12 September 2002 reprinted in *Rev. Arb.* 173 (2003) (commentary by Marie-Emma Boursier), finding arbitrability limits inapplicable if the arbitration is not “un litige individuel à propos d'un contrat de travail.”

¹¹⁵ See Ph. Fouchard *et al.*, *supra* n. 102, §573, at 356–357.

¹¹⁶ See ZPO § 1031(5) (FRG). In Germany, the *Notar* (the *notaire* in France, Switzerland, Belgium, and analogous offices in other European countries) is a legal professional, with little resemblance to the notary known in the United States.

¹¹⁷ See *Doctor's Assocs. v. Casarotto*, 517 U.S. 681 (1996); *Allied Bruce Terminix v. Dobson*, 513 U.S. 265 (1995). For an intriguing wrinkle on the interaction of federal and state arbitration law, see *Kloss v. Jones*, 310 Mont. 123, 54 P. 3d 1 (2002), on reh'g 57 P. 3d 41, cert. denied, 123 S. Ct. 1633 (2003). In refusing to compel arbitration against a financial adviser accused of negligence and breach of fiduciary duty, the Montana court held the arbitration clause to be an impermissible attempt to waive basic rights guaranteed by the Montana constitution.

¹¹⁸ Arbitration under collective bargaining agreements rests on a legal basis separate from the FAA. See Taft–Hartley Labor-Management Relations Act § 301, 29 U.S.C. § 185 (2003); *Textile Workers Union of America v. Lincoln Mills of Ala.*, 353 U.S. 448, 451 (1957), holding that federal courts may fashion a body of federal law specifically for enforcement of collective bargaining agreements. For the scope of the FAA in employment arbitration, see *Circuit City v. Adams*, 532 U.S. 105 (2001), holding that the FAA covers all employment contracts except those related to “transportation workers” such as seamen and railroad employees.

¹¹⁹ See e.g. Susanne Craig, *Wall Street's System for Fielding Grievances of Investors Draus Fire*, *Wall Street J.*, 17 March 2005, at 1 col. 1 (describing discontent with securities arbitration between stockbrokers and their customers, in particular the alleged pro-broker bias of certain arbitrators who should in theory be considered free of links with the securities industry). See e.g. litigation concerning employment arbitration in *EEOC v. Waffle House*, 534 U.S. 279 (2002) and *Circuit City v. Adams*, 532 U.S. 105 (2001).

¹²⁰ For a fine Gallic *tour d'horizon* of American unconscionability cases, see Mathieu Maisonneuve, *Le Droit américain de l'arbitrage et la théorie de l'unconscionability*, *Rev. Arb.* 101 (2005), which points out that equivalent doctrines are less necessary in France given that pre-dispute arbitration clauses in employment and consumer transactions are invalid. In this regard, the article notes a possible conflict between Code Civil Article 2061 (validating arbitration clauses in a “professional” context) and *Code de la consommation* Article 132-1 (invalidating “abusive” clauses, a concept amplified in Article 1(q) of Loi No. 2005-67, 28 January 2005, to include renunciation of courts in favor of arbitration). On American law, Dr. Maisonneuve suggests that both the procedural and substantive elements of unconscionability must be found together (“doivent en principe se cumuler”, *ibid.* at 105), a conclusion which might not be true in all cases. See discussion *infra*.

no meaningful opportunity to bargain)¹²¹ or substantive (one-sided duty to arbitrate, unilateral discovery rights, and oppressive fees).¹²²

While one can understand the impulse to protect weaker members of society through use of “manifest disregard,” better alternatives do exist. These include protocols on procedural fairness applied specifically to consumer and employment disputes, whether imposed by government regulation or by private institutions.¹²³ Another option might construct a separate legal regime for consumer and employment cases, perhaps enforcing only post-dispute arbitration agreements that give individuals time to consider what is at stake, or subject such arbitration to a heightened degree of judicial supervision.

At least in part, the root of this American exceptionalism lies in the nature of the litigation process in the United States. In particular, claimants in ordinary contract actions possess a right to be heard by a civil jury and in some cases to claim punitive damages. These factors give industry groups a special incentive to rely on arbitration clauses in consumer contracts, and to resist reform that might limit that practice.¹²⁴ Within the business community, a widespread perception exists that arbitrators will be more reasonable than jurors in hearing claims and awarding punitive damages in actions that seem to pit the “little guy” against a large manufacturer or financial institution.

Rightly or wrongly, a fear exists that even a moderate attempt to fix things would spiral out of control.¹²⁵ Reform is seen as opening a Pandora’s box of unbridled upheaval, led by an unholy alliance of consumer advocates and plaintiffs’ lawyers bent on destroying an arbitration

¹²¹ See Court of Appeals decision on remand in *Circuit City v. Adams*, 279 F. 3d 889 (9th Cir. 2002), distinguishing between “procedural unconscionability” and “substantive unconscionability.”

¹²² In *Circuit City v. Adams*, the Court of Appeals found the arbitration clause substantive unconscionable because it “unilaterally forces employees to arbitrate” their claims against the employer. For an English case upholding unilateral arbitration, see *Pittalis v. Sherafettin* [1986] 1 QB 868, [1986] 2 All ER 227 (landlord–tenant rent review). By contrast, when employees and consumers (rather than employers and manufacturers) benefit from a right to opt-out of arbitration (through signing a form within thirty days of being hired), arbitration obligations have been upheld. See *Circuit City v. Ahmed*, 283 F. 3d 1198 (9th Cir. 2002); *Circuit City v. Najd*, 294 F. 3d 1104 (9th Cir. 2002). For a survey of case law on mutuality in arbitration, see William W. Park, *Arbitration in Banking and Finance*, 17 Ann. Rev. Banking Law 213, 251–253 (1998). On substantive unconscionability, see also *Teleserve Sys. v. MCI*, 659 N.Y. 2d 658 (N.Y. App. Div. 1997), striking down an arbitration clause in a marketing agreement that fixed the costs of arbitration (arbitrators’ fees and administrative charges) as a function of the sum in dispute, which in that case would have been \$204,000 on a \$40 million damages claim.

¹²³ See e.g. American Arbitration Association, *Consumer Due Process Protocol* (May 1998), implementing special measures related to matters such as consumer access to information, convenient location, moderate cost, and speed.

¹²⁴ The prevalence of class actions has been suggested as a third reason for the difference between the regime for consumer arbitration in the United States and Europe. See Christopher R. Drahozal & Raymond Friel, *A Comparative View of Consumer Arbitration*, 71 Arbitration 131 (2005). Since the U.S. Supreme Court effectively facilitated use of class actions in arbitration in its decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) (discussed *infra*) this factor may be less compelling.

¹²⁵ See John M. Townsend, *The Federal Arbitration Act Is Too Important to Amend*, 4 ABA Int’l Arb. News 19–20 (Summer 2004). “Bluntly speaking,” Townsend writes, “The Federal Arbitration Act is under attack. Any effort to amend the FAA . . . will have the effect of opening the statute to other amendments that may have radically different objectives.” Mr. Townsend serves as Chairman of the Executive Committee of the American Arbitration Association. For an alternate view, see articles in the same ABA symposium by Messrs. Jack Coe (at 2), Richard Hulbert (at 6), and William Park (at 10).

system they see as protecting crooked finance companies and abusive bosses from sympathetic juries prone to award damages to the likes of dear Aunt Millie and old Uncle Fred.¹²⁶

The consequence is that American arbitration has taken a special path. As Australia has its own types of animals (kangaroos, wombats, and koala bears), so the United States has hosted evolution of its own varieties of arbitration, including judicial review on mistakes of law not limited to consumer and employment arbitration.¹²⁷

Arbitral jurisdiction

Courts often get involved in arbitration when one side challenges the arbitrators' jurisdiction, either at the beginning of the process (if a court action is filed in disregard of the arbitration clause) or at the end (if award enforcement is resisted due to an alleged excess of arbitral authority).¹²⁸ The alleged limits on arbitral power may derive either from the scope of the contract or from public policy. On both counts courts have shown an increasingly benevolent attitude toward arbitral jurisdiction.¹²⁹

¹²⁶ This opposition to change brings to mind the remark attributed to Sir John Astbury, the English judge who in 1926 declared the British General Strike to be illegal. As industrial unrest spread across Britain, he reportedly asked rhetorically, "Reform? Reform? Are things not bad enough already?" Mr. Justice Astbury sat on the Chancery Bench from 1913 to 1929, and was made a Privy Councillor in 1929.

¹²⁷ Idiosyncratic jurisdictional and procedural barriers to award enforcement constitute another peculiarity of the American arbitral landscape. Some courts decline award enforcement on grounds of *forum non conveniens*. See *Monégasque de Reassurances SAM v. Nak Naftogaz of Ukraine*, 311 F.3d 488 (2nd Cir. 2002). Lack of personal jurisdiction (in the form of "minimum contacts") can raise another obstruction. To accept a case, federal courts must have both "subject matter" and "personal" jurisdiction. The former has been conveyed by statute, in Section 203 of the FAA. The latter, however, requires "minimum contacts" with the relevant jurisdiction, which may not always be evident for foreign parties. See e.g. *Glencore Grain Rotterdam BV v. Shivnath Rai Harnarain*, 284 F.3d 1114 (9th Cir. 2002); *Base Metals Trading v. OJSC Novokuznetsky Aluminum Factory*, 283 F.3d 208 (4th Cir. 2002). See generally William W. Park, Jack Coc, & Andrea Bjorklund, *International Commercial Dispute Resolution*, 37 Int'l Lawyer 445 (2003); Linda Silberman, *International Arbitration: Comments from a Critic*, 13 Am. Rev. Int'l Arb. 9 (2002); S.I. Strong, *Invisible Barriers to Enforcement of Foreign Arbitral Awards in the United States*, 21(6) J. Int'l Arb. 479 (2004); Joseph E. Neuhaus, *Current Issues in the Enforcement of International Arbitration Awards*, 36 Inter-Am. Law Rev. 23 (2004), suggesting that *Base Metals* is "simply a mistake" (since some property was present within the jurisdiction) and *Monégasque* was correctly decided on "unusual facts" (sovereign immunity issues related to a foreign state emanation). See generally William W. Park and Alexander A. Yanos, *Treaties, the Constitution and International Arbitration: The Emerging Conflict* (2005).

¹²⁸ While the basic predicate for jurisdiction is an agreement to arbitrate that has been memorialized in writing, a divergence of opinion exists as to when a signature is required. See *Kahn Lucas Lancaster v. Lark Int'l Ltd.*, 186 F.3d 210 (2nd Cir. 1999), interpreting the comma after "an arbitration agreement" in New York Convention Article II(2), which provides that an agreement in writing shall include "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." The Court found that "signed by the parties" applied to arbitral clauses encapsulated in broader contracts, as well as separate arbitration agreements. For a contrary result, see *Sphere Drake Ins. PLC v. Marine Towing, Inc.*, 16 F.3d 666, 669 (5th Cir. 1994).

¹²⁹ For better or for worse, some courts use the term "arbitrability" to cover jurisdictional issues related both to the scope of the clause (a matter of contract interpretation) and the subjects which public policy allows arbitrators to be considered (imposed regardless of what the agreement says). See e.g. *First Options v. Kaplan*, 514 U.S. 938 (1995). While understandable, the terminology often obscures analysis, which would benefit from greater clarity if the word "arbitrability" were applied only to subject matter limits imposed by public policy. See William W. Park, *The Arbitrability Dicta in First Options v. Kaplan*, 12 Arb. Int'l 137 (1996). See also *Sarbank Group v. Oracle Corp.*, 404 F.3d 657 (2nd Cir. 2005). In finding that a parent corporation was not bound by an arbitration clause signed by its subsidiary, the Court of Appeals surprisingly cited New York Convention Article V(2)(a), which addresses subject matters not capable of settlement by arbitration. One wonders why the court did not take the route of simply finding that no valid arbitration agreement existed, which is a ground on which to refuse award enforcement under Convention Article V(1).

Subject matter arbitrability

Arbitrators were once considered a bit like foxes guarding the chicken coop: not to be trusted. The resulting judicial hostility toward arbitration meant limited arbitral power to hear disputes implicating sensitive public interests such as competition law, patents, and securities transactions, which were considered “non-arbitrable” subjects beyond the competence of arbitrators regardless of what the contract said.¹³⁰

One by one, like uncomfortable garments on a hot summer day, such subject matter arbitrability restrictions are being removed. Competition law, patents, and securities regulation are now generally arbitrable.¹³¹ While ambiguity remains on some matters (such as taxation¹³² and bankruptcy¹³³), judicial antagonism toward arbitration has generally given

¹³⁰ See *Wilko v. Swan*, 346 U.S. 427 (1953) (securities) and *Am. Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2nd Cir. 1968) (antitrust). On subject matter arbitrability, see generally Bernard Hanotiau, *L'Arbitrabilité* (2003), 296; *idem*, *Recueil des cours* (2002).

¹³¹ In the United States, arbitrability of patent disputes (including questions of validity and infringement) was established in 1983 by federal legislation. See 35 U.S.C. § 294. Significant court decisions on subject matter arbitrability include *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (antitrust) and *Rodriguez de Quijas v. Shearson/American Express, Inc.* 490 U.S. 477 (1989) (securities). Judges came to realize that in most instances (albeit not all) there would be limits on the applicable law (see footnote 19, *Mitsubishi*) and a chance for a second look at what arbitrators did, when an award was presented for recognition or enforcement (see discussion of New York Convention Article V(2)(b) in *Mitsubishi*). See generally, William W. Park, *Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration*, 12 Brooklyn J. Int'l L. 629 (1986). For a comparative perspective, see the Australian experience with arbitration of questions governed by the federal Trade Protection Act, chronicled in Romauld Andrew, *The Ill-Favoured Child of Litigation: International Commercial Arbitration and the Australian Trade Practices Act 1974*, 23(3) J. Int'l Arb. 239 (June 2004).

¹³² The arbitrability of tax matters remains highly fact intensive, often depending on whether the arbitrator is asked simply to decide a contract dispute (how to allocate undisputed tax liability among contracting parties, for example pursuant to a corporate acquisition) or whether the arbitrator must speculate about how governments might make fiscal assessments. Tax arbitrability issues sometimes intertwine with questions of ripeness. On occasion, a government may agree to submit the tax questions to arbitration. See generally, Bernard Hanotiau, *Arbitrabilité*, *Recueil des cours*, *supra*, at 171–180; Pascal Ancel, *Arbitrage et ordre public fiscal*, 2001 Rev. arb. 269; Mathieu de Boisseson, *Le Droit français de l'arbitrage* (1990), Section 33 (at 37). Compare Jean-Pierre LeGall, *Fiscalité et arbitrage*, 1994 Rev. arb. 3 (noting at 24–25 several international tax arbitrations); Emmanuel Gaillard, *Tax Disputes between States and Foreign Investors*, N.Y.L.J. (April 1997) at 3; Ibrahim Fadallah, *L'ordre public dans les sentences arbitrales*, *Recueil des cours* (2002), Académie de Droit International de la Haye, 369 (1994) at para 54–56, at 410–411; Philippe Fouchard, Emmanuel Gaillard & Berthold Goldman, *International Commercial Arbitration* (English Language edition, E. Gaillard & J. Savage eds., 1999), at 348 & 359 (Sections 579, n. 478, & 589–1). Thomas Carbonneau & Andrew Sheldrick, *Tax Liability and Inarbitrability in International Commercial Arbitration*, 1 J. Transl Law & Policy 23 (1992); For discussion of arbitration of fiscal issues under bilateral tax treaties, see William W. Park & David R. Tillinghast, *Income Tax Treaty Arbitration* (2004). For examples of domestic and international tax arbitration, see *Ace Ltd. v. Cigna Corp.*, 2001 WL 767015; ICC Awards No. 6515 & 6516, in *Collection of Arbitral Awards/Recueil des sentences arbitrales de la CCI*, Volume IV (1996–2000)(Jean-Jacques Arnaldez, ed.) at 241. For domestic arbitration within the United States, see I.R.S. Ann. 2000–4 and 2002–60.

¹³³ Courts in the United States have enforced arbitration of contract disputes, at least to the extent of arbitral determination of damages. See *Sonatrach v. Distrigas*, 80 Bankr. 606 (D. Mass. 1987). However, certain “core” bankruptcy issues (such as priorities among creditors and fraudulent transfers) remain subject to the exclusive jurisdiction of the Bankruptcy Court. Such matters relate to claims not exercisable by the debtor, but properly within the power of the trustee in bankruptcy as a third-party that never signed the arbitration clause. See e.g., *Oakwood Homes Corporation, et al.*, 2005 Bankr.LEXIS 429 (Bankr. Del.), holding that claims to avoid allegedly fraudulent and preferential transfers by a bankrupt debtor were statutory rights of trustee in bankruptcy for the benefit of all creditors, not subject to arbitration.

way to a cautious embrace. Many judges have come to see arbitration as a repository for unwanted cases, providing relief from clogged dockets.

Contract scope

Challenges to arbitral authority have also been based on the contours of the parties' agreement. Commercial arbitration is a creature of contract,¹³⁴ requiring courts to inquire into the mission that litigants conferred on the arbitral tribunal. Special wrinkles in this question arise if there is doubt about the validity of the agreement containing the arbitration clause, or the right of arbitrators to make determinations as to their own authority.

The complex structures of many corporate groups means increasingly frequent challenges related to “non-signatories” whose right or duty to arbitrate is not obvious.¹³⁵ In such instances, the arbitrators' jurisdiction must be justified on principles such as agency, piercing the corporate veil, or estoppel.¹³⁶ Claimants often seek to join a respondent's parent corporation in hope of reaching a deeper financial pocket. Respondents sometimes seek “defensive” joinder of parties, hoping to make an award *res judicata* and thus reduce the prospect of unwanted court litigation against a related entity. Some arbitrators have joined related parties on the “group of company theory,” which seems to have found more acceptance in France¹³⁷ than elsewhere.¹³⁸

¹³⁴ One American judge referred to the “abecedarian tenet” that a party cannot be forced to arbitrate if it has agreed to do so.” *Intergen v. Grina*, 344 F. 3d 134 (1st Cir. 2003) (Selya, J.).

¹³⁵ The term “nonsignatories” remains useful shorthand to designate those persons (whether individuals or corporate entities) whose relationship to the arbitration may at first blush be unclear. Such litigants cannot easily be called “non-parties,” given that their status as “party” is exactly what is asserted, often successfully through theories such as agency. A more accurate expression might be “un-mentioned” parties, although that locution likewise has limits. In addressing the matter of non-signatories, Francophone scholars sometimes speak of “subjective” jurisdiction, indicating the parties subject to arbitration, rather than the subject matter of the dispute. See Laurent Lévy & Blaise Stucki, *L'Extension de la portée subjective de la clause arbitrale en droit suisse*, 2004 Rev. arb. 695 (commenting on decision of 16 October 2003). See also 22 ASA Bull. 364 (2004), with notes by Jean-François Poudret Poudret (at 390) and Philippe Habegger (at 398).

¹³⁶ See *Thomson-CSF v. American Arbitration Association*, 64 F. 3d 773 (2nd Cir. 1995). See generally Carolyn B. Lamm & Jocelyn A. Aqua, *Defining the Party*, 34 Geo. Wash. Int'l L. Rev. 711 (2003); John M. Townsend, *Nonsignatories and Arbitration: Agency, Alter Ego and Other Identity Issues*, 3 ADR Currents 19 (Sept. 1998); James J. Sentner, *Who Is Bound by Arbitration Agreements, Enforcement by and against Non-Signatories*, 6 Business Law Intl 55 (2005). See also I Domke on Commercial Arbitration § 10:00 (“A non-signatory to an arbitration agreement may nonetheless be bound by the agreement under an accepted theory of agency or contract law.”).

¹³⁷ In one well-known award rendered in Paris, based on a contract signed by Dow Chemical (Switzerland), the tribunal rejected requests that other Dow entities be dismissed as parties. See *Isover St. Gobain v. Dow Chemical France et al.*, ICC Case 4131 (1982); reprinted I Collection of Arbitral Awards: 1974–85 (Sigvard Jarvin & Yves Derains, eds., 1990). The decision was upheld by the Paris *Cour d'appel*, 21 October 1983, 1984 Rev. arb. 98; extracts in English available in 9 *ICCA Yearbook Commercial Arbitration* 132 (1984). See generally, W. Laurence Craig, William W. Park, & Jan Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, 2000), Section 5.09, at 75–76.

¹³⁸ English case law has rejected the “group of companies” doctrine, requiring clear evidence of agency to bind related companies to arbitrate. See *Peterson Farms Inc. v. C&M Farming Ltd.*, [2004] EWHC 121, [2004], 1 Lloyd's Rep 603, 2004 WL 229138 (2004, High Court of Justice, QB Div. Commercial Court). See Sonia Patil Woodhouse, *Group of Companies Doctrine and English Arbitration Law*, 20 Arb. Int'l 435 (2004); John Gaffney, *The Group of Companies Doctrine and the Law Applicable to the Arbitration Agreement*, 19 Int'l Arb. Rep. 47 (June 2004).

Separability and compétence-compétence

With respect to jurisdictional challenges based on contract limits, two key doctrines have developed to move cases forward notwithstanding allegations that the arbitrator's power fails to cover a particular claims or party. First, most countries possess some variant of the "separability" doctrine (sometimes called the "autonomy principle") under which arbitration clauses exist independently from the main contract. In cases where arbitrators must invalidate a contract, separability permits them to do their job without destroying their own power.¹³⁹

In addition, modern arbitration regimes show widespread acceptance of the principle called *compétence-compétence* ("jurisdiction on jurisdiction") whereby arbitrators may decide challenges to their own power (at least as an initial matter), and need not halt proceedings each time a party questions their authority.¹⁴⁰ In this connection, arbitral jurisdiction was recently expanded in a dramatic way when the United States Supreme Court held that arbitrators, not judges, could determine the parties' intent concerning "class action" arbitrations. This decision has created interesting opportunities for claimants' lawyers.¹⁴¹

The progress is not without cost, however. Some of these jurisdictional tools may lend themselves to misapplication by both critics and supporters of arbitration who make unwarranted assumptions about the existence and/or scope of arbitral power. Arbitration literature sometimes suggests a form of voodoo jurisprudence in which words in a written document are deemed to create rights and duties independent of whether there was in fact a real agreement between the parties allegedly bound to arbitration.¹⁴²

¹³⁹ See generally Alan Scott Rau, *The Arbitrability Question Itself*, 10 Am. Rev. Int'l Arb. 287 (1999). Alan Scott Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions* 14 Am. Rev. Int'l Arb. 1 (2003). See also Park, *The Arbitrability Dicta in First Options*, *supra*. For a recent Florida state supreme court case that seems to challenge the doctrine of separability (invalidating an arbitration clause in an allegedly usurious loan disguised a check cashing transaction), see *Cardegna v. Buckey Check Cashing, Inc.*, 894 So. 2d 860 (Fla. 2005). See also Alan Scott Rau, *Separability, Illegality and Federalism: The Cardegna Case in the Supreme Court*, 20 Int'l Arb. Rep. 1 (Oct. 2005).

¹⁴⁰ The labels *Kompetenz-Kompetenz* and *compétence-compétence* were given by German and French scholars who supplied early formulations of the doctrine. For an American decision affirming the arbitrators' power to determine their jurisdiction under institutional rules, see *Shaw Group Inc. v. Triplefine Int'l Corp.*, 322 F. 3d 115 (2d Cir. 2003). See also, Peter J.W. Sherwin & Ana Veermal, *Arbitrability: Who Decides?*, 9 Arbitration and ADR (IBA) 86 (Oct. 2004).

¹⁴¹ *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). See generally Bernard Hanotiau, *A New Development in Complex Multiparty-Multicontract Proceedings: Classwide Arbitration*, 20 Arb. Int'l 39 (2004); William W. Park, *The Contours of Arbitral Jurisdiction: Who Decides What?*, 3 Int'l Arb. News 2 (ABA Summer 2003), reprinted in 18 Int'l Arb. Rep. 21 (Aug. 2003). On consolidation under arbitration statutes, see discussion *infra*. On class actions in Australia, see *Mobil Oil Australia Pty Ltd. v. The State of Victoria* [2002] HCA 27, 26 June 2002, in which the High Court of Australia held that the State of Victoria was not constitutionally barred from binding unaware claimants from other states in grouped proceedings.

¹⁴² See discussion of cases by Stuart M. Widman, *What's Certain is the Lack of Certainty About Who Decides the Existence of the Arbitration Agreement*, ABA Disp. Resol. J. 55 (May-July 2004), seeming to suggest that in determining the existence of an arbitration agreement courts should "simply take a quick look at the parties' agreement to determine whether there is a *prima facie* arbitration clause . . ." *Ibid.* at 59. Such an approach might be appropriate for an institution such as the AAA or the ICC, whose decisions are subject to subsequent judicial review. It might even be acceptable for courts making tentative assessments of the arbitrator's power at the beginning of arbitrations. But few judges would attach assets to enforce an award if they had doubts that the losing party agreed to arbitrate.

Error of law or excess of jurisdiction?

Most legal systems draw a line between (i) an arbitrator who exceeds his or her authority and (ii) an arbitrator who makes a simple mistake of law or fact.¹⁴³ Only the former (an excess of authority) would normally be subject to judicial review. The distinction is vital to the health of arbitration. If a losing party could routinely obtain a backdoor review of an award's merits simply by alleging jurisdictional excess, the adjudicatory finality sought from arbitration would be insignificant in practice.¹⁴⁴

Drawing this jurisdictional line continues to resist facile analysis. Many years ago, Lord Denning commented provocatively on the relationship between mistake of law and jurisdictional excess. He asserted the view (now discredited) that “[w]henver a tribunal goes wrong in law it goes outside the jurisdiction conferred on it and its decision is void.”¹⁴⁵ His assumption seemed to have been that litigants never authorize an arbitrator to make a mistake, and thus by definition the error falls beyond the arbitral mission.¹⁴⁶

The distinction between mistake of law and excess of authority was addressed squarely in an intriguing English decision titled *Lesotho Highlands v. Impreglio SpA*,¹⁴⁷ which arose from construction of a dam in Lesotho. In a London arbitration conducted by a three-member tribunal, the losing party challenged, as an excess of authority, the choice of currency in which the award was made. The arbitrators had expressed their decision in four European monies (British sterling, French francs, German Marks, and Italian lire) notwithstanding that most of the costs giving rise to the claim had been incurred in Lesotho maloti.¹⁴⁸ The English Arbitration Act permitted parties to exclude appeal on questions of law, which they did.¹⁴⁹ However, the Act granted a non-waivable right to

¹⁴³ Some arbitration regimes go further, and limit annulment for excess of authority to cases where a tribunal “manifestly” exceeds its powers. See Article 52(1)(b) of the Washington Convention, applicable in ICSID investment arbitrations.

¹⁴⁴ For an insightful analysis of excess of authority in investment arbitration, see Philippe Pinsolle, *Jurisdictional Review of ICSID Awards*, 5 J. World Investment & Trade 613 (2004). Pinsolle suggests that “manifest” should not be deemed synonymous with *prima facie*. Otherwise, clever drafting of an award might obscure an excess of authority. An excess of power might be “manifest” in the sense of being clear and obvious *once it is detected*. But time and energy might be required to understand the complex legal and factual issues of the case before the excess of power becomes evident. Similar difficulties may arise in detecting manifest errors (see *Anaconda v. Fluor*, discussed *supra*) and public policy violations (see *Corvetina Tech. Ltd. v. Clough Engineering*, discussed *supra*).

¹⁴⁵ See Lord Denning, *The Discipline of the Law* 74 (1979). See also *Pearlman v. Keepers and Governors of Harrow School* [1978] 3 WLR 736, 743 (C.A.) (“The distinction between an error which entails absence of jurisdiction and an error made within jurisdiction is [so] fine . . . that it is rapidly being eroded.”).

¹⁴⁶ For a resurrection of a modified version of this view, see Christopher R. Drahozal, *Default Rule Theory and International Arbitration Law*, 5 Int'l Arb. News 2 (ABA). Arguing for the litigants' right to expand the scope of judicial review to include error of law, Professor Drahozal focuses on FAA § 10(a)(4), which provides for review of arbitral excess of authority. “Relying on this ground [Section 10(a)(4)],” writes Drahozal, “parties should be able to obtain court review of arbitrators' legal rulings . . . by defining legal errors as exceeding the scope of the arbitrator's authority. Under such contractual language [the clause expanding review] legal error in an arbitration award is beyond the arbitrators' authority . . .” *Ibid.* at 4.

¹⁴⁷ [2005] UKHL 43 (30 June 2005), reversing the Court of Appeal decision found at [2004] All ER (Comm.) 97 (CA 2003).

¹⁴⁸ In addition, the arbitrators' right to award pre-award interest (which they did) was confirmed with no division among the judges.

¹⁴⁹ 1996 Arbitration Act, Section 69. The parties adopted the arbitration rules of the International Chamber of Commerce, which expressly provide that the award shall be final and not subject to appeal.

challenge for “serious irregularity,” defined in the statute to include “the tribunal exceeding its powers.”¹⁵⁰

In deciding that the arbitrators’ choice of award currency did *not* constitute an excess of their powers,¹⁵¹ the House of Lords affirmed the principle that “a mere error of law will not amount to an excess of power,”¹⁵² thus furthering sound arbitration policy and signaling that courts must not normally upset awards on matters that the parties have entrusted to arbitrators.¹⁵³

When may a claim be brought?

Another intriguing frontier in arbitral jurisdiction relates to the type of misbehavior that triggers the right to file a claim. Normally, simple breach of contract will be enough. However, the construction industry has experimented with a “no blame” culture called “alliancing” which allows recourse to courts only in the event of willful default.¹⁵⁴ How a “no blame” culture can be combined with arbitration remains to be seen. Thus far the drafting exercise has been problematic. “No blame clauses” have not always prevented court litigation, leading one to suspect that such clauses may also encounter difficulties in an arbitral setting.

From an economic perspective, the evolution of alliancing depends on the effect of restrictions on redress for contract breach. When recourse to courts and arbitrators is difficult, business partners may behave more cooperatively, or so one theory runs.¹⁵⁵ Another perspective, however, holds that apprehension about inability to enforce bargains may chill commercial risk-taking. If so, the drawbacks of forced togetherness may outweigh benefits.¹⁵⁶

¹⁵⁰ 1996 Arbitration Act, Section 68(2)(b). Compare Section 67, permitting award vacatur for excess of “substantive jurisdiction.”

¹⁵¹ Section 48 of the 1996 Arbitration Act permits arbitrators to “order the payment of a sum of money in any currency.”

¹⁵² Speech by Lord Steyn, paragraph 32, decision of 30 June 2005. Lord Steyn, who gave the principal speech in the decision, believed that Section 48 of the Arbitration Act gave the arbitrators “unconstrained” power to chose the currency of their award. (Paragraph 22, decision of 30 June 2005.) However, he went on to make the hypothetical (for him) assumption that the arbitrators had erred in making the award in European currencies, which he said might have been an error in interpreting either (i) the contract or (ii) Section 48 of the Arbitration Act. (Paragraph 23, decision of 30 June 2005.) In either event, said Lord Steyn, this was a simple error of law, not an excess of powers. Three other judges (Lords Hoffmann, Scott, and Rodgers) agreed on this latter point (error of law does not equal excess of power), although apparently not with Lord Steyn’s construction of Section 48 of the Arbitration Act. Lord Phillips disagreed, on the basis that the arbitrators had purported to exercise a discretion (awarding in European currency) that the statute did not give them.

¹⁵³ In this connection, Lord Steyn’s views might be less problematic if seen simply as affirming the arbitrators’ right to make a mistake in the exercise of their statutory powers. For example, if the Arbitration Act allows awards in any currency, but the objectively “correct” interpretation of the parties’ contract calls for damages in US dollars, then by awarding the equivalent in Canadian currency the arbitrators would have acted within their statutory power, albeit in way that constituted error. Arguably, such is the risk taken in any agreement to forego courts in favor of arbitration.

¹⁵⁴ Douglas Jones, *Project Alliances* [2001. Pt. 2], *Int’l Construct. Law Rev.* 411 (2001).

¹⁵⁵ For theories of cooperation, see e.g., Robert Axelrod, *The Evolution of Cooperation* (1984); Douglas R. Hofstadter, *The Prisoner’s Dilemma Computer Tournaments and the Evolution of Cooperation*, in Douglas R. Hofstadter, ed., *Metamagical Themes: Questing for the Essence of Mind and Pattern* (1985), Chapter 29, at 715–734.

¹⁵⁶ For a somewhat contrasting view on economic cooperation, see William W. Park, *Neutrality, Predictability and Economic Cooperation*, 12 (No. 4) *J. Int’l Arb.* 99 (1995), emphasizing respect for promises and shared expectations, rather than abstract “game theory” applications.

II. Investment Treaties, Backlash, and Public Policy

Paradigm shifts

In a world lacking any supranational judiciary with mandatory jurisdiction,¹⁵⁷ arbitration has long served to bolster the reliability of cross-border economic cooperation by promoting confidence in the security of assets invested abroad.¹⁵⁸ Absent arbitration, claims related to mistreatment of a foreign investor (whether discrimination, expropriation, or other forms of unfair treatment) were subject either to the default jurisdiction of the expropriating country or to the political and military force of the investor's government.¹⁵⁹

Like Churchill's description of democracy, investment arbitration has often appeared as the worst of alternatives except for all others. Traditionally, however, such investment arbitration was a matter of contract. Concession agreements often served as the foundation for arbitrators' power to hear claims related to investment disputes.¹⁶⁰ An arbitration clause was negotiated between the host government and a foreign investor.¹⁶¹

¹⁵⁷ The International Court of Justice (ICJ) has power to decide cases only when respondents have accepted jurisdiction either through treaty or declaration (ICJ Statute Article 36), and only with respect to claims brought by states (ICJ Statute Articles 34 and 35). Thus investors remain captive to the political predisposition of their home countries, requiring national sponsorship of an ICJ claim. The ICJ must on occasion determine which country has sufficient connection with an investor to justify standing to bring a claim. See *Barcelona Traction, Light and Power Co., Ltd. (Belgium) v. Spain* (2nd Phase), 1970 I.C.J. 3, 9 I.L.M. 227 (1970) (Belgium not permitted to espouse claim of Belgian shareholders in Canadian company). For one case where the ICJ did hear an investment dispute, see *Elettronica Sicula S.p.A. v. Italy* (the "ELSI Case"), 1989 I.C.J. 15 and 28 I.L.M. 1109 (1989) (no finding of illegality when Italy requisitioned American-owned plant to prevent liquidation). See generally F.A. Mann, *Foreign Investment in the International Court of Justice*, 86 Am. J. Int'l Law 92 (1992).

¹⁵⁸ For a recent survey of investment arbitration, see e.g., Barton Legum, *Trends and Challenges in Investor-State Arbitration*, 19 Arb. Int'l 143 (2003); *Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Todd Weiler, ed., 2005). On the definition of "investment" see Noah Rubins, *The Notion of Investment in International Investment Arbitration*, in *Arbitrating Foreign Investment Disputes* (N. Horn & S. Kröll eds., 2004) 283.

¹⁵⁹ Arbitration as an alternative to force in inter-state controversies is not limited to investment disputes. Perhaps the best known use of arbitrations to reduce political tensions was the Alabama Claims case. In 1872 an arbitral tribunal in Geneva awarded more than \$15 million to the United States for damage caused by Britain's violation of the laws of war in allowing warships to be built in British ports for the Southern Confederacy. *Alabama Claims Case, Decision and Award* (14 September 1872), reprinted in Thomas Willing Balch, *The Alabama Arbitration* 131 (1900). See generally, J. L. Brierly, *The Law of Nations* (1963), 285–288. A fine summary of the saga is presented in Tom Bingham, *The Alabama Claims Arbitration*, 54 Int'l & Comp. Law Q. 1 (2005). The *Alabama's* rampages of Northern shipping and the discovery of its wreckage off Normandy are described in Max Guérout, *The Wreck of C.S.S. Alabama*, 186 Nat'l Geographic Mag. 67 (Dec. 1994).

¹⁶⁰ On "state contracts" and arbitration, see generally, Charles Leben, *La Théorie du contrat d'Etat et l'évolution du droit international des investissements*, 302 Recueil des cours de l'Académie de droit international de La Haye 201 (2003), at 331–346.

¹⁶¹ On some of the differences between contract and treaty arbitration, see Gabrielle Kaufmann-Kohler, *Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are There Differences?*, in *Annulment of ICSID Awards* (E. Gaillard & Y. Banifatemi, eds., 2004) 189. In response to the question of whether differences exist, Professor Kaufmann-Kohler concludes, "Yes, no and maybe." Yes, because different review standards are justified when different issues are presented. No, because the basic annulment process remains the same. And maybe, since policy concerns underlying treaty disputes may require structural changes to traditional arbitral mechanisms. See also Ibrahim Fadlallah, *La Distinction "Treaty claims-Contract claims" et la compétence de l'arbitre (CIRDI: faisons-nous fausse route?)*, in 124(2) Gazette du Palais: Les Cahiers de l'arbitrage (2004/2) 3 (No. 340/342, 5/7 Dec. 2004).

During the past two decades, however, bilateral¹⁶² and multilateral¹⁶³ treaties have given foreign investors an opportunity to arbitrate disputes regardless of any contract with the host state.¹⁶⁴ While consent remains the foundation of arbitral jurisdiction, government acceptance takes a blanket form under free trade and investment agreements. A standing offer to arbitrate gives foreign investors a direct right of action against the host state, exercisable as the occasion arises,¹⁶⁵ in the event of acts such as discrimination, expropriation without compensation, or failure to accord “fair and equitable” treatment.¹⁶⁶ In some instances, there may also be opportunity for government-to-government arbitration following reimbursement to investors under political risk insurance.¹⁶⁷

The private flavor of arbitration begins to erode when states relinquish sovereignty to adjudicate matters directly implicating vital societal interests such as the environment,

¹⁶² The first bilateral investment treaty is thought to have been signed between Germany and Pakistan on 25 November 1959 and entered into force 28 April 1962. See Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* (1995) 129–164 and 267. While early treaties provided for the possibility of post-dispute arbitration (cases shall be submitted “upon the agreement by both parties”), during the 1980s it became common for treaties to provide that host states would give their “assent” to arbitration. The trend in modern investment treaties, however, is now to provide consent to arbitration. *Ibid.* 133–134. While early treaties provided for *ad hoc* arbitration between investors and host states, it has now become commonplace to refer to arbitration under the rules of ICSID and/or UNCITRAL. Article 24(3)(d) of the U.S. Model BIT (November 2004 version) also permits arbitration under “any other arbitration institution or under any other rules” agreed by claimant and respondent.

¹⁶³ Examples of multilateral investment treaties include NAFTA, discussed *infra*, and the Energy Charter Treaty (17 December 1994), text at 35 I.L.M. 509 (1995). The Energy Charter Treaty was originally intended to protect Western investment in the oil and gas industries of Russia and its then satellite countries. See generally, Thomas W. Wälde, *Investment Arbitration Under the Energy Charter Treaty: From Dispute Settlement to Treaty Implementation*, 12 *Arb. Int'l.* 429 (1996).

¹⁶⁴ See generally, Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 *Harv. Int'l Law J.* (2005) 67. Stephen M. Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law*, Proc. 98th Annual Meeting of the American Society of International Law (2004), at 27. Judge Schwebel notes the U.S. Supreme Court pronouncement in the *Sabbatino* case, to the effect that “there are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state’s power to expropriate the property of aliens.” *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

¹⁶⁵ For an analytic overview of treaty-based investment arbitration, see e.g. Zachery Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 2003 *Br. Yearbook Int'l Law* 151 (2004); Jan Paulsson, *Arbitration without Privity*, 10 *ICSID Review / Investment Law Rev.* 232 (1995); Alain Prujiner, *L'Arbitrage unilatéral: Un coucou dans le nid de l'arbitrage conventionnel?*, *Rev. arb.* (2005) 64.

¹⁶⁶ See e.g. *CMS Gas Transmission Co. v. Republic of Argentina*, Award of 12 May 2005, granting \$133 million in damages for breach of obligations to accord CMS fair and equitable treatment. ICSID Case No. ARB/01/08.

¹⁶⁷ For the United States, these treaties are normally negotiated to protect the Overseas Private Investment Corporation (OPIC), which provides support for foreign investment in the form of insurance and guarantees. See Mark A. Garfinkel, *OPIC's Salvage Efforts, Developments in International Commercial Dispute Resolution*, 39 *Int'l Lawyer* 235, at 241–43 (ABA Year in Review, B. Sheppard, E. Torvey, R. O'Sullivan, M. Garfinkel, G. Anderson, G. Fischer, G. Sampliner, and R. Teitelbaum, eds. 2005). Approximately 150 Investment Incentive Agreements are now in effect. For one such agreement that has recently given rise to an arbitration claim, see Investment Incentive Agreement Between Government of United States of America and Government of India, 19 November 1997. Article 6(c) provides for an *ad hoc* government-to-government arbitration “in connection with acts attributable to the Government of India which involve questions of liability under public international law.”

taxation,¹⁶⁸ or administration of justice.¹⁶⁹ Long understood by developing countries, for which arbitration was the price of capital,¹⁷⁰ the problematic aspects of arbitration have recently come home to industrialized nations as well. This awakening to arbitration's darker side came in large measure from the change in the basis for arbitral jurisdiction, from contract to treaty.

The paradigm shift resulted in a significant backlash. When disputes arise, governments caught unaware have less room to escape. Critics of investment arbitration have made several reform proposals which, depending on perspective, would either enhance arbitration's legitimacy or reduce its effectiveness.¹⁷¹ Proposals have been floated through a variety of vehicles: journalists' editorials, legislation, governmental interpretations of free trade agreements, and a set of self-improvement suggestions by the World Bank's arbitration affiliate.

Unfortunately, rational discourse has often been obscured by intemperate rhetoric attacking investment arbitration as a "sophisticated extortion racket,"¹⁷² a "one-sided" process that "greatly favors corporations"¹⁷³ (without mention of the significant arbitrations lost by private companies¹⁷⁴), a "nasty" mechanism for "lawsuits . . . to overrule regulatory decisions by host countries,"¹⁷⁵ a "fast track attack on America's values,"¹⁷⁶ and a scheme to "force taxpayers to pay billions of dollars in lawsuits."¹⁷⁷ Surprisingly, some American

¹⁶⁸ One author recently observed that "other than the power to declare war, a democracy's power to assess taxes affects the largest percentage of its citizens in almost every aspect of their lives." James R. Repetti, *Introduction to the State of Federal Income Taxation: Rates, Progressivity, and Budget Processes*, 45 B.C. Law Rev. 989 (2004). On the relationship of taxation to renegotiation of agreements by governments, see Thomas Wälde & Abba Kolo, *Renegotiating Previous Governments' Privatization Deals: The 1997 UK Windfall Tax on Utilities and International Law*, 19 *Northwestern J. Int'l Law & Bus.* 405 (1999).

¹⁶⁹ The public-private line is not always easy to draw. Even an arbitration between two corporations may affect the public interest, as when a pharmaceutical license is at issue. Such concerns were at the heart of the "subject matter arbitrability" cases discussed *supra*.

¹⁷⁰ See e.g. Andrew Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 *Virginia J. Int'l L.* 639 (1998).

¹⁷¹ See Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 *Yale J. Int'l L.* 365 (2003). Compare Ari Afilalo, *Meaning, Ambiguity and Legitimacy: Judicial (Re-)Construction of NAFTA Chapter 11*, 25 *Northwestern J. Int'l Law & Bus.* 279 (2005).

¹⁷² See transcript of the Bill Moyers PBS special series *Trading Democracy*, which aired on 1 February 2002, and can be obtained on <http://www.pbs.org/now/transcript>.

¹⁷³ See Editorial, *The Secret Trade Courts*, *New York Times*, 27 September 2004. Almost as an afterthought, the editorial noted that "some arbitration is necessary in international trade, not least because courts in many poor countries are corrupt, inept or unfair."

¹⁷⁴ See e.g., *Loewen* and *Mondev* cases, discussed *infra*.

¹⁷⁵ Thomas Oliphant, *Can Bush finesse the free trade accord*, *Boston Globe*, 6 June 2004, at L-11, cols.1-5 (addressing the Central American Free Trade Agreement).

¹⁷⁶ Sub-captions read: "Secret Courts for Corporations" and "Taxpayer Dollars for Foreign Polluters." Sponsored by Ralph Nader's "Public Citizen's Global Trade Watch," the publication urged rejection of the 2002 Trade Act giving the President "fast track" authority to negotiate free trade agreements. Nader's group alleged that these agreements would permit "foreign corporations to sue the federal government in secret tribunals, demanding our tax dollars as payment for complying with U.S. health, safety and pollution laws." See *Washington Post*, 5 December 2001, at A-5, placed by the Global Trade Watch division of Public Citizen (<http://www.citizen.org>).

¹⁷⁷ See transcript of the Bill Moyers series, *supra* n. 172.

judges have asserted that their decisions are now subject to arbitral review,¹⁷⁸ even though no existing treaty provides for review of court decisions.¹⁷⁹

Ironically, these American complaints echo concerns expressed for over a century by developing countries. The United States and much of Europe resisted Latin American attempts to eliminate arbitration in favor of local courts under the so-called “Calvo Doctrine” (proposed by the nineteenth-century Argentine jurist Carlos Calvo¹⁸⁰), portions of which were later adopted and adapted by the United Nations General Assembly in its “New International Economic Order.”¹⁸¹ China has adopted its own variant of the Calvo Doctrine by excluding from application of the New York Convention “disputes between foreign investors and the government of the host country.”¹⁸² The practical effectiveness of

¹⁷⁸ In January 2004, the Conference of State Chief Justices included in their annual conference program a panel on NAFTA titled: “Chief Justice: You’ve been overruled.” The New York Times recently quoted Margaret Marshall, Chief Justice of Massachusetts, as telling how surprised she was to hear at a dinner party that judgments of her court were “subject to further review.” Adam Liptak, *NAFTA Tribunal Stirs U.S. Worries*, New York Times, 18 April 2004. Presumably Justice Marshall was referring to the *Mondev* case (which the claimant ultimately lost), in which a Canadian real-estate developer sought damages related to Boston’s refusal to go through with a promise to sell downtown land for redevelopment.

¹⁷⁹ At most the federal government might be found liable to pay damages for mistreatment of Canadians or Mexicans, according to the very same international law standard that the United States for years has applied to foreign countries that deny justice to American citizens. To date, however, the United States has never been held accountable for discriminatory court decisions. Canadian investors met defeat in the two high profile cases of *Loewen* and *Mondev*.

¹⁸⁰ First announced in 1868, Calvo’s doctrine was given its fullest expression in his treatise on public international law. In line with the fashion of the day, the French language gave the author’s first name as Charles rather than Carlos. See Charles Calvo, *Le Droit international théorique et pratique* (5th edn, 1896), vol. I §§ 185–205, at 322–51, and vol. III §§ 1280–96, at 142–55. The principle that foreign nations should not intervene in South America to protect private property and debts included the corollary that claims for improper takings of property were to be brought by the foreign investors themselves and were subject to the exclusive jurisdiction of host state law and courts, which implied waiver of home state protection and surrender of rights under customary public international law. See generally Kurt Lipstein, *The Place of the Calvo Clause in International Law*, 22 Br. Yearbook of International Law 130 (1945), concluding at 145 that “before international tribunals the Calvo Clause is ineffective.” With his customary caution, Professor Lipstein distinguished between Calvo’s initial attempt to articulate international law (excluding claims for state responsibility due to official misbehavior, riot and insurrection) and the subsequent use of his doctrine in contracts concluded between South American nations and foreign investors. In March 2005, a bill introduced into the Argentine Congress would limit arbitration in cases involving the State or State agencies. See Guido Tawil, *Is Calvo Finally Back?*, Transnational Dispute Management News, 22 April 2005 (<http://www.transnational-dispute-management.com/news>).

¹⁸¹ An attempt to give legal form to the New International Economic Order came in the Charter of Economic Rights and Duties of States, adopted by G.A. Res. 3281, 29 U.N. GAOR, Supp. (No. 31) 50, U.N. Doc. A/9631 (1974). Charter Article 2(2)(c) provides that controversy over compensation for expropriated property “shall be settled under the domestic laws of the nationalizing state and its tribunals.” The United States opposed the Chapter, which was adopted by a vote of 120 to 6 (with 10 abstentions), the six negative votes having been cast by Belgium, Denmark, Germany, Luxembourg, the United Kingdom, and the United States. See generally William W. Park, *Legal Issues in the Third World’s Economic Development*, 61 B. U. Law Rev. 1321 (1981). This principle was rejected in *Texaco Overseas Petroleum Co. (TOPCO)/California Asiatic Oil Co. (CALASIATIC) v. Libya*, 17 I.L.M. 1 (1978). See also Thomas Waelde, *Requiem for New International Order, in Liber Amicorum for I. Seidl-Hohenveldern* 771 (G. Hafner *et al.*, eds., 1998).

¹⁸² As permitted by Convention Article I(3), China restricted its application of the Convention to legal relationships “considered as commercial” under the national law of China. The People’s Supreme Court then interpreted “commercial relationship” to exclude disputes between foreign investors and China. See Supreme People’s Court Notice on Implementation of China’s Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 20 June 1987, reprinted in Cheng Dejun, Michael J. Moser, & Wang Shengchang, *International Arbitration in the People’s Republic of China* (2nd edn, 2000), at 1173; original at <http://www.court.gov.cn/lawdata/explain/civilcation/200304010130.htm>.

this reservation depends on how arbitral tribunals treat “most favored nation” clauses in China’s bilateral investment treaties.¹⁸³

Skepticism about investment arbitration took an interesting twist during negotiation of the Australia–U.S. Free Trade Agreement,¹⁸⁴ which relegated the matter to something that might be discussed later,¹⁸⁵ assuming either country requests consultations on the subject.¹⁸⁶ From the Australian perspective, there was little relish for the prospect of a host of litigious Americans filing arbitration claims which would otherwise be addressed in local courts.¹⁸⁷

When the rhetoric is toned down, two core concerns seem to emerge. The first is the prospect of appellate review of the legal merits of arbitral awards. The second focuses on greater public involvement, through more accessible proceedings (often called “transparency”) and the intervention of non-parties in the form of *amicus* briefs by organizations such as environmental, business, or labor associations that purport to represent groups affected by the outcome of the arbitration. The context and wisdom of these proposals will be explored below in greater depth.

¹⁸³ Investment treaties between China and both Germany and the Netherlands contain consent to arbitration. Whether investors from other countries may avail themselves of this consent depends on the “most-favored-nation principle,” as discussed in *Maffezini v. Spain*, ICSID Case ARB 97/17 (Decision on Jurisdiction, 25 January 2000) (jurisdiction found under the Spanish–Argentina investment treaty by incorporating provisions of the Spanish–Chile treaty which, unlike the Argentina treaty, imposed no waiting period during which host country courts had exclusive competence). See Ruth Teitelbaum, *Who’s Afraid of Maffezini? Recent Developments in the Interpretation of Most Favored National Clauses*, 23 (No. 3) J. Int’l Arb. 225 (2005); Dana H. Freyer and David Herlihy, *Most-Favored Nation Treatment and Dispute Settlement in Investment Arbitration: Just How “Favored” is “Most Favored”?*, 20 ICSID Rev. / Foreign Investment Law J. 58 (Spring 2005); Stephen D. Sutton, *Emilio Augustin Maffezini v. Kingdom of Spain and the ICSID Secretary-General’s Screening Power*, 21 Arb. Int’l 113 (2005). On the *Maffezini* decision, see also Abby Cohen Smutny, *State Responsibility and Attribution: When Is a State Responsible for the Acts of State Enterprises?*, in *International Investment Law and Arbitration: Leading Cases from the Icsid, Nafta, Bilateral Treaties and Customary International Law* 17 (T. Weiler, ed., 2005). For a case that rejected the “most favored nation” principle, see *Salini Construttori S.p.A & Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case ARB/02/13, Decision on Jurisdiction, 29 November 2004.

¹⁸⁴ See USTR Press Release 2004–42, 18 May 2004. The FTA was signed on 18 May 2004. American implementing legislation was signed into law by President Bush on 3 August 2004 (P.L. No. 108–286). The dispute resolution provisions in FTA Chapter 21 relate only to differences between the two contracting states on how to interpret the terms of the treaty.

¹⁸⁵ Article 11.16, Australia–U.S. Free Trade Agreement provides that *if* either country in the future considers investment arbitration desirable, consultations may be requested. The treaty states, “If a Party considers that there has been a change in circumstances affecting the settlement of disputes on matters within the scope of [FTA Chapter 11] and that, in light of such change, the Parties should consider allowing an investor of a Party to submit to arbitration with the other Party a claim regarding a matter within the scope of this Chapter, the Party may request consultations with the other Party on the subject, including the development of procedures that may be appropriate.” This provision continues to make clear that nothing in the FTA prevents arbitration “to the extent permitted under [host state] law.”

¹⁸⁶ The Australia–U.S. treaty represents a special situation, however, as memorialized in a note emphasizing the two nations’ shared legal traditions and respect for “due process of law, including the principle that adjudicators must perform their duties in an objective and impartial manner, thereby providing for the fair treatment of all persons, including foreign investors.” See *Summary of the Agreement for U.S.–Australia Free Trade Agreement* (included in the transmittal package sent to the Congress with the treaty text), at p. 11. After noting that Australia has a “legal system similar to that of the United States” and affirming American investors’ “confidence in the fairness and integrity of Australia’s legal system,” the memo cautioned, “There are few other countries in the world that are in similar circumstances.” See also the jointly prepared U.S.–Australian “Negotiating History on Article 11.16 (Consultations on Dispute Settlement).”

¹⁸⁷ For a caustic comment on the U.S.–Australian FTA, see Ross Gittins, *Selling Off a Slice of Our Country*, Sydney Morning Herald, 11 August 2004, at 17, cols. 1–6.

Lessons from the North American Free Trade Agreement

Backlash against arbitration took a new direction when the United States found itself a respondent in actions brought by Canadians pursuant to the North American Free Trade Agreement (NAFTA),¹⁸⁸ which gives investors from one NAFTA country the right to arbitrate grievances against the government of another.¹⁸⁹ Americans came to see that arbitration is not something that happens only to countries like Albania and Kazakhstan. For the United States, NAFTA brought investment arbitration full circle to 1794, when the so-called “Jay Treaty” (named for its American negotiator John Jay) gave British creditors the right to arbitrate claims of alleged despoliation by American citizens and residents.¹⁹⁰

Much of the American reaction can be traced to two high-profile cases which implicated state judicial actions, one in Mississippi and the other in Massachusetts. While such cases understandably touch sensitive nerves, it is important to remember that they follow a long line of American claims against foreign countries for “denial of justice”¹⁹¹ by foreign

¹⁸⁸ North American Free Trade Agreement, 32 I.L.M. 289, 1993 WL 574441, enacted in the United States on 8 December 1993, 107 Stat. 2057. Entry into force on 1 January 1994.

¹⁸⁹ NAFTA Chapter 11 provides both substantive protection for cross-border investment and arbitration to remedy host state breaches of its duties. NAFTA Article 1120 permits aggrieved investors to choose arbitration either supervised by the World Bank affiliate ICSID (International Center for Settlement of Investment Disputes) or conducted under rules adopted by the United Nations Commission on International Trade Law (UNCITRAL). Substantive investor protection is provided by Articles 1102 (national treatment), 1105 (respect for international law, including “fair and equitable treatment” and “full protection and security”), and 1110 (compensation for nationalized property). Payment for takings must be made without delay, at fair market value, and in a form fully realizable: a formula reminiscent of the “prompt, adequate and effective” standard taken by the United States and summarized in Restatement (3rd) Foreign Relations Law § 712.

¹⁹⁰ Treaty of Amity, Commerce and Navigation, London, 19 November 1794, U.S.–U.K., 8 Stat. 116. Under Article 6, damages for British creditors were to be determined by five Commissioners, two appointed by the British and two by the United States. The fifth was to be chosen unanimously by the others, in default of which selection would be by lot from between candidates proposed by each side. See generally Barton Legum, *Federalism, NAFTA Chapter Eleven and the Jay Treaty of 1794*, 18 ICSID News (Spring 2001).

¹⁹¹ See generally, J. L. Brierly, *The Law of Nations* (1963) at 286–287, noting two different views on what constitutes a denial of justice, also sometimes referred to as *déni de justice*. The narrower interpretation (on occasion adopted by Latin American scholars) contends that denial of justice exists only when foreigners have been denied access to courts. The broader view (embraced in much English, American, and Continental writing) includes substandard judicial acts such as corruption, dishonesty, unwarranted delay, and decisions imposed by the executive. Brierly laments that the denial of justice is “sometimes loosely used to denote any international delinquency towards an alien for which a state is liable to make reparation,” and then goes on to list ways in which a court may fall below “the standard fairly to be demanded of a civilized state,” including corruption, unwarrantable delay, or “a judgment . . . so manifestly unjust that no court which was both competent and honest could have given it.” *Ibid.* at 287. Brierly adds that “no merely erroneous or even unjust judgment of a court will constitute a denial of justice” unless it misinterprets a rule of international law. For the most recent study on this rich and variegated topic, see Jan Paulsson, *Denial of Justice in International Law* (2005), suggesting *inter alia* that our discourse should abandon the term “substantive” denial of justice to describe national court disregard of international law, which should be treated like any other violation of the law of nations. See also A. W. Freeman, *The International Responsibility of States for Denial of Justice* (1938); Ian Brownlie, *Principles of Public International Law* (6th edn, 2003) at 506–508.

courts.¹⁹² Consistent with longstanding practice,¹⁹³ NAFTA prohibits government measures tantamount to expropriation¹⁹⁴ and gives “measure” a broad scope to include “any law, regulation, procedure, requirement or practice.”¹⁹⁵

If hard facts make bad law, they also make for interesting cases, as illustrated in *Loewen v. the United States*.¹⁹⁶ A Mississippi jury awarded \$500 million in favor of a Mississippi claimant against a Canadian funeral company for breach of an agreement related to burial insurance contracts. The transactions giving rise to the lawsuit were valued at 1% of the amount awarded.¹⁹⁷ The trial included allegedly xenophobic comments intended to inflame jurors. After the half-billion dollar verdict, the investor attempted to appeal only to find a requirement that it post a bond of \$625 million. Not surprisingly, the investor then filed a NAFTA claim alleging discrimination, unfair treatment, and *de facto* expropriation.

The arbitrators found the Mississippi court’s behavior clearly improper, describing the trial with terms such as “miscarriage of justice,”¹⁹⁸ “disgrace,”¹⁹⁹ and “discreditable.”²⁰⁰ Nevertheless, the arbitrators dismissed the case on jurisdictional grounds. A bankruptcy reorganization occasioned in part by the settlement had left the company’s business assets in a surviving American entity,²⁰¹ thus breaking the continuing diversity of nationality which

¹⁹² See *Calmark Commercial Dev., Inc. v. United States of Mexico*, Notice of Intent to Commence Arbitration filed 11 January 2002. An American corporation that had agreed to develop a tourist attraction in Mexico ended up paying for land which was transferred to a third party. A lawsuit in the courts of the State of Baja California failed to recover the misplaced investment, due to what the American claimant alleged were procedural improprieties. The NAFTA claim was based on Article 1105: “treatment in accordance with international law, including fair and equitable treatment and full protection and security.” Supporting authorities cited by the American claimant included a 1927 American claim against Mexico, *United States (Laura Janes) v. Mexico* (Opinions of Commissioners 108, 1927 General Claims Commission 1926), in which failure to punish was deemed to constitute approval of wrongdoing.

¹⁹³ See Vandeveld, *United States Investment Treaties: Policy and Practice*, Appendix C, at 166, noting the State Department position that bilateral investment treaty prohibitions on expropriations apply to “essentially any measure regardless of form” which may deprive an investor of important property rights.

¹⁹⁴ NAFTA Article 1110. ¹⁹⁵ NAFTA Article 201.

¹⁹⁶ *The Loewen Group, Inc. & Raymond L. Loewen v. U.S.A.*, ICSID Case No. ARB (AF)/98/3, Final Award 26 June 2003 (Anthony Mason, Abner J. Mikva, and Michael Mustill arbs.), 42 I.L.M. 811 (2003), available at <http://www.naftaclaims.com>. The Interim Award on Jurisdiction, 5 January 2001, rejected a suggestion that judicial actions constitute an exclusion to the notion of governmental measure. A request for reconsideration of the individual claim of Ray Loewen under NAFTA Article 1116 (claim by investor on its own behalf) was rejected by the tribunal in a brief decision dated 17 August 2004 but sent 13 September 2004. Three months later Raymond Loewen filed a “Notice of Petition to Vacate” in the U.S. District Court for the District of Columbia (*Loewen v. USA*, Case No. 1.04CV02151). Under Section 12 of the Federal Arbitration Act (FAA) notice of a motion to vacate must be served on the adverse party (the U.S. government in this case) within three months after an award has been rendered, even if the motion itself is filed later. Loewen served his notice on 13 December 2004, announcing that a motion to vacate would be filed in January 2005. The asserted grounds for vacatur (as provided under FAA Section 10) included misconduct in refusing to hear evidence, misbehavior prejudicing the claimant’s rights, excess of jurisdiction and manifest disregard of the law. On 31 October 2005, the U.S. District Court for the District of Columbia rejected the motion as untimely, holding that the time limit began to run when the award itself was dispatched on 26 June 2003.

¹⁹⁷ The dispute involved three contracts valued at \$980,000, and an exchange of funeral homes valued at \$2.5 million for a burial insurance company valued at \$4 million. ¹⁹⁸ Final Award, paragraph 54.

¹⁹⁹ Final Award, paragraph 119. ²⁰⁰ Final Award, paragraph 137.

²⁰¹ See *In re Loewen Group Int’l Inc.*, 274 B.R. 427 (Bankr. D. Del 2002). In June 1999, The Loewen Group Inc. and its Delaware subsidiary (Loewen Group International, Inc.) filed a petition for relief under Chapter 11 of the U.S. Bankruptcy Code. Insolvency proceedings were also commenced in Canada. Pursuant to a plan of reorganization approved by the Bankruptcy Court, The Loewen Groups’ business assets (funeral

the arbitrators considered necessary for standing to bring a claim.²⁰² The tribunal indicated, however, that even absent the reorganization the claim would have been denied for failure to exhaust local judicial remedies.²⁰³ Some observers have questioned whether the result would have been the same had the respondent been a country other than the United States.²⁰⁴

Some observers familiar with litigation in the United States might note that some Americans also complain about Mississippi juries as dispensers of equal-opportunity injustice. The relevance of the observation, however, remains obscure in a world where investment protection has long included a minimum standard for protecting aliens under customary international law. The United States has never accepted mistreatment of its citizens abroad on the ground that the relevant country treats its own people just as badly. Indeed, perceptions of across-the-board judicial corruption in certain regions of the world have been one of the chief motivators for the American tradition of arbitrating investment disputes.²⁰⁵

In the other case,²⁰⁶ the Massachusetts Supreme Judicial Court dismissed an action brought by a Québec corporation against the city of Boston and its Redevelopment Authority. Following an increase in the property value, Boston refused to go through an agreed-upon sale of land. The Canadian sued and obtained a short-lived victory. A jury verdict in its favor was overturned by a court that deemed the developers to have forfeited their rights by failure to show they were ready to close the sale.²⁰⁷

homes and insurance) were transferred to a reorganized American corporation and The Loewen Group ceased to exist. The Delaware company (Loewen Group International, Inc.) became the parent of the reorganized surviving entity, renamed Alderwoods Group Inc. NAFTA claims against the United States were assigned to a new company called “Nafcanco” (incorporated in Nova Scotia) whose only function was to pursue the arbitration.

²⁰² An American company cannot bring a claim against the United States. NAFTA Chapter 11 obligations run from a host state to an “investor of another Party” under Articles 1102, 1105, and 1110. The arbitral tribunal denied the claim brought by the individual owner, Ray Loewen, in a decision announced 13 September 2004, signed 17 August (Mason and Mikva) and 6 September (Mustill). See U.S. Department of State, <http://www.state.gov/s/l>.

²⁰³ For a more general perspective on the exhaustion of local remedies in investment arbitration, see Christoph Schreuer, *Calvo’s Grandchildren: The Return of Local Remedies in Investment Arbitration*, 1 Law and Practice of International Courts and Tribunals 1 (2005).

²⁰⁴ See Noah Rubins, *Loewen v. United States of America: The Burial of an Investor-State Arbitration Claim*, 21 Arb. Int’l 1 (2005).

²⁰⁵ Problematic members of the judiciary do not limit themselves to any one geographical area. For an exploration of the problem in the United States, see Geoffrey P. Miller, *Bad Judges*, Working Papers, NYU Center for Law & Business (Paper CLB-03-002, 2005).

²⁰⁶ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB (AF)/99/2; Award of 11 October 2002 published in 42 I.L.M. 85 (2003). For the underlying litigation, see *Lafayette Place Assocs. v. Boston Redev. Authority*, 427 Mass. 509, 694 N.E.2d 820 (1998). Operating in Boston through the limited partnership, Mondev had agreed to participate in a project originating in an attempt to rehabilitate the so-called “Combat Zone,” a dilapidated area near Boston’s downtown shopping district. See generally, Jack Coe, *Denial of Justice and NAFTA Chapter Eleven: The Mondev Award*, 3(1) Int’l Arb. News 2 (Winter 2002–2003); Rudolph Kass, *How Sharp are the Tiger’s Teeth?*, Boston Bar Journal (Sept.–Oct. 2003) 10; Dana Krueger, *The Combat Zone: Mondev International Ltd. v. United States and the Backlash Against NAFTA Chapter 11*, 21 B.U. Int’l Law J. 399 (2003).

²⁰⁷ A jury verdict has been rendered against the defendants. The Superior Court then entered judgment against the city, but granted judgment notwithstanding the verdict for the Redevelopment Authority. The developer appealed. The Supreme Judicial Court, in an opinion authored by Justice Charles Fried, held that purchaser’s failure to perform certain contractual obligations precluded it, as a matter of law, from placing the city in default. The Canadians apparently did not follow the steps required by the agreement, since the offer to buy the parcel had not manifested a precise time and place for passing papers. 427 Mass. 509 (1998). The Boston Redevelopment Authority was held immune from liability under the Massachusetts Tort Claims Act.

As in *Loewen*, the result was an arbitration asserting the panoply of NAFTA claims: discrimination, unfair treatment, and expropriation. Again the claimant lost, in part because Boston's controverted behavior occurred before NAFTA's entry into force, and in part because the Massachusetts court decision fell short of a "denial of justice."²⁰⁸

Politicized dispute resolution and global economic efficiency

In both *Loewen* and *Mondev*, the United States ultimately won, obtaining dismissal of Canadian claims. In the interim, however, these and other cases caused enough apprehension to stir legislative proposals to change the nature of investment arbitration. Some would have stood the process on its head, focusing less on fairness for Americans abroad than on limiting rights of foreigners in the United States.

A bill proposed by Senator John Kerry would have politicized the process by eliminating any right to arbitration.²⁰⁹ The Kerry proposal would have allowed an investor's own government (not the host state) to deny approval for arbitration of claims deemed lacking in "legal merit." Such screening would have been a retreat toward the practice whereby expropriation was addressed by diplomatic protection, through governments' espousal of their nationals' claims related to foreign assets.

Politicization of asset protection would in many cases leave investment stability a casualty, thereby chilling beneficial cross-border capital flows. If the investor's government was negotiating with the expropriating country (for example, to obtain approval of a naval base or support for a military action), there might be little enthusiasm for expropriation claims that would exacerbate relations.

Investors can normally (but not always) be expected to prefer arbitration to the more cumbersome political process whereby private claims are subrogated to the government. In some instances, however, the political process whereby one government pressures another might still have its advantages, either as a way to avoid the cost of arbitration or when the legal basis of the investor's claim was doubtful.²¹⁰

A return to anything approaching gunboat diplomacy, however, would have significant costs to the economic efficiency and stability that have usually been fostered by the rule of law. Investment arbitration thus constitutes an instrument of global economic efficiency, whose absence would mean greater risk reflected in higher prices.

²⁰⁸ On "denial of justice," see works by Brierly, Paulsson, Freeman, and Brownlie, discussed *supra*.

²⁰⁹ See proposed amendment to Andean Trade Preference Expansion Act, H. R. 3009 (107th Cong. 2nd Sess.), Senate Amendment 3430, §2102(b) of the Andean Trade Preferences Act, Cong. Rec. 16 May 2002 S 4504. The amendment was tabled 21 May 2002. See SA 3430, proposing Section 2102(b)(3)(H)(i) & (ii).

²¹⁰ See presentation by Grant S. Kesler, ABA Section on International Law, Houston, 14 October 2004 (copy on file with author). Mr. Kesler, former CEO of Metalclad Corporation, the American claimant that obtained the first award under NAFTA Chapter 11, expressed the view his company would have been "better off to continue the political pressure being brought by the White House and Commerce Department." On the saga leading to that conclusion, see *Metalclad v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000, reprinted in 16 Int'l Arb. Rep. 62 (January 2001), finding expropriation without adequate compensation where a U.S.-owned company was prevented by a Mexican municipality from operating a hazardous waste facility in Mexico. A survey of cases on administrative transparency as a principle of international law can be found in John Hanna, Jr., *Is Transparency of Governmental Customary International law in Investor-Sovereign Arbitrations? – Courts and Arbitrators May Differ*, 21 Arb. Int'l 287 (2005).

Commercial cooperation is normally enhanced by a reliable adjudicatory system providing for impartial enforcement of agreements.²¹¹ In a world lacking international courts with mandatory jurisdiction, arbitration provides the most reasonable analogue of such a relatively neutral dispute resolution process, making determinations based on the parties' mutual expectation on signing their contract, rather than on whose government has the bigger florilla.

The new free trade agreements

As finally enacted, the 2002 Trade Act²¹² called for substantial modification of investment arbitration. "Trade Negotiating Objectives" set forth a laundry list of steps to improve dispute resolution, including establishment of permanent appellate bodies for arbitration intended to provide coherence to interpretations of trade agreements, and public input through open proceedings and *amicus curiae* briefs from interested third parties.²¹³ These measures dovetail into the *Notes of Interpretation* issued a year earlier by the NAFTA Free Trade Commission,²¹⁴ addressing criticism that arbitration was not "transparent" by stating that nothing in NAFTA imposes a general duty of confidentiality on the disputing parties. In addition, the *Notes* interpreted NAFTA's requirement of "fair and equitable

²¹¹ See Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (ed. and trans. P. Baehr & Gordon Wells, 2002), Appendix II, *Collected Essays in the Sociology of Religion*, at 365 ("Modern rational capitalism requires . . . calculable law and administration conducted according to formal rules, without which no rational private economic business with standing capital . . . is possible."). See also Max Weber, *General Economic History* trans. F. Knight (1966) at 277. Three thousand years earlier, an absence of effective adjudicatory mechanisms seems to have furthered Absalom's revolt against King David—assuming, of course, that Absalom was telling the truth. Apparently Absalom would stand on the roadside and shout to those with litigation pending, "Your claims are good and right; but there is no one deputed by the king to hear you. If only I were judge in the land! Then all who had a suit or cause might come to me [for] justice." II Samuel 15 2–4.

²¹² Trade Act of 2002 (P.L. 107–210, 16 Stat. 933) § 2102(b)(3), codified 19 U.S.C. 3801 *et seq.*

²¹³ See § 2102(b)(3), Trade Act of 2002 (P.L. 107–210), 16 Stat. 933, codified 19 U.S.C. 3802. The ultimate portion of the preamble states that American objectives are (*inter alia*) to improve investment dispute resolution mechanisms including (i) "mechanisms to eliminate frivolous claims"; (ii) procedures to ensure the efficient selection of arbitrators and the expeditious disposition of claims; (iii) procedures to enhance opportunities for public input into the formulation of government positions; and (iv) to provide "an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions of trade agreements." In addition, the objectives included transparency in dispute settlement (to the extent consistent with protection of confidential business information) by "(i) ensuring that all requests for dispute settlement are promptly made public; (ii) ensuring that (I) all proceedings, submissions, findings, and decisions are promptly made public; and (II) all hearings are open to the public; and (iii) establishing a mechanism for acceptance of *amicus curiae* submissions from businesses, unions, and nongovernmental organizations."

²¹⁴ See NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001*, Part B, reprinted in 13 *World Trade and Arb. Materials* 139 (Dec. 2001). NAFTA Article 1131(2) states that an interpretation by the Free Trade Commission "shall be binding on a [Chapter 11] Tribunal." However, Article 2202 requires any departure from the text of NAFTA to be approved pursuant to "applicable legal procedures of each Party." To date, at least one decision (*Pope & Talbot*) suggested in dicta that the *Notes* were really an amendment that would not be followed if the relevant issue had been dispositive. By contrast, other tribunals have deferred to the *Notes*. See e.g. Final Award in *Loewen*, paragraph 128, stating that "fair and equitable treatment" and "full protection and security" were not free standing obligations, but constituted duties under NAFTA "only to the extent recognized by customary international law." The *Loewen* tribunal stated that any contrary view of other NAFTA tribunals "must be disregarded." Similar provisions for interpretation now find their way into investment treaties and free trade agreements. See e.g. Article 30(3) of the 2004 Uruguay bilateral investment treaty discussed *infra*. For a recent commentary on the matter, see Charles H. Brower, II, *Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105*, 5 *Int'l Arb. News* 2 (ABA, Summer 2005).

treatment” as mandating only the minimum standard of customary international law, whose violation would not be established by breach of another NAFTA provision or separate international agreement.²¹⁵

Following the 2002 Trade Act, new patterns for investment dispute resolution found their way into American free trade agreements with Singapore and Chile,²¹⁶ the Central American Free Trade Agreement (CAFTA),²¹⁷ and a new standard text for use as a paradigm in bilateral investment treaty (BIT) negotiations.²¹⁸ The State Department in 2004 released a model bilateral investment treaty,²¹⁹ later modified to reflect public comments and experience in negotiating the treaty with Uruguay.²²⁰

In some respects, the new regime is quite investor friendly. For example, the revised Model BIT contains no “fork in the road” provision constituting an absolute bar to arbitration by an investor who had previously referred the dispute to courts of the host state.²²¹ Instead, the new BIT requires only that the investor, as a condition of arbitration, must agree to waive the right to initiate or to continue judicial or administrative actions in either host or investor state.²²²

²¹⁵ For example, a Multilateral Agreement on Investment (reached in the future within the OECD or the WTO) might refine concepts such as “regulatory taking” in a way different from customary international law.

²¹⁶ The agreement with Chile has received particular attention. See generally, David Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States–Chile Free Trade Agreement*, 19 Am. U. Int’l Law Rev. 679 (2004); Scott R. Jablonski, ¡Sí, PO!, *Foreign Investment Dispute Resolution Does Have a Place in Trade Agreements in the Americas: A Comparative Look at Chapter 10 of the United States–Chile Free Trade Agreement*, 35 Inter-Am. Law Rev. 627 (2004).

²¹⁷ See USTR Press Release 2004–45 (28 May 2004), at <http://www.ustr.gov>. The treaty would include Dominican Republic, Costa Rica, El Salvador, Guatemala, Nicaragua, and Honduras. The agreement was approved by the U.S. Senate on 30 June 2005.

²¹⁸ See generally, Barton Legum, *Lessons Learned from the NAFTA: The New Generation of U.S. Investment Treaty Arbitration Provisions*, 19 (No. 2) ICSID Review–Foreign Investment Law J. (Fall 2004) 344, focusing on four areas of investor-state arbitration: transparency of proceedings; objections treated as preliminary questions; constitution of the arbitral tribunal; and the process for rendering final awards.

²¹⁹ The State Department first released the Model in February 2004. The new version was made public in November. See Mark Kantor, *The New Draft Model U.S. BIT: Noteworthy Developments*, 21 J. Int’l Arb. 383 (Aug. 2004).

²²⁰ Treaty Between USA and Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, 25 October 2004, available at <http://www.ustr.gov> (hereinafter “Uruguay Investment Treaty (2004)”).

²²¹ Some older investment treaties foreclosed arbitration if investors had brought actions before host state tribunals. See e.g. Article IX(3) of the 1994 U.S. Model BIT. Even with a “fork in the road” provision, the question remains whether an irrevocable election has occurred if parties and claims in domestic proceedings differ from the claims brought for breach of the applicable investment treaty. See e.g. *Azurix Corp. v. Argentine Republic*, ICSID Case. No. ARB/01/12 (2003), 43 I.L.M. 262 (2004); *CMS v. Argentine Republic*, 42 I.L.M. 788 (2003). Both decisions held that the treaty claim was not barred. See generally, Emmanuel Gaillard, *Introductory Note on Azurix Corp. v. Argentine Republic*, 43 I.L.M. 259 (2004); Henry Weisburg, Daniel Schimmel, & Christopher Ryan, *A New Framework for International Investment: Changes in the U.S. Model Bilateral Investment Treaty*, 16 World Arb. & Med. Rep. 59 (February 2005) For a case rejecting a “fork in the road” in NAFTA Chapter 11, see *GAMI Investments Inc. v. Government of United Mexican States* (UNCITRAL Rules), Final Award of 15 November 2004 (dismissing American claims related to expropriation of Mexican sugar plantations).

²²² Article 26(2), Model BIT (November 2004 version). A similar provision is found in the Uruguay Investment Treaty (2004), which in Annex C also forecloses arbitration by American investors that previously alleged breach in a Uruguay court; however, no prohibition stops Uruguayan investors from bringing actions in the United States.

In general, however, the tone of changes to investor protection shows increased understanding of host states' positions. The United States is now more aware of the defensive aspects of litigating investment claims.²²³ Public officials, forced to defend actions brought by private parties, have influenced the evolution of American BITs in a direction more responsive to government, rather than private, concerns.

"Transparency" (public pleadings and hearings) is a significant theme of the new regime.²²⁴ Arbitrators have authority to allow non-parties to intervene in argument.²²⁵ A limitation period requires claims to be brought within three years of the date the investor learned of the treaty breach.²²⁶ Arbitrability limits imposed on certain subject matters such as financial services and taxation permit the two governments' competent authorities jointly to determine defenses to claims (related to financial services)²²⁷ or even to veto arbitration (in tax matters).²²⁸

The new BIT clarifies the contours of substantive investor protection, particularly with respect to "indirect" expropriation through regulatory actions that decrease the value of an investor's property.²²⁹ Governmental regulations will not normally constitute expropriation if non-discriminatory and designed to protect legitimate welfare objectives.²³⁰ In connection

²²³ The new American ability to see both sides in no way calls into question the professionalism of government officials who must support or defend investment claims. The present debate implicates heterogeneous national groups, including politicians, journalists, environmentalists, judges, and business leaders. In noting the policy shift, my hope is to help the United States demonstrate to the world that quintessential American quality of even-handedness.

²²⁴ Article 29 of both the Model BIT (November 2004 version) and the Uruguay Investment Treaty (2004).

²²⁵ Article 28(3) of both the Model BIT (November 2004 version) and the Uruguay Investment Treaty (2004) provides authority for the tribunal to consider *amicus* briefs. A non-disputing party to the treaty (e.g., Canada in an action by a Québec investor against the United States) may intervene under Article 28(2)).

²²⁶ Article 26(1), Model BIT (November 2004 version).

²²⁷ Article 20, Uruguay Investment Treaty (2004).

²²⁸ Article 21, Uruguay Investment Treaty (2004). For tax analogies in NAFTA, see William W. Park, *Arbitration and the Fisc: NAFTA's Tax Veto*, 2 Chicago J. Int'l Law 231 (2001). The status of tax commitments can be problematic. Taxation is often considered to touch the very essence of sovereignty. However, the economics of many resource development agreements and infrastructure projects depend on stabilization agreements covering taxes. On tax policy in the NAFTA, see generally Arthur Cockfield, *NAFTA Tax Law and Policy* (2005). For two recent decisions addressing tax concessions in the context of bilateral investment treaties, see Final Award in *Occidental Exploration and Production Co. v. Ecuador* (1 July 2004) (LCIA Case UN 3467, conducted under the UNCITRAL Rules with fund-holding and certain administrative services provided by the LCIA), reported at 19 Int'l Arb. Rep. 29 (Aug. 2004); Decision on Jurisdiction, *Enron Corporation and Ponderosa Assets v. Argentine Republic* (14 January 2003), ICSID Case No. ARB/01/3.

²²⁹ Annex B, Section 4(a) of both the Model BIT (November 2004 version) and the Uruguay Investment Treaty (2004). This provision states that expropriation is "indirect" where a government action "has an effect equivalent to direct expropriation without formal transfer of title or outright seizure," determined by considering factors that include (i) the economic impact of the action (with the caveat that "the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred"); (ii) the extent to which the action interferes with distinct, reasonable, investment-backed expectations; and (iii) the character of the action.

²³⁰ See Annex B, Section 4(b), of the Model BIT (November 2004 version) and Uruguay Investment Treaty (2004). This provisions states that non-discriminatory regulatory actions designed to protect legitimate welfare objectives (health, safety, and environment) would not normally (i.e., "except in rare circumstances") constitute indirect expropriation.

with such “creeping” or indirect expropriation, the choices are not always easy.²³¹ Care must be taken on two fronts: that lack of investor protection will not chill cross-border capital flows, and that compensation for takings will not discourage legitimate measures to protect public welfare.²³²

The substantive provisions of the new investment treaties also reflect experience with the proliferation of disputes resulting from monetary crises during the past few years, most notably the Argentinean cases.²³³ The new Model BIT provides that “nothing in this treaty applies to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies.”²³⁴

The trend toward transparency and *amicus* briefs for special interest groups brings both costs and benefits. Publicity can further justice by keeping the arbitrators themselves subject to scrutiny. Non-party participation can be expected to enhance the legitimacy of investment arbitration in the eyes of those members of the public who may be vitally affected by the outcome of a dispute. Searching for analogies, one remembers that courts once resisted commercial arbitration that implicated sensitive subject matters (such as competition law and securities regulation) directly affecting public welfare.²³⁵ Perhaps similar public policy concerns impose some third-party participation as the price for arbitration of investment disputes.

Non-party involvement could also be expected to bring a “downside” on several levels. Additional arguments and briefing can increase delay and expense. And on occasion, public pressure might be exerted against settlements that were in the interest of the parties, but ran counter to an advocacy group’s agenda.²³⁶

²³¹ See generally, Jan Paulsson & Zachary Douglas, *Indirect Expropriation in Investment Treaty Arbitrations*, in *Arbitrating Foreign Investment Disputes* (N. Horn & S. Kröll, eds., 2004) at 145; Michael Reisman & Robert D. Sloane, *Indirect Expropriation and its Valuation in the BIT Generation*, 74 Br. Yearbook of Int’l Law 115 (2003); L. Yves Fortier & Stephen L. Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor*, 19 (No. 2) ICSID Review–Foreign Investment Law J. (Fall 2004) 293.

²³² For a comparison of regulatory takings under American and international law, see Gary Sampliner, *Arbitration of Expropriation Cases Under U.S. Investment Treaties: A Threat to Democracy or the Dog That Didn’t Bark*, 18 ICSID Rev./For. Investment Law J. 1 (Spring 2003), exploring factors applied to “takings” by the U.S. Supreme Court in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), which include a regulation’s economic impact on the investor and the extent of interference with the owner’s reasonable expectations. In 2005, the U.S. Supreme Court added a controversial element to American eminent domain case law by allowing a municipality to take private property for transfer to a private developer (with the aim of increasing jobs and revenues) rather than for use by the general public. See *Kelo v. New London*, 545 U.S. ___, 125 S.Ct 2655.

²³³ Currently thirty-three ICSID arbitrations are pending against Argentina, and it is estimated that an additional five cases have been filed under the UNCITRAL rules.

²³⁴ See Article 20(2)(a) of both the Model BIT (November 2004 version) and the Uruguay Investment Treaty (2004). Significantly, however, a footnote adds that “measures of general application taken in pursuit of monetary and related credit policies or exchange rate policies do not include measures that expressly nullify or amend contractual provisions that specify the currency of denomination or the rate of exchange of currencies.”

²³⁵ See discussion of *Mitsubishi* and *Scherk* cases, *supra*.

²³⁶ For discussion of the costs and benefits of non-party participation in investment arbitration, see Proceedings of Institute for Transnational Arbitration, Symposium, Arbitration and the Involvement of Non-Parties: Transparency, Intervention and Appeal, 30 March 2005, Washington, D.C. See also Loukas A. Mistelis, *Confidentiality and Third Party Participation: UPS v. Canada and Methanex Corp. v. United States*, 21 Arb. Int’l 211 (2005).

The foundation for admission of special interest groups should rest on the consent of the parties, either directly or through provisions in applicable treaties and procedural rules, rather than an arbitral tribunal's unilateral decision. Arbitration survives only as a consensual process. Attempts to transfer "ownership" of the dispute from the parties to the public would likely create a market for new forms of investment arbitration under the aegis of institutions less sensitive to public concerns.

The most far reaching of the new measures relates to establishment of permanent appellate review bodies,²³⁷ which the business community seems to have accepted as the cost of preserving investment arbitration.²³⁸ Although the Model BIT provides that awards are to be binding,²³⁹ it now instructs contracting states to consider, within three years of the treaty's entry into force, creation of an appellate body.²⁴⁰ DR-CAFTA contains an even more accelerated timetable, requiring no later than three *months* from entry into force the establishment of a negotiating group to set up an appellate body within a year.²⁴¹

Traditionally, judicial scrutiny of investment awards has been available in one of two ways. For International Centre for Settlement of Investment Disputes (ICSID) arbitration, review would be conducted by an *ad hoc* committee,²⁴² which could examine challenges based on allegations of improper constitution of the tribunal, manifest excess of powers, corruption, serious departure from fundamental rules of procedure, and the absence of reasons in the award.²⁴³ In some cases, failure to apply the proper governing law²⁴⁴ might constitute an excess of power.²⁴⁵ Awards other than those rendered by an ICSID tribunal

²³⁷ For a general survey of the merits of appellate bodies, see *Appeals and Challenges to Investment Treaty Awards: Is it Time for an International Appellate System?*, 2 *Transnational Dispute Management* 39 (Apr. 2005) (Proceedings of Symposium on 7 May 2004, British Institute of International and Comparative Law, London).

²³⁸ As indicated above, the 2002 Trade Act called "an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions of trade agreements." See § 2102(b)(3), Trade Act of 2002. See generally, Barton Legum, *The Introduction of an Appellate Mechanism: the U.S. Trade Act of 2002*, in *Annulment of ICSID Awards* (E. Gaillard & Y. Banifatemi, eds., 2004) at 289. It would have been possible, of course, to satisfy this objective through a "similar mechanism" other than an appellate body.

²³⁹ Article 34(5), Model BIT (November 2004 version) and Uruguay Investment Treaty (2004), states that "parties shall abide by and comply with an award without delay."

²⁴⁰ See Annex D of the Model BIT (November 2004 version) and Appendix E of Uruguay Investment Treaty (2004).

²⁴¹ Consequently, the whole process is expected to take a total of fifteen months. DR-CAFTA Annex 10-F.

²⁴² The Committee would be constituted by the Chairman of the Administrative Council. On the debate over proper use of ICSID annulment, see Emmanuel Gaillard & Yas Banifatemi, eds, *Annulment of ICSID Awards* (2004); Emmanuel Gaillard, *La Jurisprudence du CIRDI* (2004); Christoph Schreuer, *ICSID Annulment Revisited*, in 30 (2) *Legal Issues of Economic Integration* (2003) 103; W. Michael Reisman, *Systems of Control in International Adjudication and Arbitration* (1992), at 46–106.

²⁴³ Washington Convention, Article 52.

²⁴⁴ Article 42 of the ICSID Convention provides for the arbitral tribunal to decide in accordance with "such rules of law as may be agreed by the parties." In the absence of such agreement, the tribunal is to apply "the law of the Contracting State party to the dispute . . . and such rules of international law as may be applicable." See generally, Emmanuel Gaillard, *The Extent of the Applicable Law in Investment Treaty Arbitration*, in *Annulment of ICSID Awards* (E. Gaillard & Y. Banifatemi, eds, 2004) at 223. On review of facts by an Ad Hoc Committee, see Pierre Mayer, *To What Extent Can an Ad Hoc Committee Review the Factual Findings of an Arbitral Tribunal*, *Ibid.* at 243.

²⁴⁵ See Christoph Schreuer, *Failure to Apply Governing Law in International Investment Arbitration*, 7 *Austrian Rev. Int'l Eur. Law* 147 (2002), at 176–177. For an example of how one Ad Hoc Committee dealt with the matter, see the annulment discussion in *Wena Hotels v. Egypt*. The award (rendered in 2000) can be

would normally be subject to challenge in national courts under analogous principles related to the procedural integrity of the arbitration, looking to matters such as bias, lack of due process, and excess jurisdiction, as discussed in the previous section.²⁴⁶

The new free trade agreements tell us nothing about what sort of award scrutiny to expect from permanent appellate bodies (a matter left to the government negotiators), nor whether litigants may agree to exclude appeal, either before or after the dispute arises. A review standard greater than simple procedural unfairness seems contemplated, since such scrutiny is already available now for both ICSID arbitration and arbitration subject to national arbitration statutes.²⁴⁷

One might expect review standards along the lines of serious mistake of fact and clear error of law, with the appellate inquiry focused on whether the arbitrators “got it right” in their decision. A hybrid test such as “arbitrariness” might be considered, which would include both subjective and objective elements. Setting aside for mistake on the facts might be limited to cases of manifestly unjust results.²⁴⁸

To work properly, permanent appellate mechanisms would require clarity as to the relationship between treaty-based appeal and existing review processes. The most sensible solution would be to consider consent to arbitration as a waiver of the right to seek award vacatur other than as provided by the relevant investment treaty.

Any appellate body will involve a trade-off between competing costs and benefits. A more extensive right of appeal than now available might enhance consistency of result, thereby promoting the parties’ sense of having been treated fairly.²⁴⁹ At present, awards are subject to a patchwork of review standards under different national arbitration statutes or ICSID *ad hoc* committees, depending on the applicable procedural framework. More importantly, an appeals mechanism that encourages arbitrators to consider broad community interests might increase public acceptance of the arbitral process, making treaty-based arbitration more sustainable.²⁵⁰

found at 41 I.L.M. 896 (2002). The Annulment Decision is reproduced at 41 I.L.M. 93 (2002). Egypt argued that the arbitral tribunal manifestly exceeded its power in awarding 9% interest compounded quarterly. The Ad Hoc Committee admitted that failure to apply the governing law may constitute a manifest excess of power, but did not find such to be the case in the award at issue. See generally Eric Schwartz, *Finality at What Cost?*, in *Annulment of ICSID Awards* (E. Gaillard & Y. Banifatemi, eds, 2004) at 43.

²⁴⁶ UNCITRAL and the so-called “Additional Facility” arbitrations are subject to review under arbitration statutes at the arbitral situs, as well as pursuant to Article V of the New York Convention. Matters covered include invalid arbitration agreements, lack of due process, arbitrator excess of authority, and irregular composition of the arbitral tribunal, as well as public policy and subject matter arbitrability.

²⁴⁷ ICSID arbitration is subject to the ad hoc review described *supra*. UNCITRAL and the so-called “Additional Facility” arbitrations are subject to review under arbitration statutes at the arbitral situs, as well as pursuant to Article V of the New York Convention.

²⁴⁸ For a case under the FAA applying a similar standard, see *Williams v. CIGNA Financial Advisors Inc.*, 197 F. 3d 752, 760–61 (5th Cir. 1999) (old-age discrimination in employment), providing vacatur only if award would result in “significant injustice” under the circumstances.

²⁴⁹ On consistency in investment arbitration, see Susan D. Frank, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 Fordham Law Rev. 1521 (2005).

²⁵⁰ One cogent presentation of arguments for appellate bodies was made by Doak Bishop on 7 May 2004 in an address in London at a conference sponsored by the British Institute of International and Comparative

On a practical level, it is not entirely certain that host states will always be the beneficiaries of greater award review. Well-financed claimants might also have more staying power through an appellate process. An investor who loses against a host state can continue the battle. Moreover, if investors perceive appellate review as increasing investment risk, they may pass the cost to the host country in higher prices or other less favorable terms.

Some observers ask whether the costs of appellate bodies might outweigh their benefits. A mechanism to second-guess arbitrators can promote fuller consideration of public interests. The downside of the compromise, of course, is a weakened adjudicatory finality in the safeguards of investment rights. In this respect the evolutionary paths of investment and commercial arbitration seem destined to diverge, at least for now.

III. Guidelines for the Conduct of Proceedings

The emergence of soft law

Our final illustration of arbitral evolution looks at how proceedings are actually conducted: the way evidence and argument are presented. The goal of the arbitral process is ostensibly to assist arbitrators in ascertaining what happened between the parties and what applicable law says about the proper result.²⁵¹ From the filing of a claim to the closure of hearings, myriads of procedural questions arise that have no clearly established right answers. Should the case in chief be presented in written statement or oral testimony? Or both? What objections justify excluding an exhibit? When should the arbitrator make an order to produce documents? What sanctions should be imposed for refusal to comply with a discovery order? Battlegrounds are plentiful: the process for proving applicable law;²⁵² the nature of confidentiality restrictions;²⁵³ time allocation among the litigants;²⁵⁴ issue preclusion;²⁵⁵

Law. See also Howard Holtzmann, *A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards* in *Internationalization of International Arbitration* (LCIA Centenary Conference, Martin Hunter, Arthur Marriott, and V.V. Veeder, eds., at (1995) 109; Stephen M. Schwebel, *The Creation and Operation of an International Court of Arbitral Awards*, *Ibid.* at 115.

²⁵¹ For a recent exploration of the factors that affect fact-finding, see Richard M. Mosk, *The Role of Facts in International Dispute Resolution* (2004), reprinted from Hague Academy of International Law, 304 *Recueil des cours* (2003). On the interpretation of the parties' intent in legal texts, see Larry Alexander & Saikrishna Prakash, "Is That English You're Speaking?", *Why Intention Free Interpretation is an Impossibility*, 41 *San Diego Law Rev.* 967 (2004). For an exploration of applicable law in investment arbitration, see W. Michael Reisman & Mahnoush H. Arsanjani, *The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes*, 19 (No. 2) *ICSID Review—Foreign Investment Law J.* 328 (Fall 2004).

²⁵² See Gabrielle Kaufmann-Kohler, Iura Novit Arbitrator: *Est-ce bien raisonnable? Reflexions sur le statut du droit de fond devant l'arbitre international*, in De Lege Ferenda: *Etudes pour le professeur Alain Hirsch* (A. Héritier Lachat & L. Hirsch, eds., 2004) at 71; Julian D. M. Lew, *Proof of Applicable Law in International Commercial Arbitration*, in *Festschrift für Otto Sandrock zum 70. Geburtstag* (Klaus Peter Berger, Werner F. Ebke, Siegfried Elsing, Bernhard Grossfeld, & Gunther Kühne, eds., 2000) at 581.

²⁵³ See e.g., *Odfjell ASA v. Celanese AG*, 205 WL 106897 (SDNY, 18 January 2005), where an arbitral tribunal ordered a non-party to produce documents and give testimony subject to a confidentiality order that the non-party wanted made more restrictive, to reduce the prospect that information would get into the hands of its customers. The court upheld the tribunal's decision declining to modify the confidentiality order.

²⁵⁴ See Jan Paulsson, *The Timely Arbitrator: Reflections on the Bäckstiegel Method*, in *Recht der Internationalen Wirtschaft und Streiterledigung im 21. Jahrhundert: Liber Amicorum Karl-Heinz Bockstiegel* (R. Briner, L. Y. Fortier, K.-P. Berger & J. Bredow, eds., 2001) at 607.

²⁵⁵ See *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383 (2d Cir.2003).

avoiding “trial by ambush;”²⁵⁶ fixing the proper role for legal authority;²⁵⁷ and even what to do if an arbitrator is kidnapped.²⁵⁸

The briefest look at arbitration statutes, treaties, and institutional rules will reveal a relative paucity of fixed procedural rules to govern these matters. Modern arbitration is either blessed or cursed (depending on perspective) with a lack of fixed standards related to how arbitrators conduct proceedings. Little “hard law” exists on the specifics of gathering evidence and hearing argument.

To fill these gaps, non-governmental groups have drafted norms related to evidence, conflicts of interest, ethics, and the organization of arbitral proceedings. Often these norms evolve from principles created by scholarly and professional associations.²⁵⁹ Frequently the standards build on the lore of international dispute resolution as memorialized in articles, treatises, and learned symposium papers.

These procedural guidelines represent what might be called “soft law,” in distinction to the harder norms imposed by arbitration statutes and treaties, as well as the procedural framework adopted by the parties through choice of pre-established arbitration rules. The growth of such soft law has accelerated during the past half-dozen years.²⁶⁰ The International Bar Association has revised its rules on evidence²⁶¹ and issued conflicts-of-interest

²⁵⁶ Often called “trial by ambush,” undue surprise might occur when a litigant waits until late in the proceeding to produce evidence. See e.g. *London & Amsterdam Properties Ltd v. Waterman Partnership Ltd* [2003] EWHC 3059 TCC, with comment by Hew Dundas, 70 *Arbitration* 18 (2004). An adjudicator’s decision was set aside when one party delayed putting forth crucial parts of its case, giving the other side insufficient opportunity to consider the claim. In such instances the appropriate response by an arbitrator is highly problematic. To strike a claim might result in a pyrrhic victory for the moving party by opening the award to vacatur. However, the timetable might not permit an additional round of witness statements.

²⁵⁷ François Dessemontet, *Des Auteurs, des arbitres et des citations dans les sentences. Une figure obligée?*, in *Figures juridiques / Rechtsfiguren: Mélanges dissociés / K(Deine Festschrift für Pierre Tercier* (Pascal Pichonnaz & Peter Gauch, eds., 2003).

²⁵⁸ In one well-known ICC case, an effort to derail the proceedings resulted in one member of the arbitral tribunal being abducted and forced home to Indonesia. For safety reasons, the hearing venue had been transferred from Indonesia to the Hague. See Stephen M. Schwebel, *Injunction of Arbitral Proceedings and Truncation of the Tribunal*, 18 *Int’l Arb. Rep.* 33 (Apr. 2003); Marc J. Goldstein, *International Commercial Arbitration*, 34 *Int’l Lawyer* 519, at 528 (2000). At issue were 1999 awards in *Himpurna California Energy Ltd. (Bermuda) v. PT. (Persero) Perusahaan Listrik Negara (Indonesia) (PLN)* and *Patuha Power Ltd. (Bermuda) v. PT (Persero) Himpurna California Energy Ltd (Indonesia) (PLN)*. The cases are reported in 25 *Yearbook Comm. Arb.* 13 (2000) and 25 *Yearbook Comm. Arb.* 109 (2000).

²⁵⁹ An analogous attempt to help evolution in cross-border litigation can be found in the ALI/UNIDROIT Principles and Rules on Transnational Civil Procedure, which represent an intellectual joint venture between Rome-based UNIDROIT (The International Institute for the Unification of Private Law) and the Washington-based American Law Institute (ALI). The draft procedural principles, supplemented by a specific set of rules, are offered for national adoption in court litigation of disputes arising from international commercial transactions. See generally Janet Walker, *The Utility of the ALI/Unidroit Project on Principles and Rules of Transnational Civil Procedure*, 6 *Uniform Law Review/Revue de droit uniforme* 803 (2001). Professor Walker continued her analysis in *The Better Part of Harmonizing Jurisdictional Law*, Proc. 96th Annual Meeting, American Society of International Law (13–16 March 2002).

²⁶⁰ See generally, Nathalie Voser, *Harmonization by Promulgating Rules of Best International Practice in International Arbitration*, in *Schieds VZ (Zeitschrift für Schiedsverfahren/German Arbitration J.)* (2005) 113.

²⁶¹ See IBA Working Party, *Commentary on the New IBA Rules of Evidence in International Commercial Arbitration* *Bus. Law Int’l.* (2002 Issue 2) 14. The rules are available at <http://www.ibanet.org>. See generally, Michael Bühler & Carroll Dorgan, *Witness Testimony Pursuant to the IBA Rules of Evidence in International Commercial Arbitration*, 17 *J. Int’l Arb.* 3 (2000 No 1); Nadia Darwazeh, *Document Discovery and the IBA Rules of Evidence: A Practitioner’s View*, *Int. A. L. R.* (2002 Issue 4) 101.

guidelines.²⁶² The American Arbitration Association has revamped its ethical code for arbitrators.²⁶³ The United Nations has put out *Notes on Organizing Arbitral Proceedings*.²⁶⁴ The American College of Commercial Arbitrators is currently debating a compendium of “Best Practices” for business arbitration.²⁶⁵

The compromise reached in such principles may be helpful in some instances,²⁶⁶ notwithstanding that they will not necessarily resolve all procedural challenges.²⁶⁷ Despite their non-binding character, the guidelines will usually have far-reaching effects. *Faute de mieux*, they will be cited during the procedural debates that develop in most major arbitrations. Some guidelines may ultimately constitute a canon of authoritative writings cited during procedural battles.²⁶⁸

Not all arbitration specialists approve of the soft law trend. Some see the drift toward procedural codification as a potentially dangerous constraint on arbitral autonomy – a concept

²⁶² IBA Guidelines on Conflicts of Interest in International Commercial Arbitration, approved by the IBA Council on 22 May 2004, published in 9 (No. 2) *Arbitration & ADR* (IBA) 7 (October 2004); See Markham Ball, *Probity Deconstructed: How Helpful, Really are the New IBA Guidelines on Conflicts of Interest in International Arbitration*, 15 *World Arb. & Mediation Rep.* 333 (Nov. 2004); Jan Paulsson, *Ethics and Codes of Conduct for a Multi-Disciplinary Institute*, 70 *Arbitration* 193 (2004), at 198–99; David Lawson, *Impartiality and Independence of International Arbitrators: Commentary on the 2004 IBA Guidelines*, 23 *ASA Bull.* 22 (2005); Stephan Wilske & Michael Stock, *Rule 3.3.7 of the IBA Guidelines on Conflicts of Interest in International Arbitration: The Enlargement of the Usual Shortlist?*, 23 *ASA Bull.* 45 (2005) (commenting on the rule requiring disclosure when an arbitrator has been appointed by the same law firm within the prior three years).

²⁶³ See generally discussion *supra*.

²⁶⁴ *Notes on Organizing Arbitral Proceedings*, finalized in New York in June 1996, published in *UNCITRAL Yearbook*, vol. 27 (1996), pt 1, paras. 11–54.

²⁶⁵ *College of Commercial Arbitrators, Best Practices in Commercial Arbitration* (Revised Draft, Apr. 2005). The CCA initiative was inspired by a similar project undertaken by the American College of Construction Lawyers, which earlier prepared a guide to best practices in construction arbitration. At the CCA Meeting on 30 October 2004, consideration was given to changing the title from *Best Practices* to something that would indicate that more than one practice was permissible, depending on the context. The introduction to the version of April 2005 picks up on this theme by acknowledging that “it is not possible to prescribe a single set of best practices that commercial arbitrators should invariably follow in every case.” Rather, the CCA guide attempts to “identify the principal issues that typically arise in each successive stage of an arbitration and to explain the pros and cons of various preferred ways of handling each issue.” April 2005 Draft, p. 3.

²⁶⁶ Under the *IBA Rules of Evidence*, Article 3 requires that any request for documents describe how the material is “relevant and material” and must aim at a “narrow and specific” class of documents. No provision is made for depositions or for documents “reasonably calculated” to lead to evidence as in the American Federal Rules of Civil Procedure, Rule 26(b)(1). Enumerated defenses to document production or admission include lack of sufficient relevance, legal impediment or privilege, unreasonable burden, loss or destruction, commercial or technical confidentiality, political sensitivity, and “considerations of fairness or equality of the Parties.” *IBA Rules of Evidence* Article 9(2).

²⁶⁷ The *IBA Rules of Evidence* permit arbitrators to deny requests for document production that would create an unreasonable burden, a concept on which interpretation is certainly likely to vary from one culture to another. It would be surprising if the evaluation of what production is burdensome did not vary dramatically when seen through the eyes of a French *avocat* and a New York litigator. Often incorporated into initial procedural orders on a “for guidance” basis, the *IBA Rules on the Taking of Evidence in International Commercial Arbitration* were adopted June 1999.

²⁶⁸ A “red list” describes situations that give rise to justifiable doubts about an arbitrator’s impartiality. Some are non-waivable (such as a financial interest in the outcome of the case), while others (such as a relationship with counsel) may be ignored by mutual consent. An “orange list” covers scenarios (such as past service as counsel for a party) which the parties are deemed to have accepted if no objection is made after timely disclosure. Finally, a “green list” enumerates cases (such as membership in the same professional organization) that require no disclosure.

considered sacred by even the most impious of arbitrators.²⁶⁹ One French commentator has suggested whimsically that with the way things are going, the United Nations will soon require multilingual “dangerous produce” warnings on arbitration files.²⁷⁰

Clearly, guidelines that are too restrictive can cause harm. As Talleyrand reportedly observed, anything excessive becomes insignificant: “Tout ce qui est excessif devient insignifiant.”

However, concern about arbitral autonomy seems misplaced. The parties are always free to opt out of “soft law” standards in favor of their own contractual elaboration of relevant procedural norms. Professional guidelines operate only as default rules.

Yet a more nuanced view might see procedural soft law as enhancing arbitration’s integrity. Although clearly not possible to identify “best practices” for all cases, the arbitration community should be able to point out some practices that are less than optimum, and indicate the range of acceptable alternatives.

As indicated below, much of the debate surrounds the timing for establishment of procedural rules. Understandably, the tendency (or perhaps temptation) for arbitrators and litigants alike is often to wait to address a procedural question until it arises, for the simple reason that it may not arise at all. The risk in that path, however, is that the arbitrators will be faced with creating or choosing the rule after learning which sides will get the short end of the procedural stick.

As in other areas, the devil is in the detail. The following discussion explores the appropriate balance in procedural rule-making.

Balancing fairness and efficiency

Arbitral case management implicates the delicate counterpoise between efficiency and fairness. One of the arbitrator’s most difficult tasks is to strike the right equilibrium: to keep the process moving, while allowing cases to be presented fully enough that the parties feel they have been treated in a just fashion.

Efficiency in dispute resolution involves making the process shorter and cheaper. Fairness, however, can implicate additional time and cost, as needed to provide a meaningful right

²⁶⁹ One comment on a recent Privy Council arbitration decision began, “Genuflection to the principle of party autonomy is common in international arbitration.” See Paul Mitchell, *Party Autonomy and Implied Choice in International Commercial Arbitration*, 14 Am. Rev. Int’l Arb. 571 (2003), analyzing the case *Bay Hotel & Resort Ltd. v. Cavalier Construction Co. Ltd.* [2001] UKPC 34 (P.C. Appeal No. 32 of 2000, 16 July 2001; opinion by Lord Cooke of Thorndon) concerning hotel construction in Turks & Caicos Islands. The principle of party autonomy was invoked *inter alia* to permit the law of the Turks & Caicos Islands to be considered the *lex arbitri* notwithstanding the arbitral situs in Miami.

²⁷⁰ The foreword of a recent French periodical referred to arbitration’s procedural soft law as a loathsome skin disease: *le prurit réglementaire* (“regulatory pruritus”). The attack began with a hypothetical hearing in which counsel asks the presiding arbitrator for a pause in testimony to permit a restroom visit. “Monsieur le Président, puis-je aller aux toilettes?” The response is a resounding negative (“Non, mon cher Maître”) bolstered by citation to Article 41 of the *Rules of Code of Conduct for Arbitral Hearings* (Règlement pour la conduite des audiences arbitrales) which stipulates precise numbers of breaks in function of the length of hearings. See Serge Lazareff, *Avant-propos: Le bloc-notes de Serge Lazareff*, in 124 Gazette du Palais: Les Cahiers de l’arbitrage (2004–2002, pt 1) 3 (No. 338/339, 3 and 4 Dec. 2004).

to be heard. In arbitration these goals sometimes compete, and sometimes run together in the same harness. Fairness requires some measure of efficiency, since justice too long delayed becomes justice denied. Likewise, without fairness an arbitral proceeding would hardly be efficient, since it would fail to deliver a key element of the desired product: a sense that justice had been respected. A chef who aimed to provide fine dining might fail either by making customers wait too long or by serving junk food instead of a gourmet meal.²⁷¹

Many years ago, the secretary general of an arbitral institution was being interviewed following his retirement after a long career during which his organization had seen a marked increase in caseload and prestige. When asked what he considered to be his most important achievement, the eminent elder statesman replied without a moment's hesitation, "My greatest success was taking a process that had been quick and cheap and turning it into one that is now long and expensive. *Enfin!* At last we are respected." The point, of course, was that business managers who complain about too much legal procedure also object to too little. Procedural formality is often another term for due process.

The competition between aspirations toward fairness and toward efficiency shows itself with particular starkness in connection with mass claims, such as the so-called "Holocaust arbitrations" that address insurance policies²⁷² and bank accounts²⁷³ belonging to victims of

²⁷¹ For an attempt to address analogous tension between flexibility and certainty, see Howard Holtzmann, *Balancing the Need for Certainty and Flexibility in International Arbitration Procedures*, in *International Arbitration in the 21st Century: Towards Judicialization and Uniformity?* (Richard Lillich & Charles Brower, eds., 1993) at 3. Judge Holtzmann begins with invocation of Benjamin Cardozo's Yale lectures of eighty years ago. After noting that law as a guide to conduct would be "reduced to the level of mere futility if it is unknown and unknowable," Cardozo goes on to note that certainty is "not the only good" and can be bought "at too high a price." Benjamin Cardozo, *The Growth of the Law* (1924), 3 and 16–17.

²⁷² To address claims to unpaid insurance policies issued to Holocaust victims, the International Commission on Holocaust Era Insurance Claims (ICHEIC), chaired by Lawrence Eagleberger, was formed pursuant to a Memorandum of Understanding concluded on 25 August 1998 among several European insurance companies, Jewish organizations, the state of Israel, and insurance regulators in Europe and the United States. ICHEIC was established as a private entity (*Verein/association*) under Article 60 of the Swiss Civil Code. In turn, ICHEIC established a London-based Appeals Tribunal to hear challenges to insurance company decisions about policy entitlement. Additionally, in October 2002 ICHEIC entered into an agreement with the German Insurance Association to provide processing for other Holocaust era claims, and the establishment of an Appeals Panel related thereto. For press reports of the somewhat controversial nature of the process, see Joseph B. Treaster, *Two Holocaust Survivors to Sue Group Set Up to Collect Insurance*, New York Times, 25 September 2003. See also *The Holocaust and Insurance: Too Late, Too Slow, Too Expensive* 368 The Economist (Aug. 2003), 2 at 14; *Insurers and the Holocaust: Line to Nowhere*, 368 The Economist (Aug. 2003), at 61. Replies by Chairman Eagleberger can be found on ICHEIC web site, <http://www.icheic.org>.

²⁷³ The genesis of the "dormant account" arbitrations might be dated from a 1995 Wall Street Journal article by Peter Gumbel, *Secret Legacies: Heirs of Nazis' Victims Challenge Swiss Banks on Wartime Deposits*, Wall Street Journal (21 June 1995) p. 1, col. 6. In May 1996, under the leadership of Paul Volcker, an Independent Committee of Eminent Persons was established to sponsor an audit of Swiss banks and create in Zürich a "Claims Resolution Tribunal" of arbitrators to hear claims to accounts inactive since the end of World War II. Independently class actions in New York led to a \$1.25 billion settlement announced in August 1998. See *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d 139 (E.D.N.Y. 26 July 2000), corrected by 2000 U.S. Dist. LEXIS 15644 (E.D.N.Y. 9 August 2000). The complicated history of the lawsuit began with *Weisshaus v. Union Bank of Switzerland*, filed in October 1996, and followed by other cases later amended, restructured, and consolidated. See Special Master's Proposed Plan of Allocation and Distribution of Settlement Proceeds (Judah Gribetz, 11 September 2000), available at <http://www.nyed.uscourts.gov/pub/rulings/cv/1996/96cv4849-erk-smplan.pdf>. The first phase of the CRT process is discussed at <http://www.swissbanking.org/crt1.pdf>. The second phase is described at <http://www.crt-ii.org>. For a particularly complete account of the CRT process, see Thomas Maissen, *Verweigerte Erinnerung: Nachrichtenlose Vermögen und Schweizer Weltkriegsdebatte 1998–2004* (2005), at 457–473.

Nazi persecution.²⁷⁴ Oral hearings, even by telephone, can add to the sense of fairness; but with thousands of claimants, some who have already waited a long time for their money, oral hearings mean considerable delay.²⁷⁵ To take another example, claims among competing heirs (one cousin in New Jersey and the other in New South Wales) might normally be decided by reference to the legal system with the closest connection to the decedent account holder. In practice, however, this could mean having to decide which family member was deemed to have died last in the concentration camp, which in turn might require interpreting a simultaneous death statute applicable in 1943 Hungary or France.²⁷⁶ In such circumstances, a somewhat arbitrary (yet less legally correct) set of succession guidelines might prove a more efficient way to proceed, particularly when an account is relatively small.²⁷⁷

In connection with such competing goals, there used to be a sign in the window of a shoe repair shop in downtown Boston, run by a Greek immigrant who seemed to have had enough of customer complaints. A triangle connected three expressions: “fast service,” “low price,” and “high quality.” Underneath was the instruction: “Pick any two.”

Due process

Notions of procedural fairness The evolution of business arbitration depends in large measure on the type of fairness business managers expect in dispute resolution. Arbitration is neither trial by combat nor a random process such as consulting the entrails of a chicken. Rather, arbitration implies respect for a bundle of rights often called due process, which the British sometimes label as natural justice.²⁷⁸ Once summarized as “the duty to hear before

²⁷⁴ See generally, Detlev Vagts & Peter Murray, *Litigating the Nazi Labor Claims: The Path Not Taken*, 43 Harv. Int'l Law J. 503 (2002); Detlev Vagts, *Switzerland, International Law and World War II*, 91 Am. J. Int. Law 466 (1997); Stuart Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II*, 37 Vanderbilt J. Trans. L. 333 (2004); Jean-François Bergier, *La Suisse et les transactions sur l'or pendant la Seconde Guerre Mondiale* (1998). On the bank account arbitrations, see generally, Hans Michael Riemer, Georg von Segesser, & Brigitte von der Crone, *Claims Resolution Tribunal for Dormant Accounts in Switzerland*, 14 Int. Arb. Rep. 19 (Feb. 1999); Roger P. Alford, *The Claims Resolution Tribunal and Holocaust Claims against Swiss Banks*, 20 Berkeley J. Int'l Law 250 (2002); Daniel Girsberger, *Das Internationale Privatrecht der Nachrichtenlosen Vermögen in der Schweiz* (1997); Urs Zulauf, *Bankgeheimnis und Historische Forschung*, 1994 Z. Schweiz. Recht 105.

²⁷⁵ It can be problematic even to fix the threshold of plausibility required to permit claims to be considered. Participation by individuals based on nothing more than sharing the same last name with the account holder might make the process fairer to those with tenuous claims, but would make recovery longer and more complex for those with better initial evidence of entitlement.

²⁷⁶ See Article 16 of the “CRT-I” Rules of Procedure governing the first phase of Swiss bank account claims, which require the arbitrator to apply “the law with which the matter in dispute has the closest connection” in determining the relationship between the account holder and the claimant (i.e., heirship).

²⁷⁷ In the alternative, such mass claims rules might well apply across-the-board succession guidelines based on a hierarchy of kinship. For example, the spouse and children might share proceeds equally; if no spouse makes a claim, distribution would go in equal shares to children; if there are no claims by children, parents, or spouse, distribution might go in equal shares to surviving issue of parents (e.g., siblings and their descendants). Indeed, succession guidelines were adopted in the second phase of the Swiss bank account claims process (“CRT-II”) (see Article 29 of the Rules Governing the Claims Resolution Process), as well as the insurance claims process (Annex II of ICHEIC Appeals Tribunal Rules of Procedure).

²⁷⁸ See *Dicey & Morris, The Conflict of Laws* (13th edn, L. Collins, ed., 2000), Rule 46 (foreign money judgment may be impeached if the proceedings were opposed to natural justice) and Rule 64 (foreign arbitration award will not be recognized in England if the proceedings were opposed to natural justice). See also *Adams v. Cape Industries* [1990] 2 WLR 657, 2 WLR 657 (C.A.) (denying recognition to Texas federal court default judgment on the basis of lack of jurisdiction over the parent company and improper calculation of damages, constituting denial of “substantial justice”).

condemning,²⁷⁹ due process lies at the core of what litigants seek in both arbitration²⁸⁰ and litigation.²⁸¹

Like other elastic notions such as justice and equity,²⁸² the term “due process” has no sacramental value in itself, but takes meaning from usage. Since one person’s delay is often another’s due process, notions of arbitral fairness evolve as they are incarnated into flesh and blood responses to specific problems. Except on a case-by-case basis, due process is difficult to define with any reasonable precision. As discussed later, determinations of what practices are fair or unfair depends largely on culturally conditioned baseline expectations.²⁸³

Most arbitration statutes and treaties contain some notions of due process, whether or not so labeled.²⁸⁴ These often reflect broader societal concepts of fairness seen in areas such as

²⁷⁹ The phrase originated with the great orator and advocate Daniel Webster when he made his famous arguments to defend the charter of Dartmouth College. After asking rhetorically whether the Dartmouth trustees “lost their franchise by due course and process of law” Webster defined the concept as “law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial.” See *Trustees of Dartmouth v. Woodward*, 17 U.S. 518, 4 Wheaton’s Report 518 (1818), at Wheaton 581.

²⁸⁰ A recent study by the Global Center for Dispute Resolution (an affiliate of the American Arbitration Association) found that attorneys and parties to arbitrations rated a “fair and just outcome” as the most important element in arbitration, above all other considerations, including cost, finality, speed, and privacy. See Richard W. Naimark and Stephanie E. Keer, *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People* in 30 Int’l Bus. Lawyer 203 (May 2002). Prior to the first hearing and after the award, parties to business arbitrations were asked to rank the importance of eight variables: (i) speed, (ii) privacy, (iii) receipt of monetary award, (iv) fair and just outcome, (v) cost-efficiency, (vi) finality of decision, (vii) arbitrator expertise, and (viii) continuing relationship with opposing party. Both claimants and respondents ranked “fair and just result” higher (90% for respondents and 75% for claimants) than any other variable.

²⁸¹ For a discussion of common procedural principles in court litigation and arbitration, see Georges Bolard, *Les Principes Directeurs du procès arbitral*, 2004 Rev. Arb. 511, taking as an illustrative springboard the French *Nouveau Code De Procédure Civile*. Professor Bolard points out that Article 1460 of the NCPC (applicable to arbitration) incorporates by reference the provisions of Articles 4–10, 11 and 13–21 (applicable to court litigation), which emphasize *le principe dispositif* (certainty in dispute characterization) and *le principe de la contradiction* (adversarial process).

²⁸² For discussion of the concept of equity in international resource allocation, see William W. Park, *Legal Issues in the Third World’s Economic Development*, 61 B. U. Law Rev. 1321 (1981), questioning attempts to label free market prices as “inequitable” (is it inequitable to refuse purchase of unwanted sand or to decline an economically unattractive investment?), and suggesting that without definitional rigor “equity” may become simply an excuse for opportunistic programs of “he takes who can.”

²⁸³ A lawyer from New York might say that fundamental fairness requires the respondent to produce certain documents even if adverse to its defense, while a lawyer from Paris or Geneva, used to a quite different legal system, would reply that the claimant should have thought about its proof before filing the claim.

²⁸⁴ For example, the 1965 Washington Convention establishing ICSID speaks of “serious departure from a fundamental rule of procedure” / “inobservation grave d’une règle fondamentale de procédure.” For examples of notions of arbitral due process incorporated in grounds for award vacatur or non-recognition, see e.g., UNCITRAL Model Law (Article 34); Swiss *LDIP* (Article 190); 9 U.S.C. §10; English Arbitration Act 1996, Section 68; and Article V New York Convention. Typically, grounds for vacatur based in procedural unfairness are set forth in the most general terms. One exception can be found in England, where the 1996 Act in Section 68 illustrates “serious procedural irregularity” with a laundry list of procedurally defective arbitrator behavior, such as failure to deal with all of the issues, failure to conduct the proceedings according to the agreement of the parties, and failure to comply with the general requirement that the arbitrator act fairly and impartially. Section 68 also specifies that to be grounds for vacatur a mistake must cause substantial injustice to the party challenging the award.

enforcement of foreign judgments,²⁸⁵ protection of refugees,²⁸⁶ consumer relations,²⁸⁷ *forum non conveniens* analysis,²⁸⁸ and basic human rights.²⁸⁹ Standards set by treaties, statutes, case law, and professional organizations involve intellectual borrowing among the multiple contexts in which lawyers speak of procedural fairness. Comparisons, of course, must be approached with caution. Due process notions are often invoked in connection with substantive (rather than procedural) safeguards of life, liberty, and property,²⁹⁰ or fundamental constraints on governmental power.²⁹¹

²⁸⁵ Restatement (Third) of the Foreign Relations Law of the United States § 482 provides for denial of recognition to a foreign judgment “rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law.” Commentary provides examples of denial of due process, including: a judiciary dominated by political branches of government or an opposing litigant, inability to obtain counsel, to secure documents, or to secure attendance of a witness and lack of appellate review. A judicial system may fail in a general way (e.g., the treatment of Jews in Nazi Germany) or in a particular case. See also Uniform Foreign Money Judgments Recognition Act, Section 4.

²⁸⁶ See United Nations Convention Relating to the Status of Refugees, opened for signature 28 July 1951, which in Article 32(2) provides that “The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.” Whether this requires a judicial determination, rather than simple administrative action, is open to question.

²⁸⁷ See e.g., American Arbitration Association, *Consumer Due Process Protocol* (May 1998), implementing special measures related to matters such as consumer access to information, convenient location, moderate cost, and speed.

²⁸⁸ Courts in the United States that consider foreign litigation procedures at odds with American notions of due process might find a foreign tribunal inadequate as an alternative forum, and thus refuse to dismiss actions on *forum non conveniens* grounds. See e.g., *Nemariam v. Ethiopia*, 315 F.3d 390 (D.C. Cir.), cert. denied 124 S.Ct. 278 (2003), discussed in Case Comment by Ryan Bergsieker, *International Tribunals and Forum Non Conveniens Analysis*, 114 Yale Law J. 443 (2004). Ethiopia had moved to dismiss an action by an expelled Eritrean merchant whose assets had allegedly been confiscated by Ethiopia, arguing that the suit should be heard in the Claims Commission established pursuant to the 2000 peace treaty between Eritrea and Ethiopia (text at 40 I.L.M. 260).

²⁸⁹ Litigants in Europe sometimes resist arbitration by invoking the requirement of a “fair and public hearing” in the European Convention on Human Rights (4 November 1950, Rome), Section 6, which provides in pertinent part that in determination of civil rights and obligations “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” See generally, Clare Ambrose, *Arbitration and the Human Rights Act*, 2000 Lloyd’s Maritime & Comm. Law Q. 468 (concluding that an agreement to arbitrate constitutes waiver of any right to public hearing under the Human Rights Convention); Richard Buxton, *The Human Rights Act and Private Law*, 116 Law Q. Rev. 48 (Jan. 2000); William Robinson & Boris Kasolowsky, *Will the United Kingdom’s Human Rights Act Further Protect Parties to Arbitration Proceedings?* 18 Arb. Int’l 453 (2002); Adam Samuel, *Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human Rights*, 21(5) J. Int’l Arb. 413 (2004); Dominique Poncet & Alessandra Cambi Favre-Bulle, *Un Arbitre indépendant et impartial aux termes de l’art. 6 § 1 de la Convention européenne des droits de l’homme*, in *Les Droits de l’homme au seuil du troisième millénaire: Mélanges en hommage à Pierre Lambert* 655 (2000); Georgios Petrichilos, *Procedural law in International Arbitration* (2004), at 151–158.

²⁹⁰ The U.S. Constitution’s 5th Amendment prohibits the federal government from depriving any person of “life, liberty, or property, without due process of law.” The 14th Amendment imposes similar restraints on states, and has been held to incorporate other Constitutional rights, such as freedom of religion. “Procedural” due process (fairness in adjudication) is often distinguished from “substantive” due process, while requiring legislative measures to be rationally connected to intended goals. Procedural due process tells us how rules should be applied, while substantive due process addresses the rationality of the rule itself. See *Lochner v. New York*, 198 U.S. 45 (1905) (limits on employees’ work hours); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (advice on contraceptives); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion). Thanks are due to my colleague Larry Yackle for helpful discussions on substantive due process.

²⁹¹ The German Constitutional “rule of law principle” (*Rechtsstaatsprinzip*) is contained in Article 20(3), *Grundgesetz* (Basic Law), 23 May 1949, which provides that “Legislation is subject to the constitutional order;

Although analogous concepts exist outside Anglo-American law jurisdictions, the precise translation into Continental equivalents remains elusive.²⁹² French law often speaks of “the right to be heard in an adversarial process” (*droit d’être entendu en procédure contradictoire*) or “the principle of contradictory process” (*principe de la contradiction*).²⁹³ Germans sometimes refer to the “fair-trial principle” (*rechtsstaatliches Verfahren*)²⁹⁴ or speak of a “hearing in accordance with law” (*Anspruch auf rechtliches Gehör*).²⁹⁵ In public international law, particularly investment disputes,²⁹⁶ due process inheres in claims for “denial of justice” by injured aliens who find gross deficiencies in the quality of the local legal system.²⁹⁷

Elements of procedural integrity Whether in court or in arbitration, due process is normally said to include the right to be heard²⁹⁸ by an unbiased tribunal.²⁹⁹ In arbitration, the arbitrators’ respect for the contours of their mission is usually considered as another predicate of due process.³⁰⁰ The fundamental procedural defects that normally permit challenge to an award (articulated in a variety of ways, depending on statutory structure) might be given a tripartite formulation: bias, no opportunity to present one’s case, and excess of jurisdiction.³⁰¹

the executive and the judiciary are bound by the law.” (“Die Gesetzgebung ist an die verfassungsmässige Ordnung, die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden.”)

²⁹² For a recent discussion of due process in Islamic law, see Nudrat Majeed, *Good Faith and Due Process: Lessons from the Shari’ah*, 20 Arb. Int’l 97 (2004).

²⁹³ See generally, Bernard Audit, *Droit International Privé* (3rd edn, 2000), § 463, at 401–402; Matthieu de Boisseson, *Le Droit Français De L’arbitrage* (1990), § 728, at 708. The French also speak of “the right of defense” (*droit de la défense*) or “right of a fair trial” (*procès équitable*). Swiss law recognizes the same principles (*droit d’être entendu en procédure contradictoire / der Anspruch auf rechtliches Gehör*). See Article 190(2)(d) the *Loi fédérale sur le droit international privé* (commonly called LDIP or IPRG). In addition, Swiss law permits award vacatur for failure to respect the parties’ equality (*l’égalité des parties / die Gleichbehandlung der Parteien*). See LDIP Article 182, which applies regardless of the chosen procedural rules.

²⁹⁴ See *Grundgesetz* Article 20(3), *supra*, establishes a “rule of law principle” that has been interpreted by the Constitutional Court (*Bundesverfassungsgericht*) to encompass entitlement to *rechtsstaatliches Verfahren* (“procedure in accordance with the rule of law”). See Michael Sachs, *Grundgesetz* (1996), Article 20, notes 109–112, at 649–651; Dieter Umbach & Thomas Clemens, *Grundgesetz* (2002), Article 20, note 110, at 1293. Thanks to Hubert Eisenack for help with German analogues of due process.

²⁹⁵ See *Grundgesetz* Article 103(1), reading “Vor Gericht hat jedermann Anspruch auf rechtliches Gehör.” (“In the courts every person shall be entitled to a hearing in accordance with law.”) Thanks to Dr. Nina Freiburg for help in understanding this principle.

²⁹⁶ Such claims have been considered recently in several awards made in the context of NAFTA (the North American Free Trade Agreement) among Canada, Mexico, and the United States, to which we shall return later. See discussion *supra* of *Loewen* and *Mondev* cases. *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB (AF)/99/2; Award of 11 October 2002 published in 42 I.L.M. 85 (2003) (Ninian Stephen, James Crawford, and Stephen Schwebel).

²⁹⁷ See discussion *supra*, with references to works by Brierly, Paulsson, Freeman, and Brownlie.

²⁹⁸ The traditional Latin maxim in this connection was *audi alteram partem*: “the other party must be heard.”

²⁹⁹ Lack of bias has sometimes been expressed as *nemo iudex in parte sua*: “no one may judge his own case.”

³⁰⁰ Awards that exceed an arbitrator’s power are usually challenged on a statutory basis separate from other procedural irregularities, although procedural unfairness and excess of jurisdiction may overlap. See *Lesotho Highlands v. Impreglio SpA*, discussed *supra*. Section 67 of the 1996 English Arbitration Act speaks to lack of substantive jurisdiction, while other procedural irregularities are addressed in Section 68. See also Swiss LDIP Article 190 (2)(c); French *NCPC* Article 1502 (3); UNCITRAL Model Arbitration Law, Article 34(2)(a)(iii); New York Arbitration Convention, Article V(1)(c).

³⁰¹ Another approach separates fairness requirements into (i) the arbitrator’s independence and impartiality, (ii) party equality and (iii) the absence of undue delay. Georgios Petrochilos, *Procedural law in International Arbitration* (2004), at 130–151 (“A Right to a Fair Arbitration?”). Dr. Petrochilos notes, however, that the right to public hearings (a common element of judicial due process) is clearly waived in arbitration.

While these rudiments of fairness often overlap, such is not always the case.³⁰² Arbitrators who decide by flipping coins might be unbiased; but in failing to consider testimony they give no genuine opportunity for proofs to be heard. Conversely, arbitrators who go through the motions of listening attentively to witnesses might still violate due process if they enter the arbitration with minds already decided.³⁰³ In some instances elements of fairness exist in tension one with another. Granting a party additional time for witness examination constitutes unequal treatment, but might justify itself in exceptional circumstances if one side bears a special burden of proof.

Equality of arms among the parties constitutes yet another element of due process. An arbitrator might well decide to deny all right of oral depositions, believing the Anglo-American system to be unduly burdensome.³⁰⁴ However, the arbitrator could hardly consider requests for depositions by one side but not the other.

Application of established norms fosters a sense of equal treatment: the perception that procedure is “regular” and according to a “rule of law” principle. Indeed, to ask whether due process can exist without some measure of regularity is a question that suggests its own answer.

An essential element of Western legal tradition is that similar cases should be treated in a similar fashion.³⁰⁵ The very notion of law implicates that general rules will apply to more than one person or situation.³⁰⁶ Indeed, this principle is contained explicitly in the constitution of at least one nation whose recent history saw the rule of law ignored during a

³⁰² For an excellent summary of issues related to arbitral due process, see Fernando Mantilla-Serrano, *Towards a Transnational Procedural Public Policy*, 20 Arb. Int'l 333 (2004), addressing *inter alia* an arbitral tribunal's failure to observe its own instructions on form of proof, time limits for awards, biased experts, *ex parte* communications with arbitrators, and the impact of local procedural policy at the arbitral situs.

³⁰³ Interestingly, the requirement of a neutral tribunal is omitted in some arbitration statutes. UNCITRAL Model Law Article 34 allows award vacatur for denial of the right to be heard, but not for arbitrator bias. It has been observed, of course that bias as a reason for annulment might be subsumed under the catchall phrase “violation of public policy.” Compare UNCITRAL Model Law Article 12, which allows arbitrator challenge for “justifiable doubts” about impartiality. Similar structures hold true for other arbitration statutes. See e.g. Swiss federal arbitration law (*LDIP*), Articles 180(1)(c) (challenge of an arbitrator) and 190(2) (award vacatur).

³⁰⁴ The use of oral depositions derives in part from the desire to reduce the prospect of “ambush” at trial, which would reduce the prospect that a party can adequately present its side of the dispute. Affidavits might go some way toward meeting this goal. However, American litigation holds to the view that witnesses should be tested through an adversarial examination hot enough to burn off fabrication and false recollection, leaving only the raw core of truth. The extent to which this view proves accurate remains open to question.

³⁰⁵ H.L.A. Hart once observed, “We may say that [justice] consists of two parts: a uniform or constant feature, summarized in the precept ‘Treat like cases alike’ and a shifting or varying criterion used in determining when, for any given purpose, cases are alike or different. In this respect justice is like the notion of what is genuine, or tall, or warm, which contain an implicit reference to a standard which varies with the classification of the thing to which they are applied. A tall child may be the same height as a short man [and] a warm winter the same temperature as a cold summer.” H.L.A. Hart, *The Concept of Law* (1961) 156. For an essay questioning Hart's premise, see Kenneth I. Winston, *On Treating Like Cases Alike*, 62 Cal. Law Rev. 1 (1974). See also Frederick Schauer, *Profiles, Probabilities and Stereotypes* (2003). Philosophers, of course, might tell us that long before Hart, Aristotle gave a serious discussion of treating like cases in like fashion. See *The Nicomachean Ethics of Aristotle*, Book V.

³⁰⁶ Hart refers to this as “justice in the administration of law,” not justice of the law itself. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. Law Rev. 593 599 (1958).

significant period of time.³⁰⁷ The job of a judge or an arbitrator is thus to determine when cases are alike and when they are different.

By contrast, when arbitrators invent procedural norms after a procedural squabble arises, one side may perceive application of different sets of weights and measures. The risk seems inevitable when procedural standards are adopted *after* the arbitrator learns which party will receive the rough end of a rule.

Notions of arbitral fairness sometimes evolve on a path separate from courtroom fairness. For example, while trials are usually public,³⁰⁸ privacy is generally the rule in arbitration.³⁰⁹ Courts normally give reasons for their decisions,³¹⁰ while arbitrators in England³¹¹ and the United States³¹² sometimes dispense with reasoned awards,³¹³ at least in non-international cases.³¹⁴ Judicial determinations are normally subject to some form of appeal, but an agreement to arbitrate usually incorporates a waiver of the right to challenge findings of law or fact.³¹⁵

³⁰⁷ See Article 19(1), German *Grundgesetz*, which provides that any abridgment of a right must apply “generally and not only to an individual case.” (“Soweit nach diesem Grundgesetz ein Grundrecht durch Gesetz oder auf Grund eines Gesetzes eingeschränkt werden kann, muß das Gesetz allgemein und nicht nur für den Einzelfall gelten.”)

³⁰⁸ On the European Convention on Human Rights, see Dominique Poncet & Alessandra Cambi Favre-Bulle, *Un Arbitre indépendant et impartial aux termes de l’art. 6 § 1 de la Convention européenne des droits de l’homme*, in *Les Droits de l’homme au seuil du troisième millénaire: Mélanges en hommage à Pierre Lambert* (2000) 655.

³⁰⁹ Post-hearing confidentiality, of course, is a less certain and more nuanced matter, as has been shown in recent cases. See discussion *supra* of *Esso v. Plowman* and other authorities.

³¹⁰ See *North Range Shipping Ltd. v. Seatrans Shipping Corp.* (The Western Triumph) [2002] EWCA Civ. 405. See generally, Alan S. Reid, *The UNCITRAL Model Law on International Commercial Arbitration and the English Arbitration Act: Are the Two Systems Poles Apart?*, 21 (3) J. Int’l Arb. 227 (2004), at 235–36. For a related inquiry into reasons in an administrative context, see Jerry Mashaw, *Administrative Due Process: The Quest For a Dignitary Theory*, 61 B.U. Law. Rev. 885, 888–93 (1981).

³¹¹ In England, even some judicial decisions concerning arbitration need not give reasons. See e.g. *Mousaka Inc. v. Golden Seagull Maritime Inc.*, Comment by Gemma Birt, 5(1) Int’l Arb. L. Rev. N-2 (2002), holding that a judge need not give reasons in granting leave to appeal error of law under Section 69 of the 1996 Arbitration Act.

³¹² In American domestic arbitration, arbitrators traditionally do not give reasons for their decisions. Indeed, the American Arbitration Association traditionally discouraged reasoned awards, on the assumption that reasons provided a hook on which an unhappy loser might challenge an award. The former President of the American Arbitration Association once offered the following advice: “Written opinions can be dangerous because they identify targets for the losing party to attack.” Robert Coulson, *Business Arbitration: What you need to know* (3rd edn, 1987), at 29. However, in a surprising decision related to age discrimination, an American court stated that an arbitrator’s failure to give reasons might reinforce suspicions that there had been “manifest disregard of the law.” *Halligan v. Piper Jaffray*, 148 F. 3d 197 (2nd Cir. 1998), cert. denied 119 S. Ct. 1286 (1999). See generally Barry H. Garfinkel & Rona G. Shamoon, *A Dangerous Expansion of Manifest Disregard*, 3 ADR Currents 1 (Dec. 1998).

³¹³ By contrast, in France reasoned awards are required in domestic arbitration. NCPC Article 1471(2) (*la décision doit être motivée*).

³¹⁴ For international arbitration, most rules require reasoned awards. See *AAA International Rules*, Article 27(2) (the arbitrators shall “state the reasons upon which the award is based, unless the parties have agreed that no reasons need be given”); *ICC Rules* Article 25(2) (“the award shall state the reasons on which it is based”); *UNCITRAL Arbitration Rules*, 32 (award shall state reasons “unless the parties have agreed that no reasons need be given”); *LCIA Rules* Section 26.1 (award to be reasoned “unless all parties agree in writing otherwise.”)

³¹⁵ See e.g. Article 28(6) of the *ICC Rules*, Article 27(1) of the *AAA International Rules*, Article 26(9) of the *LCIA Rules* and Article 32(2) of the *UNCITRAL Rules*.

Conversely, since commercial arbitration is normally a creature of contract (“venue by consensus” in one taxonomy³¹⁶), some procedural tools open to judges are denied to arbitrators. Courts routinely join cases involving common issues of fact and law, whereas such joinder may be impossible for arbitrators if an entity has not agreed to be bound by the relevant arbitration clause.³¹⁷

Judicialization

The evolution of due process often dovetails into what has been called judicialization of arbitration: the procedural transformation of arbitral dispute resolution to resemble court litigation more closely.³¹⁸ At first blush, judicialized arbitration may seem a contradiction in terms. Arbitration is presumed to present an alternative to legal formalities, a phrase often stirring images of the judicial waste satirized in the Dickensian inheritance dispute *Jarndyce v. Jarndyce*, which had become so complicated that no living soul knew what it meant, and whose legal costs consumed the entire estate.³¹⁹

Putting aside this fine press that has long blessed us lawyers, elements of legal process inevitably enter arbitration as soon as the litigants want a binding result. No one would much care about legal rights if either party could unilaterally elect to disregard the arbitrator’s decision. But such is not normally the case.

³¹⁶ Andrew Bell, *Forum Shopping and Venue in Transnational Litigation* (2003), ch. 5, at 275.

³¹⁷ If X arbitrates with Y, who in turn arbitrates with Z, and both disputes raise common issues of law and fact, it would normally make sense to bring the cases together. Nevertheless, they may have to proceed on parallel tracks unless an authorization to consolidate can be found in an applicable arbitration statute or in the parties’ agreement. See LCIA Section 22.1(h), permitting joinder by a third party who so agrees, notwithstanding objection by one of the original litigants. With respect to class action arbitration, see discussion of the U.S. Supreme Court decision in *Bazzele supra*. On consolidation under national law, see generally *United Kingdom v. Boeing*, 998 F. 2d 68 (2nd Cir. 1993) (denying consolidation of arbitrations with Boeing and Textron, relating to contract to develop an electronic fuel system); *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F. 2d 1, 5 (1st Cir. 1988) (ordering consolidation under Massachusetts Gen. Laws, c. 251, § 2A, which through incorporation of Massachusetts Rules of Civil Procedure Rule 42 permits joinder of actions “involving a common question of law or fact.”); California Code of Civil Procedure, § 1281.3; Hong Kong Arbitration Ordinance, Ch. 351, § 6B (domestic arbitration only); Dutch Code of Civil Arbitration Law Procedure, § 1046.

³¹⁸ See generally the University of Virginia’s 12th Sokol Colloquium, *International Arbitration in the 21st Century: Towards Judicialization and Uniformity?* (Richard Lillich & Charles Brower, eds., 1993), with contributions by C.F. Amerasinghe, Richard Bilder, Andrea Bucher, Thomas Carbonneau, Andrea Giardina, Howard Holtzmann, Clifford Larsen, Richard Lillich, Arthur Rovine, David Stewart, and Albert Jan van den Berg. For an exploration of the judicialization of inter-governmental trade disputes, see J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and external Legitimacy of WTO Dispute Settlement*, 13 Am. Rev. Int’l Arb. 177 (2002). See also Gerald F. Phillips, *Is Creeping Legalism Infecting Arbitration?*, 58 ABA Dis. Resol. J. 37 (Feb.–Apr. 2003).

³¹⁹ Dickens described a “scarecrow of a suit [which] has, in course of time, become so complicated that no man alive knows what it means.” He continued, “Scores of persons have deliriously found themselves made parties . . . without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant, who was promised a new rocking-horse when [the case] should be settled, has grown up, possessed himself of a real horse, and trotted away into the other world.” Charles Dickens, *Bleak House* (1853) (Nicola Bradbury, ed., 1996), at 16. The case led old Tom Jarndyce to blow out his brains in despair at a Chancery Lane coffee house, and young Richard Carstone (who had married Ada, a Jarndyce ward) to pass away in hopeless dejection. For an attempt to produce the arbitration equivalent, see D. Mark Cato, *The Sanctuary House Case: An Arbitration Workbook* (1996).

Arbitration proceeds in the shadow of judicial power,³²⁰ enlisted to seize assets and grant *res judicata* effect to awards. So it is not at all surprising that litigants expect ordered arbitral proceedings that enhance the prospect that similar cases will be treated in similar ways.³²¹ Few business managers want a lottery of inconsistent results. Nor will many courts wish to lend their authority to a fundamentally unfair process.³²² When cases are won or lost, rather than negotiated away, procedural rights inevitably become an object of concern. The idiosyncrasies of legal process enter arbitration as the price for a binding result.

Rhetoric and reality

Institutional provisions

At this point, the careful observer might wonder what the fuss is all about. After all, institutions can always adopt rules to define the precise nature of the practices that will satisfy the litigants' senses of arbitral due process.

Here we see a disjunction between rhetoric and reality. On the one hand, arbitral institutions consistently endorse flexibility and its twin sister, arbitrator discretion. On the other hand, more specific norms inhabit the less elastic world where lawyers *do* care about the "regular" way to do things.

While cynics might suggest that these two approaches cohabit so arbitrators can hedge their bets (invoking discretion as an escape hatch and customary practices as rationale), better ways exist to explain this divergent evolution. The emphasis on flexibility likely represents a Darwinian survival mechanism, helping institutions market themselves globally by sidestepping tough questions about what fairness means when legal cultures diverge.³²³

³²⁰ The arbitral process itself, of course, remains voluntary, in the sense that parties must first accept to arbitrate. This would normally be done either by a clause in a commercial contract providing for arbitration of future disputes (pre-dispute agreement to arbitrate) or agreement to arbitrate concluded after a controversy arises (post-hearing agreement to arbitrate). Increasingly, arbitral jurisdiction may also be based on a government's irrevocable treaty-based commitment to arbitrate (often contained in a bilateral investment treaty or an income tax convention), which a private investor or taxpayer may accept at the time a specific dispute arises.

³²¹ See e.g. Ronald A. Cass, *The Rule of Law in America* (2001). It might be worth noting that non-binding processes such as mediation work in large measure because they are carried out in the shadow of possible litigation and arbitration.

³²² This search for enhanced certainty of both process and result (sometimes called *Rechtssicherheit* by German scholars) constitutes much of what law is all about. See Gerhard Walter & Samuel P. Baumgartner, *Utility and Feasibility of Transnational Rules of Civil Procedure: Some German and Swiss Reactions to the Hazard-Taruffo Project*, 22 *Texas Int'l Law J.* 463 (1998). One of the chief objections to forum selection has been its negative effect on the certainty of legal process, albeit with the corresponding benefit of improving the legal outcome for at least one of the parties. See generally, Fritz Juenger, *What's Wrong with Forum Shopping?*, 16 *Sydney Law Rev.* 5 (1994); Brian R. Opeskin, *The Price of Forum Shopping: A Reply to Professor Juenger*, 16 *Sydney Law Rev.* 14 (1994).

³²³ Significant differences exist in at least five areas: (i) the familiar problems with discovery, discussed *infra*; (ii) the way documents are used at hearings (civil law practitioners may be less likely than common lawyers to expect that documents will be authenticated and explained by live witnesses); (iii) witness testimony (judges rather than lawyers ask most of the questions in civil law jurisdictions); (iv) experts (Continental tend to expect that the arbitral tribunal will appoint experts, while Americans usually insist on each side presenting its own experts); and (v) legal argument (the common law tradition relies more on cases while the Continental practice has been to cite leading professorial commentaries). See Siegfried H. Elsing & John M. Townsend, *Bridging the Common Law-Civil Law Divide in Arbitration*, 18 *Arb. Int'l* 59 (2002); Axel Baum, *Reconciling Anglo-Saxon and Civil Law Procedure: The Path to a Procedural Lex Arbitrationis*, in *Recht*

These distinctions have often been noted between so-called “adversarial” and “inquisitorial” approaches, the former emphasizing the role of lawyers in controlling the proceedings (with the arbitrators simply listening to evidence and argument) and the latter granting the arbitrators a greater role in asking questions and directing the inquiry.³²⁴

The prevailing orthodoxy, of course, says that flexibility strengthens arbitration, and that arbitrators should have wide discretion to do what best fits each individual case.³²⁵ It is an exceptional arbitration conference without at least one war story about a praiseworthy arbitrator (usually the speaker himself) who exercised just the right touch of procedural *je ne sais quoi* that made things come out right. And indeed, it would be hard to argue that proceedings should be forced into an ill-fitting straitjacket of rules designed for some other controversy, rather than reflecting the contours of each particular case.

Major institutional rules address the conduct of proceedings simply by saying that arbitrators may establish the facts by “all appropriate means,”³²⁶ with the “widest discretion to discharge [their] duties”³²⁷ in “whatever manner [the tribunal] considers appropriate.”³²⁸ While this lack of direction might not matter when all arbitrators and counsel are cut from the same mold, such gaps might cause awkward confusion when one arbitrator or lawyer is doing his or her first international arbitration.³²⁹

It has sometimes been suggested that the homage paid to flexibility in major arbitration rules confirms the lack of users’ demand for more specific procedures.³³⁰ One wonders,

der Internationalen Wirtschaft und Streiterledigung im 21. Jahrhundert: Liber Amicorum Karl-Heinz Böckstiegel 21 (R. Briner, L. Y. Fortier, K.-P. Berger & J. Bredow, eds., 2001); reprinted in 16 Int’l Arb. Rep. 27 (Nov. 2001). See also Paul D. Friedland, *A Standard Procedure for Presenting Evidence in International Arbitration*, Mealey’s Int’l Arb. Rev. 133 (1996); Howard Holtzmann & Giorgio Bernini, *Comparative Arbitration Practice*, in *Comparative Arbitration Practice and Public Policy in Arbitration* (ICC Congress Series No. 3, P. Sanders, ed., 1987).

³²⁴ See e.g. Piero Bernardini, *The Role of the International Arbitrator*, 20 Arb. Int’l 113 (2004); Christopher Staughton, *Common Law and Civil Law Procedures: Which is More Inquisitorial? A Common Lawyer’s Response*, 5 Arb. Int’l 352 (1989). See also *International Commercial Arbitration: Important Contemporary Questions* (2002 ICCA Congress Proceedings, Series No. 11, 2003), containing debate on whether the parties or the arbitrators control the arbitration.

³²⁵ For a dissenting view, see John Uff, *Predictability in International Arbitration, International Commercial Arbitration: Practical Perspectives* (2001) at 151. Professor Uff provocatively suggests that “in most cases it is a matter of pure chance whether the parties to an international arbitration end up with what might objectively be called a ‘good’ resolution of their dispute.” *Ibid.* at 152.

³²⁶ ICC Arbitration Rules, Article 20. This applies as long as the arbitrators “act fairly and impartially” so as to ensure that each party has a “reasonable opportunity to present its case.” See ICC Arbitration Rules, Article 15. ³²⁷ LCIA Arbitration Rules, art. 14.2.

³²⁸ UNCITRAL Rules, Article 18; AAA International Rules, Article 16. In Article 16(3) the Rules go further and state that the tribunal “may in its discretion direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.” By contrast, the AAA Commercial Arbitration Rules (used in domestic cases) provide that the parties shall produce evidence “as the arbitrator may deem necessary.” See Rule 33, which continues that arbitrators may dispense with “conformity to the legal rules of evidence.” Rule 34 adds that evidence by affidavit is to be given “only such weight as the arbitrator deems it entitled.”

³²⁹ Matters that institutions usually *do* address include appointment and challenge of arbitrators, initial filings, hearing attendance by party representatives, the problem of multiple parties that cannot agree on an arbitrator, treatment of new claims, correction of mathematical mistakes, recovery of costs, and of course the delicate matter of arbitrator compensation.

³³⁰ Howard Holtzmann once suggested that “major arbitration rules . . . confirm that there is little, or no, demand by users of international commercial arbitration for additional arbitration procedures that parties could include by reference in their contracts.” Howard Holtzmann, *Balancing the Need for Certainty and*

however, whether the prevailing emphasis on flexibility indicates an absence of demand or a paucity of supply.³³¹ No empirical evidence drawn from modern arbitration indicates that more specific rules were tried and found wanting, rather than simply not having been tried at all. Indeed, the recent proliferation of guidelines from professional organizations suggests that arbitration's users seek more rather than less procedural predictability.³³²

In contrast to this rhetoric, the conduct of arbitral proceedings is often quite focused on fidelity to specific established norms. When a dispute arises over some procedural issue, such as privilege, discovery, or witness sequestration, counsel frequently invoke what they believe to be the normal way to do things. These customary standards are believed to exist; they are summoned into play during procedural disagreements; and the parties' sense of having been treated fairly is linked to how well the norms have been respected.³³³ They are also part of the package sought by consumers of arbitration services.³³⁴

In the real world, flexibility is far from an unalloyed good. Sometimes a flexible approach enhances performance of the arbitrator's tasks. Sometimes not.

One difficulty in evaluating flexibility lies in its chameleon-like quality. The concept changes color depending on context, which is not surprising for a concept defined as the ability to adapt in response to new situations.³³⁵ In some instances, flexibility can be nothing more than a synonym for ambiguity.

On a continuum between precision and generality, a flexible approach falls toward the "generality" end. Flexibility usually involves determining the specific rule after the procedural question arises: in essence, a type of *ex post facto* rule-making. A spectrum exists between rules and discretion. The search for procedural balance evokes the Swedish notion of *lagom* in the application of rules: not too much and not too little.

The very nature of the legal process, of course, contains an inherent tension between generality and specificity. Law would hardly be law without an aspiration to grant similar treatment to those in similar situations. Such a goal, however, calls for a determination of what similarities are relevant. An overly broad rule would fail by denying recognition to critical distinctions among different cases.

To recognize the limits of flexibility does not, of course, mean that "one-size-fits-all" rigid standards should cover all procedural issues, or that any specific set of rules represents some platonic ideal of universal application. For any given controversy, the optimum way to hear

Flexibility in International Arbitration Procedures, in *International Arbitration in the 21st Century: Towards Judicialization and Uniformity?* 3 (Richard Lillich & Charles Brower, eds., 1993), at 12.

³³¹ There was no lack of demand for Thomas Edison's inventions simply because people seemed satisfied with candles and live music before he brought them the electric light and phonograph.

³³² See discussion of IBA and CCA guidelines *infra*.

³³³ One often hears arbitrators and counsel say, "Let's do it the normal way," even when referring simply to the speaker's most recent experience.

³³⁴ Even if no arbitral bias is alleged, consumers of arbitration services often see the lack of rules as inefficient. See comments by Grant S. Kesler (former CEO of claimant in NAFTA arbitration), discussed *supra*. Mr. Kesler stated, "To obtain [procedural] rulings ad hoc takes too long. There are three judges in three countries and unless they figure out how to move these issues more quickly their needs to be more guidance to the parties working their way though." *Ibid.* at 6.

³³⁵ Usually the term is associated with words like "reasonable" and "appropriate" and used in juxtaposition or contrast to "rigid" or "strict." Of course, the difference between flexible and rigid procedures is one of degree.

evidence and argument usually varies as a function of the type of evidence to be presented, the questions to be decided, the sophistication of the litigants, and the amounts at stake.

On some questions, however, the establishment of pre-set rules make eminent sense. Simply because some questions do not lend themselves to rules does not mean that all procedural issues must be open-ended. By long experience, arbitration practitioners can identify trouble spots with a “repeat offender” character. As discussed below, for example, arguments over whether communications with in-house counsel should be privileged arise again and again in cross-border disputes. Adoption of some standard (whatever it might be) prior to procedural wrangling will usually promote a sense of fairness, regardless of what the content of that standard might be.³³⁶

Baselines and equal treatment

When arbitration takes place among lawyers who share little common legal culture,³³⁷ the absence of pre-established procedural standards can create special problems.³³⁸ This is ironic, of course, since flexibility is understandably justified as the best way to address cultural diversity.

The problem lies in the lack of common cross-cultural baselines. Parties can usually accept a ruling that follows a common pattern. Established norms articulating the “regular” way to do things reduces the risk that one side might perceive arbitrators to apply weights and measures chosen after knowing which side needs a thumb on the scale.

When there are no shared expectations about regular ways of doing things, however, litigants lack common assumptions about what fairness means. The absence of fixed standards, while perhaps making arbitration less cumbersome in some instances, can generate feelings of inequality.

The existence of two different baselines means that any *ex post* choice by the arbitrators will deviate from one side’s sense of procedural integrity. Practices that constitute procedural rights in one system might elsewhere be unfamiliar, unethical, or prohibited.³³⁹

³³⁶ In this connection, one might recollect the admonition of Justice Brandeis that “In most matters it is more important that the applicable rule of law be settled than that it be settled right.” See *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 447 (1932) (holding non-taxable a lessee’s oil income pursuant to government lease).

³³⁷ The experience of most international arbitrators has been that legal culture trumps party nationality. If a construction arbitration is conducted in New York with large Wall Street firms on both sides, and the majority of arbitrators drawn from the ranks of the American College of Construction Lawyers, there will be a tendency to gravitate toward familiar norms notwithstanding that the contractor and the owner are based in different countries.

³³⁸ On some occasions, of course, lawyers from different systems may seek strategic advantage from a dispute’s international character. A French *avocat* might refer to pre-trial discovery as the “enlightened” trend in a case where his client hopes to obtain documents that would never have been required under French principles. By contrast, a New York attorney might object that American-style procedures are disfavored in international proceedings, hoping to protect her client from the other side’s intrusive requests.

³³⁹ For a recent attempt at a cross-cultural code of conduct in arbitration, see Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 Mich. J. Int’l Law 341 (2002); Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 Am. U. Int’l L. Rev. 957 (2005); Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 Stanford J. Int’l Law 53 (2005). See also John M. Townsend, *Clash and Convergence on Ethical Issues in International Arbitration*, 36 Inter-American Law Rev. 1 (2004), comparing the AAA Code of Ethics for Arbitrators, the IBA Rules on Taking Evidence, the 2003 AAA Commercial Arbitration Rules, and the IBA Conflicts of Interest Guidelines.

Examples include witness interviews³⁴⁰ and oral depositions.³⁴¹ Divergent customs have also evolved with respect to experts, not only in how they are appointed,³⁴² but also in the way their testimony is heard,³⁴³ the admissibility of the evidence they present,³⁴⁴ and the scope of cross-examination.³⁴⁵ While good arguments can often be made for alternative rules, it is vital to the parties' sense of fairness that they know what to expect in advance of the hearings. Otherwise, the litigants may be subject to a "bait and switch" game in which they prepare their case one way only to learn, too late, that the arbitrators really wanted something else.³⁴⁶

The example of in-house privilege

One particularly enlightening example of culture clash relates to communications from in-house lawyers, which are privileged in the United States³⁴⁷ but not in many

³⁴⁰ See e.g., Article 13 of Geneva's *Us et coutumes de l'ordres des avocats* ("L'avocat doit s'interdire de discuter avec un témoin de sa déposition future et de l'influencer de quelque manière que ce soit.") Concerning the German prohibition on interviewing witnesses out of court, see John H. Langbein, *The German Advantage in Civil Procedure*, 52 *Chicago Law Rev.* 823 (1985) at 834; John H. Langbein, *Trashing The German Advantage*, 82 *Nw. Law Rev.* 763 (1988). By contrast, U.S. lawyers would be considered lacking in diligence if they failed to rehearse their witnesses about the type of questions to be asked, in theory seen as a way to keep witnesses from being misled or surprised, and arguably making the testimony more accurate. See *Wigmore on Evidence* (3rd edn) § 788; Thomas A. Mauet, *Pretrial* (4th edn, 1999) at 40.

³⁴¹ The IBA Rules of Evidence make no provision for oral depositions analogous to Federal Rules of Civil Procedure, Rule 26(b)(1).

³⁴² Under the Anglo-American adversarial system, counsel (rather than judges or arbitrators) often take the principal initiative in shaping how litigation will be conducted, and thus prefer experts hired by the parties rather than appointed by the tribunal. Under more inquisitorial approaches, judges and arbitrators engage in more extensive *sua sponte* searches for truth. See generally, Vera Van Houtte, *Party-Appointed Experts and Tribunal-Appointed Experts*, in *Arbitral Procedure at the Dawn of the New Millennium* 135 (2004).

³⁴³ Increasingly arbitrators encourage experts testifying on the same subject to do so together, in a "dueling" format that permits more efficient questioning by the tribunal. The New Zealand Code for expert witnesses includes a provision for court-ordered "conferencing" (one expert to confer with another). See Code of Conduct for Expert Witnesses, Schedule 4, Section 6, New Zealand High Court Rules, Part 3, Rule 330A. On witness conferencing in general, see Wolfgang Peter, *Witness Conferencing*, 18 *Arb. Int'l J.* 3 (2003); Alain Hirsch, *L'interrogatoire collectif des témoins*, in *Liber Amicorum Guy Horsmans* 525 (2004). The practice has crept into the revised (1999 version) IBA Rules of Evidence, which provide in Article 8(2) that witnesses may "be questioned at the same time and in confrontation with each other."

³⁴⁴ In the United States, a so-called "Daubert" motion may be made to disqualify an expert because his or her method is not sufficiently reliable. See *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), confirmed in Federal Rules of Evidence § 702. When scientific or technical knowledge will assist in understanding evidence, an expert witness may testify in the form of an opinion if "the testimony is the product of reliable principles and methods."

³⁴⁵ For example, British practice tends to allow cross-examination of any matter relevant to the arbitration's claims and counterclaims, while American lawyers often try to limit cross-examination to the scope of the direct examination (whether oral or in witness statement). Under the latter practice, a witness could not be asked whether he saw the proverbial "smoking gun" unless the gun had been mentioned in his direct testimony.

³⁴⁶ See *Iran Aircraft Indus. v. Avco Co.*, 980 F.2d 141 (2nd Cir. 1992), illustrating lack of due process in an international context. During proceedings before the Iran-U.S. Claims Tribunal, an arbitral tribunal led claimant to believe that evidence could be presented in the form of an auditor's report summarizing accounts, rather than the thousands of ledgers and invoices underlying the claim. Later, after a change in the presiding arbitrator, the panel rejected the claims on the ground that the evidence was insufficient. Ultimately, the Second Circuit found that claimant was unable to present its case and refused to recognize the award.

³⁴⁷ See e.g. *NCK Organization Ltd v. Bregman*, 542 F.2d 128, 133 (2nd Cir. 1976).

European countries.³⁴⁸ How should an arbitrator choose between these divergent models of privilege?

One way for the arbitrator to proceed would be to apply the rules of the place where the relevant memo was written. Accordingly, a memo would be protected if sent by an in-house lawyer in New York. By contrast, advice given by an in-house counsel in Geneva would not be protected, since the Swiss lawyer presumably had no expectation of privilege.

Such an approach has the merit (at least in theory) of giving effect to the expectations about privilege held by the drafters of the communication. However, other legitimate expectations would have to be ignored. In particular, short shrift would be given to the understandable anticipation of equal treatment.

Instinctively, therefore, a good arbitrator shrinks from assigning procedural benefits and burdens unequally, allowing one side but not the other an opportunity to claim privilege on the very same type of document. An arbitrator who gives one side such stark procedural handicaps would be inviting award vacatur.

Moreover, the principle that each litigant carries around its national procedural expectations could have other untoward implications. Would it be possible to grant discovery to a Frenchman litigating against an American, but to deny similar discovery to the American, on the theory that the Frenchman, when creating his documents, never expected them to be subject to discovery? A respondent in New York (where the expectation of discovery exists) would not likely be enthusiastic about an order compelling production of documents to a claimant in Paris but simultaneously denying a similar right to the American side simply because such fishing expeditions were unknown in France.³⁴⁹

Timing and the establishment of rules

The best moment for establishment of procedural protocols lies before proceedings begin, in an initial procedural order. In practice, however, many arbitrators (and litigants) may shy away from raising matters that could cause unnecessary wrangling at the beginning of the proceedings, for much the same reason that transactional lawyers drafting contracts often resist complicated debates over details of dispute resolution.

If procedural protocols can be established by agreement among the parties, or by initial procedural order, then so much the better. However, when agreement or consensus proves

³⁴⁸ In Switzerland, the notion of lawyer (*avocat / Rechtsanwalt*) depends not on a professional license but on activity of an “independent” character. Employment as an in-house counsel disqualifies from lawyer status. See Article 231, *Code Pénal* and Article 13, *Loi fédérale sur la libre circulation des avocats* (23 June 2000), establishing the obligation of professional secrecy. See also Article 29 of the *Loi fédérale d’organisation judiciaire* (limiting the right to represent clients to practicing lawyers and university professors). See generally Peter Burckhardt, *Legal Professional Secrecy and Privilege in Switzerland*, IBA Int’ Litigation News 33 (Oct. 2004); Bernard Corboz, *Le Secret professionnel de l’avocat selon l’article 321 CP*, *Semaine Judiciaire* 77 (1993); Albert Stefan Trechsel, *Schweizerisches Strafgesetzbuch: Kurzkomentar* (2nd edn, 1997).

³⁴⁹ For a Continental perspective on American-style discovery, see Klaus Sachs, *Use of Documents and Document Discovery: “Fishing Expeditions” versus Transparency and Burden of Proof*, 1 *Schieds VZ* (Zeitschrift für Schiedsverfahren/German Arbitration J.) 193 (2003). See also Axel Baum, *Reconciling Anglo-Saxon and Civil Law Procedure, supra*; Gabrielle Kaufmann-Kohler & Philippe Bärtsch, *Discovery in International Arbitration: How Much is Too Much?*, 2 *Schieds VZ* (Zeitschrift für Schiedsverfahren/German Arbitration J.) 13 (2004).

impossible, soft law can provide a sense of what rules are “regular,” thus enhancing perceptions of fairness.

The risk of flexibility is not so much award vacatur (most modern arbitration statutes give arbitrators relatively wide discretion on procedural matters), but rather disruption in the serenity of the proceedings and party satisfaction. Perceptions of *ad personam* justice (what the French might call *justice à la tête du client*) increases the risk of tension between the tribunal and at least one of the parties.

In this context, professional guidelines have evolved to mitigate some of the hazards of arbitral discretion. The gaps of institutional rules have become so large as to engender a secondary market for opinions, met by treatises, articles, speeches, and professional guidelines.³⁵⁰ The more specific norms of the secondary market represent intelligent design, in essence the invention of civil procedure on several levels.

Secondary markets for procedural norms: some examples

Who gets the last word?

The interaction of flexible discretion and concrete rules is illustrated by a recent English case, *Margulead v. Exide*.³⁵¹ An Israeli–American joint venture went sour, ending up in a London arbitration. The sole arbitrator, wanting to finish before lunch on the final day of hearings, refused a right of reply to the claimant’s lawyer. “You did [such an] admirable job of stating your case,” the arbitrator said to counsel, that a reply will not be necessary.³⁵² The Israeli claimant challenged the award,³⁵³ alleging serious procedural irregularity because it

³⁵⁰ See e.g. Lucy Reed and Jonathan Sutcliffe, *The Americanization of International Arbitration* 16 Int’l Arb. Rep. 37 (2001); Julian Lew and Larry Shore, *Harmonizing Cultural Differences in International Commercial Arbitration*, 54 Disp. Res. J. 32 (Aug. 1999); Karl-Heinz Böckstiegel, *Major Criteria for International Arbitrators in Shaping an Efficient Procedure, Arbitration in the Next Decade* (ICC Int’l Ct. Bull. Supp. 1999); Jack J. Coe, *Pre-Hearing Techniques to Promote Speed and Cost-Effectiveness: Some Thoughts Concerning Arbitral Process Design*, 17 Int’l Arb. Rep. 22 (2002); Benjamin Davis, *Laying Down a Gauntlet: The Thirty-Six Hour Chairman*, 3 Am. Rev. Int’l Arb. 170 (2002); Lee M. Finkel & Robert F. Oberstein, *Ten Commandments of Arbitration*, 5 ADR Currents 19 (Mar. 2000); Paul Friedland, *Combining Civil Law and Common Law Elements in the Presentation of Evidence in International Commercial Arbitration: Novel or Tested Standards?*, 17 J. Int’l Arb. 3 (2000); Mark Huleatt-James and Robert Hunter, *The Laws and Rules Applicable to Evidence in International Arbitration Procedure*, in *The Commercial Way to Justice* 45 (G.M. Beresford Hartwell, ed., 1997); Martin Hunter, *Modern Trends in the Presentation of Evidence in International Commercial Arbitration*, 3 Am. Rev. Int’l Arb. 204 (1992); Andreas F. Lowenfeld, *The Two-Way Mirror: International Arbitration as Comparative Procedure*, Mich. Y.B. Int’l Studies 163 (1995); James J. Myers, *Ten Techniques for Managing Arbitration Hearings*, 51 Disp. Res. J. 28 (1996); Alan Scott Rau & Edward F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 Texas Int’l Law. J. 89 (1995); John Uff, *The 1994 Bill Tompkins Memorial Lecture*, 61 Arbitration 18 (1995).

³⁵¹ *Margulead Ltd. v. Exide Technologies*, High Court of Justice (QB, Commercial Court), 16 February [2004] EWHC 1019 (Comm.) (Colman, J.), discussed in 20 Int’l Arb Rep. at B-1 (May 2004).

³⁵² The arbitrator later denied both the claim and the counter-claim, finding that mutual mistake of fact made the parties’ agreement unenforceable. The arbitrator, Paul Hannon, was appointed by the LCIA. However, the proceedings were subject to the UNCITRAL Rules. The applicable law was determined to be that of the American state of Georgia. By agreement between the parties, the arbitrator applied the IBA Rules of Evidence. While the official seat of the arbitration was in London, the hearings took place in Chicago.

³⁵³ The challenge under Section 68(2)(a) of the 1996 Arbitration Act referred to failure to comply with Section 33 of the Act, which in turn imposes a general duty for the arbitral tribunal to act fairly and impartially, giving each side a reasonable opportunity to present its case. A secondary challenge was brought under Section 68(2)(d) of the Act for failure to deal with all the issues. Margulead alleged that the arbitrator should have made reference in the award to its argument that Exide could not rely on mutual mistake as a defense because it had affirmed the agreement.

had not been given the last word, as apparently would have been normal in English courts for the claimant carrying the burden of proof.³⁵⁴

An English judge upheld the award, on the basis that a rule giving final say to claimants did not apply in arbitration. The judge looked first to the procedural framework accepted by the parties, which included a well-recognized set of arbitral provisions (the UNCITRAL Rules) and the IBA Rules of Evidence. Neither authority said who gets to speak last. The judge then turned to the English Arbitration Act, which also punted the question to the arbitrator.³⁵⁵

But discretion was not enough. The reviewing court then made reference to a learned treatise that *did* set forth a rule, to the effect that in international arbitration parties normally have the right to make an *equal* number of submissions.³⁵⁶ Thus, the failure to give claimant the last word comported with an established practice. One can only speculate on how the case would have been decided if a treatise had indicated a different rule.

Ex parte *interim measures*

The current debate over the arbitrator's right to grant *ex parte* interim measures of protection provides another point to ponder. Revisions of the UNCITRAL Model Arbitration Law would permit arbitral orders on application of only one side.³⁵⁷ Good arguments exist for and against the proposals.³⁵⁸ Ultimately, the UNCITRAL Working Group reached a compromise that would permit arbitrators to make preliminary procedural orders (not awards) on application by one side without notice to the other, effective for a brief period of twenty days. Moreover, the orders would be backed by the arbitrators' moral authority only, rather than any judicial sanctions.³⁵⁹

³⁵⁴ The pattern of submissions that runs "Claimant–Respondent–Claimant" can also be seen in the Arbitration Rules of the LCIA, which permit claimants to make a Statement of Reply to a respondent's Statement of Defence. Compare Article 5(6) of the Arbitration Rules of the Paris-based International Chamber of Commerce, which provide for a Reply only in the event that Respondent has filed a counterclaim.

³⁵⁵ The act said only that the arbitrator should "decide all procedural matters [including] . . . whether and to what extent there should be oral or written evidence or submission." 1996 Arbitration Act, Section 34(1) and 34(2)(h), cited in paragraphs 31 and 32 of Justice Colman's opinion.

³⁵⁶ Justice Colman cited Alan Redfern & Martin Hunter, *Law and Practice of International Arbitration* (3rd edn, 1999), para. 6–107 ("Who has the last word?") at 336, stating that the practice of giving the claimant two submission opportunities is "not widely followed, since arbitrators tend to feel, instinctively, that due process is generally served only if the parties are permitted an equal number of opportunities to make oral submissions."

³⁵⁷ Draft Articles 17 and 17Bis are discussed in Hans van Houtte, *Ten Reasons against a Proposal for Ex Parte Interim Measures of Protection in Arbitration*, 20 *Arb. Int'l* 85 (2004). See Report of the Working Group on Arbitration, 39th Session, Vienna, 10–14 November 2003, Document A/CN.9/545. See also John P. Gaffney, *Ex Parte Measures in International Arbitration*, 3 *Int'l Arb. Q. Law Rev.* (No. 4) 55 (Winter 2002), providing a discussion of *ex parte* measures by courts as well as arbitrators.

³⁵⁸ When a ship is about to weigh anchor, or the contents of a bank account are to be transferred abroad, *ex parte* measures might preserve assets to satisfy subsequent awards. The competing concerns, of course, are that *ex parte* measures conflict with the principle of equal treatment and risk being abused in a heterodox world where arbitrators are drawn from the ranks of non-lawyers who may not be that familiar with the circumstances that justify hearing one side alone.

³⁵⁹ See Report of the Working Group on Arbitration and Conciliation, New York, 10–14 January 2005. Document A/CN.9/573, 27 January 2005. Immediate notice of such an order would be given to the other side, which would have an opportunity to present its case to the Tribunal as soon as possible. On judicial injunctions of an interim nature, see Robert Sentner, *Judicially Ordered Provisional Measures in New York: An Update*, 22 (No. 1) *J. Int'l Arb.* 81 (2005).

The interesting aspect of this debate lies in what is *not* being said. Would the question arise at all if arbitrators really did have discretion on the matter? But in fact, an uncodified rule imposes a general ban on deciding matters without hearing both sides, absent the parties' specific agreement to the contrary.³⁶⁰

Conflicts of interest

While non-binding on their face, such guidelines will still have far-reaching effects, since during heated procedural debates they will be cited for lack of anything better. The IBA Guidelines on Conflicts of Interest have been contested by some lawyers³⁶¹ precisely because of the prospect that they will affect arbitrator nominations. The Guidelines set out three sets of practical applications (red, orange, and green lists) detailing illustrative situations that give rise to varying levels of arbitrator disqualification.³⁶² These standards ultimately will enter the canon of sacred writings cited when an arbitrator's independence is contested.³⁶³

Procedural predictability: A modest proposal

Ultimately, the tension between judicialization and flexibility brings us full circle to party expectations. At a minimum, most litigants hope that the process for proving their case will be reasonably foreseeable and orderly.³⁶⁴ While few business managers wish to put an

³⁶⁰ The matter of *ex parte* interim measures must be distinguished from an arbitrator's *ex parte* communications with one of the litigants, usually the party that appointed the arbitrator engaged in the improper communication. Although *ex parte* communications between arbitrators and parties are subject to general disapproval by the international arbitration community, some major institutional rules contain no explicit prohibition of the practice. The ICC Rules provide an example. One can, of course, make arguments about the "spirit" of the ICC Rules, which in Article 15(2) say arbitrators should act "fairly and impartially." But as illustrated by the American practice until 2004 (which allowed *ex parte* communication) fairness and impartiality are notoriously flexible notions. Compare the LCIA Rules, Sections 5.2 and 13, which prohibit arbitrators from advising on the merits of a case and requires all communication to pass through the LCIA Registrar. The latter rule, however, has generally been interpreted to allow limited conversations with respect to choice of a presiding arbitrator.

³⁶¹ More than one conference participant has commented on Toby Landau's speech at the American Bar Association conference in New York on 14 April 2004.

³⁶² A "red list" describes situations that give rise to justifiable doubts about an arbitrator's impartiality. Some are non-waivable (such as a financial interest in the outcome of the case), while others (such as a relationship with counsel) may be ignored by mutual consent. An "orange list" covers scenarios (such as past service as counsel for a party) which the parties are deemed to have accepted if no objection is made after timely disclosure. Finally, a "green list" enumerates cases (such as membership in the same professional organization) that require no disclosure.

³⁶³ Sometimes, of course, norms evolve not from group pronouncements, but from an individual mishap, as happened recently when an award was challenged because the wrong *curriculum vitae* had been sent to the ICC. See *ATT v. Saudi Cable Co.*, 2000 WL 571190 (Court of Appeal); [2000] 2 All ER (Comm) 625; [2000] 2 Lloyd's Rep. 127. See also Barton Legum, *Investor-State Arbitrator Disqualified for Pre-Appointment Statements on Challenged Measures*, 21 Arb. Int'l 241 (2005), concerning a speech by an arbitrator touching on several matters pending in a trade dispute between the United States and Canada which later became relevant to the NAFTA Chapter 11 arbitration *Canfor Corp. v. United States*. In connection with mishaps, one recalls words attributed to a former Australian Prime Minister, Robert Menzies, about how some public contributions can be made in the form of problematic examples. See also *Containers Ltd. v. ICT Pty Ltd.* [2002] NSW CA 84 (New South Wales Court of Appeal), affirming *ICT Pty Ltd. v. Sea Containers* [2002] NSW SC 77 (New South Wales Supreme Court), 2002 WL 599992 (removal of arbitrators for requesting a cancellation fee at an inopportune time).

³⁶⁴ One might also recall the work of the late Harvard philosopher John Rawls, who proposed that those who create law should remain behind a "veil of ignorance" about the exact contingencies to which a rule might apply. See John Rawls, *A Theory of Justice* (1971), § 24 at 136. The "veil of ignorance" distinguishes an arbitrator who aspires to interpret pre-existing norms from one who establishes procedures after receiving indications of how one model or another will likely affect the outcome of the case.

arbitrator into a procedural straitjackets, neither do they feel comfortable committing their property and financial welfare to binding dispute resolution without knowing what to expect on critical matters as to which different cultural baselines exist.

To this end, professional associations should continue to explore the development of proposed default standards to serve as starting points from which to address procedural questions arising frequently in cross-border arbitrations, subject to appropriate provision for “good cause” exceptions to be made by the arbitrator. Likewise, arbitral institutions could make available more specific rules which the parties could adopt on either an “opt-in” or an “opt-out” basis. Matters covered by such default standards or optional rules might include privilege for in-house counsel, pre-trial discovery, the form of direct testimony (whether written or oral), witness sequestration and *ex parte* communications with the tribunal.

Nothing in such standards need prevent the parties from agreeing to other rules, or from crafting clever and flexible procedures if they mutually so desire. In the absence of mutual agreement, however, the existence of these standards will give the litigants an idea what to expect, and will help arbitrators conduct proceedings on a basis perceived as “regular” in the event of contestation.

Concerns about “*ad hoc* justice” and the misuse of “flexibility” have also led some commentators to suggest that arbitral institutions consider a smorgasbord approach that would offer a menu of more specific provisions from which litigants might choose.³⁶⁵ Choice might be offered between procedure which is “rules light” and “rules heavy,” or between procedural protocols with Continental, English, or an American flavor.

When such proposals were floated a few years ago on the occasion of the University of London’s Freshfields Lecture,³⁶⁶ some members of the arbitration community received the suggestion with all the enthusiasm one might reserve for a horde of pesky ants at a Sunday-school picnic. After the lecture’s publication, however, a large number of letters to the author expressed delight and satisfaction that the question had been raised openly. These communications shared experiences of “imperial arbitrators” whose abusive disregard of procedural regularity was facilitated by the flexibility inherent in institutional rules. As Rudyard Kipling might have written, however, that is a story for another day.

Conclusion: A View from Mount Pisgah

In our efforts to understand the evolution of business arbitration, most of us are a bit like Moses on Mount Pisgah. We are able to look forward to the next stage, though never fully entering the new territory.³⁶⁷

³⁶⁵ See e.g. Lawrence E. Newman & David Zaslowsky, *Cultural Predictability in International Arbitration*, New York Law J. (25 May 2004), at 3, developing themes raised earlier in the 2002 Freshfields Lecture, discussed *infra*.

³⁶⁶ William W. Park Arbitration’s *Protean Nature: The Value of Rules and the Risks of Discretion* (The 2002 Freshfields Lecture), 19 Arb. Int’l 279 (2003).

³⁶⁷ The final chapters of Deuteronomy recount that Moses was forbidden to enter the Promised Land as a consequence of earlier disbelief. See Deuteronomy 32: 48–52 and 34: 1. For the background to this incident, see Numbers 20: 12, when water came from the rock at Meribah, which Moses appears not to have interpreted as a miracle from the Lord.

There is reason for optimism. Today national traditions are being woven together in a way that brings us nearer an optimal balance of fairness and efficiency. Arbitration continues to be informed by vigorous debate and experiment among lawyers, judges, and arbitrators. These thoughtful individuals would surely be counted among the men and women in the arena, whose faces are marked by the trial and error that moves humankind forward, sometimes by design and sometimes by dumb luck.³⁶⁸

In all of this change, business arbitration benefits from a spirit of questioning authority.³⁶⁹ Some arbitration practices which are widespread today may at a future time appear no more evolved than the Neanderthals who roamed Europe a hundred thousand years ago.³⁷⁰ Whether a practice is drawn from long-standing American, English, or French tradition should be of less consequence than whether it helps arbitrators ascertain the facts and interpret contract language in a way that is efficient and leaves the litigants feeling that they have been treated fairly.

³⁶⁸ The model “man in the arena” seems to originate in Theodore Roosevelt’s address to the University of Paris on 23 April 1910, entitled *Citizenship in a Republic*. Nestled among praise for the French (“certain lessons of brilliance and generous gallantry that [France] can teach better than any of her sister nations”), Roosevelt speaks of the credit due “the man [from any nation] actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes short again and again [but whose] place shall never be with those cold and timid souls who neither know victory or defeat.” Theodore Roosevelt, *The Man in the Arena: Selected Writings of Theodore Roosevelt* (B. Thomsen, ed., 2003). Thanks are due to my friend Jim Groton for this gem.

³⁶⁹ Oliver Wendell Holmes once remarked that it was revolting to have “no better reason for a rule of law than that it was laid down in the time of Henry IV.” Still more revolting, he said, that a rule persists from blind imitation long after its *raison d’être* has vanished. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. Law. Rev. 457, 459 (1897). Presumably Holmes was thinking of Henry IV of England (who died in 1413), rather than two other eminent rulers of the same name: the Holy Roman Emperor (who reigned three centuries earlier) and the King of France (who came almost two centuries later).

³⁷⁰ The enigmatic “Neanderthal Man” was named after the Neander Valley (*Tal* in German) where the first specimen’s remains were found in 1856 at Feldhofer Cave near Düsseldorf. Portrayed as dim-witted brutes with sloping foreheads and chinless jaws, Neanderthals met a controversial fate, with opinion divided between those who maintain they became extinct and those who argue they interbred with *Homo sapiens sapiens*, the double wise creatures represented by men and women today. See generally James Shreeve, *The Neanderthal Enigma* (1995).

