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Portuguese guitars in Alfama, Lisbon, Portugal | Jacek Sopotnicki

CHANGING INTERNATIONAL ARBITRATION AND LOOKING TO THE FUTURE: YAR 2.0 Keynote Address

By Steven Finizio

The article is adapted from the keynote speech at YAR 2.0, in Lisbon.

I had the honor to have written the first article in the first edition of YAR. It was published in January 2011, and was called "Constancy and Change in International Arbitration". On YAR's second anniversary, in 2013, I wrote a second article; it was called "Constancy and Change in International Arbitration Revisited: A Cautious Look to the Future".

What does it mean to refer to constancy in arbitration? It means that certain of its key attributes have been remarkably constant and enduring: procedural flexibility, informality, an essentially adversarial process involving party representatives, decisions based on the evidence and arguments presented, and a role for the parties in choosing the decision makers.

And what about change? Despite these constant features, international arbitration is susceptible to change because it is a creature of compromise. This necessarily means compromise among participants coming from different places: international arbitration by its very nature is a collision between (often very smart and usually very motivated) participants from different legal systems, with different experiences, expectations and sensibilities. It therefore requires participants to confront (and sometimes to participate in despite their own objections) procedures that reflect these diverse views.

This process must happen in each case. In each case, the international collection of participants in that particular case must reach some agreement on how to best proceed in that case. And they must do so in an adversarial context where they are focused on winning – and not focused on the development of global practices or norms.

International arbitration will only continue to exist as a meaningful practice if its users believe that it leads to sensible outcomes in cross-border disputes more reliably and more efficiently than litigation in national courts. This means that, for international arbitration to survive and to thrive, those who are interested in it must constantly strive for ways to respond to any inefficiencies that emerge, while also maintaining the principle of fairness. And this requires a constant and very real process of re-consideration.

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I started in 2011 by saying that there is no doubt that YAR, and those who participate in creating it, can and will change international arbitration. And that they will inevitably be changed as lawyers because of their interest in international arbitration.

Nearly a decade later, in late 2019, and on the occasion of the second YAR international conference, it seems appropriate to look at how arbitration has changed in the intervening years, how YAR has contributed to changing arbitration, and to again cautiously look to the future.

One of things I wanted to do was to look at the topics YAR has covered over the last decade to see what that shows about the issues younger arbitration practitioners have focused on and also to find (I hoped) a few topics that, in hindsight, did not justify the attention the arbitration community gave them at the time. The reality turned out to be different.

It turns out that YAR does serve as a microcosm for the arbitration community, and looking at its table of contents provides a wonderful map to the issues that have preoccupied the international arbitration community over the last ten years. But I failed to find anything to poke fun at, and I was reminded instead that YAR has provided an opportunity for arbitration lawyers from a very diverse set of jurisdictions to shine a light on those jurisdictions, and has been a platform for launching some truly innovative and important ideas.

Before turning to what YAR has done over the past decade, I thought I would first revisit the then-current trends and issues I highlighted in YAR in 2011 and 2013 and some concerns I expressed at the time. I list those trends and issues below, with a few observations about them today:

• A seeming explosion of protocols and guidelines and other soft law instruments (this seems to have slowed down but has not stopped).

• Concern about the time and costs frequently associated with international arbitration (which continues to be a loud theme).

• Complaints about the supposed "Americanization" of arbitral procedures and, in particular, about the perceived growth in the scope of document disclosure and risks from "e-discovery" (concerns about managing electronic data seem to have quieted down, although whether that is because the issue was overblown or whether arbitration is behind litigation in dealing with them is an open question).

• Calls for greater transparency in investor-state proceedings particularly but also in commercial arbitration (this issue is particularly ripe at the moment).

• The emergence of new arbitral institutions and the expanding geographic presence of existing institutions (interestingly, while this has continued, several of the institutions highlighted in the 2013 article no longer exist or have not been successful).

• Revisions of leading arbitration rules and the introduction of new procedures (a trend that seems to have accelerated, with many institutions revising their rules more frequently).

• The reform and modernization of arbitration laws (this is of course an ongoing process).

• The lack of shared ethical rules binding participants in international arbitration and concerns that tribunals do not have the same ability or interest as courts to police so-called "guerrilla tactics," or bad faith and obstructive conduct by parties and counsel (interestingly, while there have efforts to incorporate standards of conduct in certain arbitral rules, efforts to create a transnational code seem to have faded).

• The growing use of technology for presenting evidence and managing proceedings (notably, however, the motivation for the use of technology now includes environmental concerns and not just cost and efficiency, and what we mean by technology has shifted to include artificial intelligence and blockchain).

• The increasing use of summary presentations by experts (which is now increasingly common, but still very little commented on).

• Combining arbitration with conciliation or other forms of ADR to facilitate settlement (which seems to have received a new boost with the recent DIS and Prague Rules).

• The growth and marketing of third party litigation funding businesses, and related concerns about potential conflicts of interest and disclosure issues (now being addressed through a number of rules revisions).

I noted at the time that these issues – and how the arbitration community was responding to them – were both a source of concern and a source of hope.

The reason that some of these trends and developments were (and remain today) a source of concern is that they have the potential to stifle innovation and flexibility, rather than to encourage it.

One particular concern was and is the proliferation of soft law guidelines, and whether that runs the risk of making arbitral practice overly formal and rigid.

To take advantage of the flexibility and informality inherent in arbitration, it requires not just choices – it requires a willingness to take advantage of those choices. It is good to learn from experienced practitioners and to identify useful practices. But this must be balanced against considerations of party autonomy and consent, and parties must have the right to propose a process that meets their expectations and

Top view on the Commerce square in the centre of Lisbon city | Olena Kachmar

needs. We need to be open to new ideas, and to guard against becoming too comfortable with what is familiar, and ignoring what is actually best, and best for an individual case.

A similar concern arises from the increasing similarity of arbitration rules and institutions. It was not clear in 2011 -- and it is not clear today -- whether there will be more options, or fewer, over time. Will arbitration rules end up being essentially the same, or will some institutions offer more distinct rules and more clearly differentiate themselves in a crowded market? Once they are more firmly established, will regional institutions be more comfortable introducing approaches that are more informed by local practice? If change requires choices, and innovation requires new perspectives and the opportunity to test new ideas, this matters to the future of arbitration.

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Ultimately, despite the fact that we are still considering how to address many of these issues in 2019, international arbitration's capacity to implement change is the source of hope.

In fact, one of the reasons it was easy to be hopeful in 2011 and to predict that YAR would play a role in changing arbitration was that, unlike many other practice areas, international arbitration can be directly and immediately influenced by the ongoing dialogue among those who participate in it. It is influenced by those who have made the choice to adopt it to resolve their disputes, by those who act as counsel and arbitrators, and by those who administer it and study it. And the choices made by those who participate in arbitral proceedings can be implemented without legislation or rulemakers.

Some change is slow (as compromise by committee usually is), but international arbitration also is capable of changing rapidly and organically, as illustrated by the fact that arbitration practitioners from many different backgrounds have adopted a number of procedural innovations, including the use of Redfern Schedules, witness conferencing (or "hot-tubbing"), and the "Bockstiegel method" for time management. Many of these innovations have been associated with well-known practitioners, and have been adopted because they provide pragmatic ways to address practical issues, not because they were mandated by any rules or laws.

This is why it was clear in 2011 that YAR would help change arbitration. As more parties from around the world engage regularly in international arbitration, their expectations and their views will affect the procedures used in individual cases and therefore, inevitably and appropriately, influence arbitration practice more generally. This is true whether the parties are from South Korea, Brazil, Portugal or Texas.

Indeed, YAR was launched shortly after the 2010 revision of the IBA Rules on the Taking of Evidence in International Arbitration and this conference takes place shortly after the launch of the Prague Rules (the Rules on the Efficient Conduct of Proceedings in International Arbitration). Regardless of one's views of these rules themselves, much like YAR, the launch of the Prague Rules has helped create a renewed dialogue about assumptions about how to approach

arbitration procedure, and should remind participants of the menu of choices they have in every case.

* * * * *

So, has YAR changed international arbitration? Has it changed its contributors? Has it proposed important innovations?

The answer to all of those questions is yes.

At its launch, one of YAR's particular appeals was that it included younger voices from a jurisdiction – Portugal – that had not been heard loudly in the then existing international discussion about arbitration practice. At the same time, YAR was founded with an understanding that international arbitration at its best involves an opportunity for lawyers from one jurisdiction to listen to and draw upon the experiences of those from other jurisdictions, while adding their own experiences and views to the conversation.

The articles published by YAR prove that this has been true.

Not only has YAR been an important journal to discuss the development of arbitration in Lusophone countries (indeed, despite being founded in Portugal, it may be the leading English language arbitration journal addressing developments in Brazil), but YAR has had a global reach. It has included articles addressing more than 40 jurisdictions, including Spain, Italy, Switzerland, Florida, Colombia, Portugal, France, Belgium, Mozambique, Sao Tome, Guinea Bissau, Cape Verde, East Timor, Bulgaria, Iran, Poland, Ukraine, Germany, Brazil, Belarus, Tunisia, Saudi Arabia, Malaysia, Brunei, Lebanon, Bosnia Herzegovina, India, South Korea, Russia, SAARC, OHADA, Turkey, Vietnam, England, China, California, Singapore, Austria – and others. The list itself demonstrates the diversity and breadth of YAR's contributors, and the melting pot of experience many of them have gained from working and studying internationally.

In covering these jurisdictions, YAR has also served as a record of the issues that have concerned arbitration practitioners in these jurisdictions, and arbitration practitioners more generally over the last decade.

Reviewing the topics that YAR has focused on since 2011, particular attention has been paid to:

• Procedural developments, including, in particular, interim measures and emergency arbitration, with a more recent focus on issues of enforceability.

• The use of ADR.

• Evidence and procedural conduct, including issues about ethics/conduct, guerrilla tactics, disqualification, cross-examination, and the use of experts.

• Third party funding.

• Transparency and confidentiality.

There also have been articles on a number of other difficult and important issues that will continue to demand attention, including the role of res judicata, corruption, the impact of data protection regulations, and, I am told, tax arbitration.

And YAR also helped launching an innovative proposal that is starting to get attention in a number of jurisdictions: In "Bits, Bats and Buts: Reflections on International Dispute Resolution", published in Edition 13 of YAR, in April 2014, Gary Born explained his proposal for Bilateral Arbitration Treaties. Such a treaty would fill an important gap by providing a default dispute resolution mechanism for cross-border business to business contracts where the parties have failed to do so, which is a particular problem for small and medium sized businesses, particularly in certain jurisdictions.

All of this reflects the extraordinary success of a first decade in which YAR has more than fulfilled its promise.

What are the issues that YAR will focus on in the future?

From reading recent issues and the discussion at YAR 2.0, it is clear that YAR will continue to focus on legislative reform and the development of arbitration practices in a wide range of jurisdictions, including many jurisdictions that do not get in-depth coverage in other journals. We also will continue to see articles about reforming investor-state arbitration and related issues. In the next few years, I expect we will see increased attention to appointment mechanisms, artificial intelligence, security for costs, calculation of damages, cost allocation, data protection, the growth of international commercial courts, and the increasing use of arbitration by pharmaceutical and other IP sensitive businesses. We will also see further discussion of the impact of arbitration on the environment, and the use of arbitration of human rights and climate change issues.

These are all reasons to celebrate YAR, and to look forward to its future. The process of constant reconsideration works best when young (and no longer quite so young) lawyers from many different places come together to talk about their experiences of and expectations for arbitration. YAR as a journal and this conference, which I hope remains an annual event, have an important ongoing role to play in the future of arbitration. The hope is that YAR will help arbitration to continue to reconsider itself, to promote innovation and not rigidity, flexibility and not formality, and will continue to allow voices from different backgrounds to come together to discuss what arbitration is and what it can be.

Steven Finizio

"25 de Abril" bridge in Lisbon, PT | Luis Louro

LIVE AND LEARN: EMERGENCY ARBITRATION IN POST-M&A DISPUTES*

By Gustav Flecke-Giammarco and Martina Magnarelli

1. THE ADDED VALUE OF EMERGENCY ARBITRATION FOR POST-M&A DISPUTES

"*Vivendo e aprendendo*" goes the saying in Portuguese. Since 2006, arbitration practitioners are living and learning that emergency arbitration (***EA***) is well equipped to cater to the needs of post-M&A disputes.

Most M&A disputes arise post-closing, when the buyer acquiring the target company learns more about its state of affairs and actual financial conditions. At this juncture, the availability of an urgent remedy to intervene within the framework of purchase price determinations or representations and warranties is key.[1] Provisional measures can be particularly useful in post-M&A disputes to obtain performance of a party's contractual obligations, be it the payment of the contract price or steps to be taken to determine the contract price.[2] International arbitration is widely used in disputes on balance sheets or key figures of the target company relevant for the purchase price determination. Purchase price adaptations are prime examples of M&A arbitrations, especially because parties often agree that the final purchase price will not be determined when they conclude the share purchase agreement (***SPA***), but only later based on values existing on a certain date.[3] Another typical M&A dispute concerns accounting principles or whether and how to evaluate certain balance sheet items.[4] A party can also require emergency relief to (i) maintain the *status quo* to guarantee enforcement, (ii) prohibit the other party from calling a bank guarantee, (iii) enjoin the other party from disposing of shares of the target company, or (iv) place the purchase price or shares in an escrow account.[5]

On the other hand, examples of pre-closing M&A disputes include the binding effect of individual clauses of a letter of intent (***LOI***), or an alleged violation of them,[6] while disputes on non-disclosure agreements (***NDAs***) and exclusivity agreements as well as claims arising out of the termination of contract negotiations are comparatively rare.[7] EA is also particularly helpful in case the seller fails to perform certain actions in relation to the target company or does not take measures it must perform under the contract.[8] Thus, EA can be relied on to enforce exclusivity or confidentiality clauses, as well as obligations and undertakings by the seller concerning business conduct, management and administration of the target company.[9]

The complexity of M&A disputes derives, *inter alia*, from the multiplicity of contractual arrangements, e.g. SPAs, LOIs, NDAs and exclusivity agreements,[10] but also articles of association and the statute of the target company.[11] The entangled nature of transactions that often involve actions that cannot be easily reversed and in respect to which monetary compensation rarely provides adequate relief, also explains the added value of EA for post-M&A disputes. After all, it is standard practice for parties to M&A contracts to agree that they will be irreparably harmed if the transaction does not close and that therefore injunctive relief can be sought as a remedy against a breach.[12]

II. BALANCING THE PROS AND CONS OF EA FOR POST-M&A DISPUTES

The increasing use of EA in post-M&A disputes reveals a genuine need from users.

By 30 April 2018, the ICC International Court of Arbitration (***ICC***) had received 80 applications for EA proceedings: 69 of these ended with an order; 19 were rejected on jurisdiction or admissibility grounds; 36 were rejected on the merits; 23 were partially or fully granted on the merits; and 25 were settled before issuing the final award. As for the type of emergency measures sought by the applicant, 51 were applications to maintain the *status quo* to guarantee enforcement, 7 were applications to transfer money into an escrow account, and other measures concerned the preservation of assets or property, the performance of contractual obligations, or orders to refrain from enforcing a bank guarantee—all measures which may play a role in post-M&A disputes.[13]

The first arbitral institution to introduce provisions on EA in its arbitration rules was the International Centre for Dispute Resolution (***ICDR***) in 2006, followed by the Stockholm Chamber of Commerce (***SCC***) and the Singapore International Arbitration Centre (***SIAC***) in 2010, the ICC in 2012, the Hong Kong International Arbitration Centre (***HKIAC***) in 2013, the London Court of International Arbitration (***LCIA***) in 2014, the Arbitration Centre of the Portuguese Chamber of Commerce and Industry (***CAC***) in 2015 and the Milan Chamber of Arbitration (***CAM***) in 2019.[14] Against this trend, the German Arbitration Institute (***DIS***) resisted the strive for uniformity and did not introduce EA provisions when it revised its arbitration rules in 2018 in consideration of the ongoing revision of the 10th book of the German code of civil procedure.

Already in 2015, the annual Queen Mary University International Arbitration Survey dedicated to "Improvements and Innovations in International Arbitration" reported that, although few respondents had been involved in EA proceedings, 93% of them favoured including EA provisions in institutional arbitration rules.[15] The reasons for the success of EA in post-M&A disputes rest on the advantages it provides to its users (**B.**)—some of which are inherent characteristics of arbitration in comparison to state court proceedings (**A.**).

A. Arbitration in comparison to state court litigation

Arbitration is faster in comparison to M&A litigation.[16] Arbitration is also more flexible, to the extent that the parties can determine the applicable procedural law, the applicable language of the proceedings, the timetable, the number of submissions and the specific rules for the taking of evidence.[17]

Arbitration is usually more expensive, requiring the payment of a registration fee and possibly imposing on the losing party to reimburse the legal fees of the winning party on an hourly rate basis. Arbitration is limited to one instance and not assisted by the support of precedents.[18] But one should be mindful of the costs involved in large M&A cases before national courts, often involving several parallel proceedings before multiple state courts in various jurisdictions. Documents redacted in a foreign language regularly need to be translated when introduced before state courts—which entails additional costs. One may simply consider the high costs that would be linked to the translation of SPAs.[19] In arbitration proceedings, instead, the parties chose the language of the proceedings and may even agree to the submission of evidence in a foreign language or to the admission of non-certified translations. In addition, arbitration proceedings allow the parties to pool together before the same *forum* disputes arising from multiple contracts or involving multiple parties.

Moreover, arbitration proceedings are confidential, not only towards the public, but in certain cases also towards the opposing party thanks to available tools like *in camera* examination of documents or counsel only review.[20]

B. EA in comparison to state court litigation

The strong points highlighted above equally apply to EA. The ICC Arbitration and ADR Commission Report on Emergency Arbitrator Proceedings (***ICC Commission Report***) collected data on the first 80 EA proceedings administered by the ICC. According to the ICC Commission Report in 53 of these cases hearings were held (20 of which in person) and in 18 cases witness statements were filed.[21] Procedural arrangements on the number of written submissions exchanged by the parties, the use of witness statements, the examination of witnesses or the conduct of a hearing *tout court* indeed varied from case to case. The emergency arbitrator has, subject to the mandatory provisions of the *lex arbitri*, wide discretion to decide on procedural measures appropriate to ensure effective case management. This is the case in Germany, for example, where the EA can even issue freezing orders typical of English law but foreign to German law.[22]

Moreover, considering the exponential costs of court proceedings involving multiple parties and potentially taking place in different jurisdictions, it bears noting that 22 out of the first 80 EA proceedings involved more than two parties, 27 involved multiple contracts, and 10 cases concerned SPAs.[23] Court proceedings usually involve several instances, which increases time and costs, whereas the order of the emergency

CCB in Lisbon, PT | 4kclips

arbitrator can be repealed only by the arbitral tribunal. If a party suffered damages as a result of the granting of interim relief or the (non-)compliance with the order, compensation can immediately be sought in the ensuing arbitration.[24] However, the emergency arbitrator cannot order interim measures against third parties and if a party is not expected to comply with the emergency arbitrator's order, it is preferable to seek recourse before domestic courts, for example to ensure compliance with a confidentiality agreement or enforcing an exclusivity agreement.[25]

Yet, it should not be neglected that when interim relief is sought before domestic courts, instead of through EA proceedings, its effectiveness might be uncertain, and the independence of the court doubtful.[26] By contrast, arbitration is often agreed as a recourse because it is neutral. The tactical use of EA should be assessed case-by-case. Starting EA proceedings entails that arbitration proceedings must follow in short order. What is more, from a cost perspective, up-front registration fees can be high, but a flat administrative fee would still be less expensive than court fees based on the amount in dispute—especially in large M&A disputes.

Another aspect to consider is that *ex parte* interim relief is normally unavailable in EA proceedings in comparison to court proceedings. For example, under Article 1(5) Appendix V ICC Rules (***Appendix V***), once the President of the International Court of Arbitration (***President***) is satisfied that the emergency arbitrator provisions (***Emergency Arbitrator Provisions***) apply, the application is transmitted by the ICC Secretariat (***Secretariat***) to the responding party. Thus, the responding party may receive the application before or at the same time the emergency arbitrator is appointed. As a result, the possibility of an *ex parte* order is said to be excluded.[27] There has been one recorded case of an interim order issued by an emergency arbitrator under the Emergency Arbitrator Provisions pending the responding party's submission of its response—an *ex parte* order to maintain the *status quo* and therefore for the responding party not to call a bank guarantee. The decision has been criticized for not respecting the responding party's right to be heard.[28] By comparison, the arbitration rules of the Swiss Chambers' Arbitration Institute (***SCAI Rules***) provide for *ex parte* interim relief under Article 26(3) SCAI Rules, but the same provision stipulates that the responding party must be heard right after the granting of the order.[29] And although the DIS Rules do not provide for EA, it is interesting to note that Article 25 DIS Rules allows the arbitral tribunal to order interim relief "without giving prior notice to or receiving comments from the other party" in "exceptional circumstances". The arbitral tribunal must notify the request for interim relief to the other party "at the latest" when ordering the measure.

In addition, the decision of the emergency arbitrator usually takes the form of an order, which can be later on modified or terminated by the emergency arbitrator or the arbitral tribunal, depending on the arbitral institution's rules.[30] Article 29(2) ICC Rules explicitly provides that "[t]he emergency arbitrator's decisions shall take the form of an order", while the SCC, LCIA, China International Economic and Trade Arbitration Commission (***CIETAC***) and SIAC Rules allow the emergency arbitrator to take measures either in the form of an order or in the form of an award. Under the CAC Rules the decision of the emergency arbitrator is made by "award or another form of decision." The 2018 HKIAC Arbitration Rules, under Article 12, Schedule 4, give even more discretion to the emergency arbitrator by referring to "[a]ny decision, order or award"[31] and the SIAC—while traditionally allowing the arbitral tribunal to reconsider, modify or vacate any interim order or award of the emergency arbitrator including "on his own jurisdiction"—has gone one step further by allowing the emergency arbitrator to vacate or modify an interim order or award only "for good cause".[32] And while the order of the emergency arbitrator is not subject to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (***NY Convention***)—a typical advantage of arbitration as awards are

more easily enforceable in foreign jurisdictions in comparison to state courts' decisions[33] —,parties usually comply with interim measures ordered by the emergency arbitrator to avoid a bad first impression on the arbitral tribunal.[34] As a result, the time and costs associated with enforcement proceedings before state courts are usually saved.[35]

Voluntary compliance with the order of the emergency arbitrator also marginalizes the issue that in some jurisdictions such as Italy or Russia arbitral tribunals are not allowed to order interim relief.[36] Non-compliance with the order of the emergency arbitrator would amount to a false start into the arbitration and potentially expose the non-compliant party to damages for breach of a contractual undertaking. Article 29(2) second sentence ICC Rules establishes, for example, that "[t] he parties undertake to comply with any order made by the emergency arbitrator". By failing to comply with the order of the emergency arbitrator, a party also breaches the arbitration agreement. A similar consideration comes into play where an interim order of an emergency arbitrator or an arbitral tribunal is not enforceable before state courts. Moreover, the preliminary assessment by the emergency arbitrator can lead to a settlement of the dispute[37] or the applicant may decide not to pursue its claims any further in light of the findings of the emergency arbitrator.[38]

Thus, EA can be beneficial in that it encourages parties to settle or allows the applicant to realise it is better not to proceed with a claim at an early stage when only moderate costs have been incurred. A word of caution is, however, in order since the available statistics show that, so far, the success rate of the EA cases administered under the ICC and SCC Rules is lower than one-third.[39]

C. EA in comparison to dispute boards proceedings

There are of course other alternatives to EA, including dispute boards (***Dispute Boards***). Parties sometimes agree that pre-closing disputes should be decided by a Dispute Board, for example as a first escalation level in multi-tiered dispute resolution clauses. The procedure before a Dispute Board is informal, the decision is quick and provisionally binding. But if a notice of dissatisfaction is filed, the matter will be finally decided by arbitration. Proceedings before Dispute Boards are less adversarial, which usually make them apt for disputes concerning long-term construction contracts. But with regard to M&A disputes parties would be better served with a binding decision taken by an emergency arbitrator.[40]

III. INSTITUTIONAL RULES AND EA: WHAT DOES IT MEAN FOR POST M&A DISPUTES

Institutional rules set stringent deadlines to ensure that the decision of the emergency arbitrator on the relief sought is provided expeditiously. Article 2(1) Appendix V establishes that the President shall appoint an emergency arbitrator "within as short a time as possible, normally within two days from the Secretariat's receipt of the Application". In most cases, the emergency arbitrator is appointed the day after the receipt of the application, sometimes even on the same date.[41] The other important deadline concerns the rendering of the emergency arbitrator's decision. The time frame established by institutional rules does not vary extensively. Under the ICC Rules, the emergency arbitrator should issue an order within 15 days from the transmission of the file, under the LCIA, HKIAC and SIAC Rules within 14 days from the appointment of the emergency arbitrator and transmission of the file respectively. All institutions allow for said deadline to be extended in limited scenarios: upon a "reasoned request" under the SCC and ICC Rules, in "appropriate circumstances" or "exceptional circumstances" or "by the written agreement of all parties" under the HKIAC and LCIA Rules respectively, in "exceptional circumstances" according to the SIAC Rules.[42] The deadline set under Article 6(4) Appendix V, for example, is generally complied with and in some cases only a few days extension has been required so far.[43] For that reason, EA demonstrably satisfies the need for prompt relief—a particularly important feature for post-M&A disputes.

A. The emergency arbitrator's discretion in the conduct of the proceedings

Emergency arbitrators enjoy wide discretion in the conduct of the proceedings, as provided for example by Article 5(2) Appendix V. The lessons learned from EA proceedings show that the instrument is efficient. Most emergency arbitrators have established the procedural timetable within the two-day deadline set by Article 5(1) Appendix V.[44] Normally parties have the possibility of exchanging two submissions each and although nothing prevents adducing witness and expert testimony, most cases examined by the ICC Commission Report were decided only based on documentary evidence. In more than a half of the cases, an oral hearing was held.[45] It bears noting that under the LCIA and ICC Rules, there is no strict obligation to hold an oral hearing and according to the SIAC Rules, the emergency arbitrator can order or award any interim measures "pending any hearing, telephone, or video conference or written submissions by the parties".[46]

B. Applicable substantive standards

In rendering their orders, emergency arbitrators are *per se* not bound by the substantive standards of the *lex arbitri*. The vast majority of EA proceedings saw the application of substantive standards developed by international arbitration practice, although a good number of EA proceedings conducted under the ICC Rules also considered the effect of provisions of the *lex arbitri*.[47]

An emergency arbitrator typically considers the following international standards: urgency, whose precise meaning may vary; *fumus boni iuris*, *i.e.* a *prima facie* case on the merits; *periculum in mora* or irreparable harm, where irreparable means that the harm cannot be adequately repaired by an award on damages, provided the harm is not remote, avoidable or contingent on future events;[48] and balance of equities. Other factors sometimes considered are the appropriateness of the requested measure and the risk of prejudgment.[49]

It comes with the expeditious nature of interim relief that only an assessment of the applicant's prima facie case is conducted and limited evidentiary material is examined. Any prejudgment of the merits of the case needs to be strictly avoided.

It also bears noting that regarding the urgency and irreparable harm standards, emergency arbitrators often rely on Article 17A UNCITRAL Model Law on International Commercial Arbitration (***UNCITRAL Model Law***). Since institutional arbitration rules do not specify the substantive standards, it is common practice for emergency arbitrators to refer to the international arbitral practice, thus available former decisions, and the *lex arbitri*, but also to the UNCITRAL Model Law if applicable.

C. Most common objections

In EA proceedings under the SCC Rules, some responding parties have argued that the SCC Rules did not provide for EA when the parties concluded the arbitration agreement. Such objection is usually dismissed. Generally, the arbitration rules in force on the day of the commencement of the proceedings apply. In this respect, Article 29(6) ICC Rules clearly states that the parties to an arbitration agreement concluded after 1 January 2012 need to opt-out of the Emergency Arbitrator Provisions if they do not want EA. Article 9B LCIA Rules provides for a similar opt-out mechanism for arbitration agreements concluded after 1 October 2014. The same holds true for the SIAC Rules as regards arbitration agreements concluded on or after 1 July 2010 and the HKIAC Rules for arbitration agreements concluded on or after 1 November 2013. The SCC Rules also establish an opt-out mechanism, but differently from the other institutional rules, EA applies retroactively to any arbitration agreement referring to the SCC Rules.[50]

It is further reported that some responding parties objected that they were not bound by the arbitration agreement—in this case the emergency arbitrators usually make a jurisdictional assessment based on the submissions and evidence at their disposal.[51]

D. Interim conclusions

International arbitral practice demonstrates that EA proceedings are meeting the users' expectations. Decisions on the emergency measures requested are taken expeditiously and the parties' procedural rights are guaranteed. Emergency arbitrators do not venture beyond an assessment of the applicant's *prima facie* case, respect the arbitral tribunal's mandate, and do not risk any prejudgment of the merits. Each EA is adapted to the specific circumstances of the case with regard to organizational aspects and evidentiary material, keeping intact the guarantees of a fair trial and the rule of law.

IV. EA and post-M&A disputes: combinação perfeita

Post-M&A disputes often demand emergency relief. M&A transactions and, in particular, the differences that may arise between the parties post-closing, call for prompt intervention to avoid damages and losses that would be extremely difficult if not impossible to repair by an award. EA allows the applicant to seek recourse within a short time frame, without waiting for the constitution of an arbitral tribunal. EA therefore mirrors interim relief before domestic courts. EA is not only an alternative to state court proceedings; a party may also simultaneously seek interim relief before domestic courts and before the emergency arbitrator (*cf.* Article 29(7) ICC Rules, Article 9.12 LCIA Rules). The advantages of EA in comparison to state court proceedings are manifold. The decision of the emergency arbitrator can be confirmed, modified or repealed by the arbitral tribunal once constituted, without the need to conduct multiple parallel proceedings, possibly before the domestic courts of different countries if, for example, the responding party owns property or assets in various jurisdictions. This can often be the case in post-M&A disputes—in particular larger ones. Chances are that the parties will settle their dispute or that applicants might either withdraw or reformulate their claims once the EA is concluded. Parties profit from a chance to test their arguments in an arbitration setting. By weighing their counterparty's arguments with their own, they may find an amicable solution in the process.

A trend towards an increasing use of EA is already discernible. Users of international arbitration have frequently relied on EA since it was introduced, and they continue to do so at an accelerating pace. This demonstrates that EA fits the needs of international arbitration and post-M&A disputes. Parties should seriously consider this valuable tool. Practice shows that EA proceedings are conducted expeditiously and thoroughly. The increasing tendency of seeking relief from emergency arbitrators confirms this and advocates for an even greater use of this additional remedy. Parties and counsel dealing with post-M&A disputes are encouraged to follow this trend and use EA according to their needs. Users can learn from experience, their own or that of those who have already tested the benefits of EA. The authors have no doubt that post-M&A disputes and EA are a perfect match.

Gustav Flecke-Giammarco and Martina Magnarelli

[*] This article is based on the presentation given by Gustav Flecke-Giammarco on Emergency Arbitration in Post-M&A Disputes at the Sixth Panel during Day 2 of the 'International Arbitration Conference YAR 2.0' held in Lisbon on 11 October 2019.

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4 H-J Holzapfel & R Pöllath, *Unternehmenskauf in Recht und Praxis* (RWS) p. 442, para. 1691.
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10 H-J Holzapfel & R Pöllath, *Unternehmenskauf in Recht und Praxis* (RWS) p. 437, para. 1671.
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12 J M Moses, *Drafting M&A Contracts to Minimise the Risk of Disputes*, Global Arbitration Review: The Guide to M&A Arbitration, 1st Edition (December 2018).
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21 ICC Commission Report, p. 21, paras 127, 129.
22 K M Mehrbrey, *Handbuch Streitigkeiten beim Unternehmenskauf* (Carl Heymanns Verlag 2018) p. 36, para. 138.
23 ICC Commission Report, p. 37, ss II-IV.
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ARTIFICIAL INTELLIGENCE IN ARBITRATION: Should we consider the possibility of decision-rendering AI?

By Daniele Verza Marcon, Erika Donin Dutra and Lukas da Costa Irion

1. Introduction: general background regarding the relationship between decision-rendering and Artificial Intelligence

Amongst the different issues raised and discussed by law practitioners in relation to the ever-evolving relationship between Law and technology, the use of artificial intelligence ("AI") is certainly one of the most challenging and up-to-date ones. The academic definition of AI is still strongly controversial. The basic idea is described in Professor John McCarthy's website, who is said to have coined the term, according to which AI is "*the science and engineering of making intelligent machines, especially intelligent computer programs*"[1]. Furthermore, Professor Maxi Scherer defines the concept of machine learning, as "*a subfield of AI-research concerned with computer programs that learn from experience and improve their performance over time*". The combination of AI and machine learning programs has introduced significant changes in the legal field through the recent years.

In order to (i.) optimize the execution of repetitive tasks; (ii.) reduce the time spent in the execution of activities that not necessarily demand highly-expert human workforce, such as rendering an award in simple disputes and analysing contracts in due diligences; or even (iii.) reduce expenses with attorney's fees, AI and machine learning tools are being developed to be used by enterprises, law firms and State Courts. However, the development of the studies and research regarding the use of AI and machine learning in the legal field is raising tough and controversial queries about it among scholars.

Due to the massive number of judicial lawsuits in state courts pending of an award, AI is also being studied (either by private entities or by State Courts) to improve the decision-making process – not only reducing time spent, but also assisting in the case analysis.

An important example of initiatives created for this purpose is the Correctional Offender Management Profiling

for Alternative Sanctions ("COMPAS") algorithm, which is designed to provide a risk assessment of the probability of violent recidivism of a defendant, attributing a score from 1 to 10 (10 corresponding to the highest probability). The COMPAS risk assessment is based on responses of the defendant to some questions and other sources that might "*differ by jurisdiction and predictive assessment product. The literature on risk assessment scores generally states that they are based on administrative data, public records, self-reporting, and interviews*"[2].

Nevertheless, the adequacy and fairness of the use of the algorithm was challenged in the case *State of Wisconsin v. Loomis*, in 2016, in which the defendant alleged that the use of COMPAS amounted to a violation of his due process rights.

As a predictive justice tool, COMPAS was employed in the Pre-Sentencing Information ("PSI") analysis. The risk assessment provided by COMPAS was expressly mentioned in the sentence and changed significantly the result of the case. As summarized by Anne L. Washington[3], Loomis waived his right to trial and agreed to a plea deal with the prosecution, according to which he should get one year in county jail with probation. However, after the result provided by COMPAS, Loomis was sentenced to a total of eleven years with six in initial confinement[4].

The defendant then requested access to the software code and to the algorithmic weighting that resulted in his risk of recidivism score, claiming that the impossibility of obtaining such information was a failure of disclosure of the relevant elements considered in the sentencing. However, the Supreme Court of Wisconsin denied access in order to protect trade secret and proprietary rights of the developer, Northpointe Inc.[5]. The defendant filed an appeal to the Supreme Court of the US, but the Court denied the *certiorari* to analyse the case.

Considering the results, the employment of a predictive justice tool similar to COMPAS could raise questions about a decision-maker's independence and impartiality[6] regarding not only the parties, but also the AI-tools available to assist the judge or arbitrator in the sentencing process.

Another example regarding AI in state courts can be seen in Estonia, where the government announced in 2019 the implementation of a robot judge to deal with small claims (of up to 7 thousand euros), usually regarding the interpretation of contractual clauses[7]. The benefit of this practice is that judges will have more time to dedicate to more complex claims.

Finally, companies such as eBay have also implemented Al to solve a long-lasting problem: the costs of maintaining buyer-seller dispute resolution mechanisms. The company had to deal with over sixty million disputes per year, which had negative impacts both operationally and financially. The solution was to create the eBay Resolution Center[8], an AI-powered Online Dispute Resolution system that solves the disputes by itself, through a questionnaire-based algorithm. Essentially, the eBay algorithm collects factual information, identifies preferences and suggests resolution options to the dispute. According to reports, it successfully deals with over 90% of the disputes brought forward[9].

Thus, the widening of the use of AI in the legal field is evident. From algorithms that provide a risk assessment previous to a criminal award (COMPAS) to AI systems that act as a judge in small claims (Estonian robot judge), not to mention the implementation on eBay's online dispute resolution system, AI is leading a true disruption in the dispute resolution methods as we are currently familiar with.

And as would be expected, arbitration has not been immune to the rise of complex questions and dilemmas regarding the implementation of AI and machine learning tools. This is so especially concerning the initiatives related to the decision-making process, which is already applied in State Court proceedings.

In light of such initiatives, it is intended to dive into the debate surrounding the possibility of using AI in arbitration and provide an insight into its current framework, also considering the expansion of AI in other law-related environments.

This paper aims to highlight and analyse key arguments regarding the possibilities and challenges of the implementation of AI in arbitration, especially considering the prospect of it playing a role similar to a human arbitrator in the decision-making process.

Given the amplitude of the subject, it is not the purpose of this paper to present definite answers (nor could it be), but mostly to instigate debate on the matter.

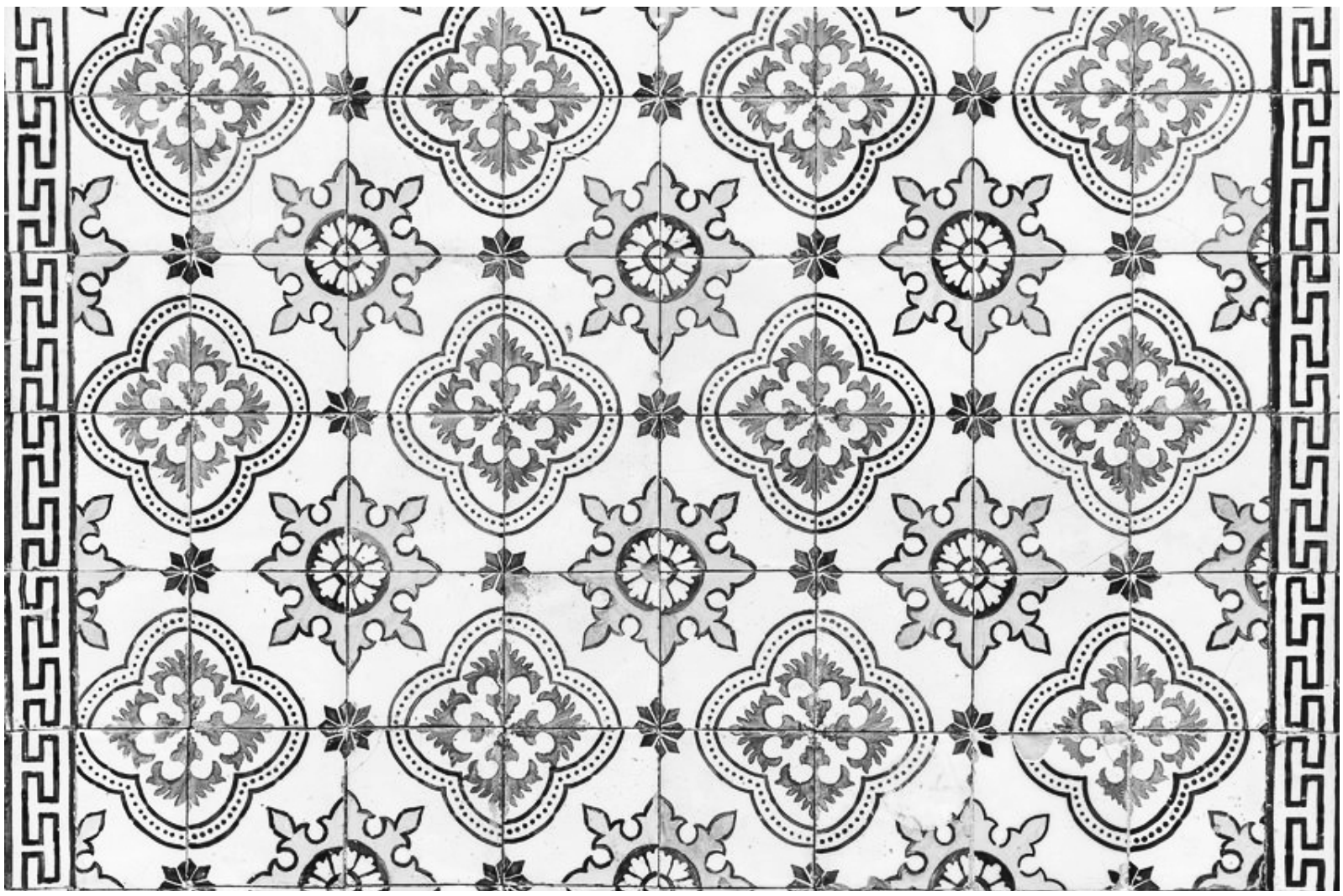
2. Can AI be an option for the decision-making process in arbitration?

The recent development and implementation of AI-tools in general raised concerns about the possibility of AI replacing humans in their jobs. This is a fear that humans have felt since the beginning of modern labour relationships and which is not only related to technology, but to any kind of innovation that has the potential of improving processes usually performed by humans[10].

Although "*[a]uthors typically either assert that AI is inevitable in the future, or express scepticism, mainly on the assumption that some 'human factor' would be necessary to ensure empathy and emotional justice*"[11], such a concern remains.

In 2013, the engineers Carl Benedikt Frey and Michael Osborne conducted a research to find out how susceptible jobs were to computerisation[12]. The results of the research were summarized in the online test "*Will Robots Take My Job?*"[13]. According to the test, AI/robots are only 4% likely to replace lawyers, but 40% likely to replace "*judges, magistrate judges and magistrates*" and 94% likely to replace "*paralegals and legal assistants*".

If there is a probability of 40% of AI/robots replacing judges, it is possible that AI/robots become an issue when it



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comes to arbitrators as well. This is because the rendering of an award in an arbitral proceeding is the same role played by a judge when sentencing a State Court lawsuit.

As it could be observed in the State Courts, AI may be useful for both working as an auxiliary tool (for various purposes, such as providing relevant case law[14]) or in the decision-making process itself in the context of arbitration. Even though it is important to discuss both AI roles and their respective implications, this paper focuses on the use of AI in the decision-making process, since this is the cause of the major ethical and practical discussions.

In order to properly address this subject, this section is divided into (2.1) an objective overview of the impacts and (2.2) implications of the use of AI in arbitration.

2.1. How AI can impact the decision of the Parties to arbitrate?

When analysing the prospect of using AI in arbitration, the starting point is to understand the reasons that lead parties to this method of dispute resolution. Many writers have properly and exhaustively dealt with the benefits of arbitration in the past. Thus, the turning point of this study is to verify the AI's potential influence over said benefits.

According to a survey published by White & Case in 2018, the four main reasons why parties choose international arbitration are: (i.) enforceability of awards; (ii.) avoiding specific legal systems/national courts; (iii.) flexibility; and (iv.) the ability of the parties to choose their arbitrators[15]. The Silicon Valley Arbitration and Mediation Centre ("SVAMC") conducted a similar research and reached a different, albeit not significantly, conclusion. In their study, the order of relevance was as follows: "*expert decision making (80%), time (54%), confidentiality (41%), streamlined process (38%), flexibility (35%), facilitated enforcement (27%) and cost (20%)*"[16].

Regardless of the relevance order, the issue is: would the introduction of AI in the decision-making process impact the reasons that lead parties to arbitrate?

In relation to flexibility, if the parties elected arbitration aiming to have more autonomy to interfere in the proceedings, for instance by establishing the deadlines and the necessary evidence to be produced, the possibility of using AI would not jeopardize such objective. This is because the Parties would still be able to agree upon the aspects of the proceeding and even program the robot to work accordingly.

Furthermore, the AI may positively affect another relevant benefit sought in arbitration, which is time. Should AI be implemented in the analysis of contracts and written submissions, e-discovery or case law research[17], there could be significant reduction of the time that arbitrators and lawyers spend performing such activities, especially considering that AI is capable of processing data infinitely faster than humans[18].

Finally, AI may have a positive impact on costs, since many arbitrators and lawyers are paid for how much time they spent working on the case. In relation to this issue, there are at least two hypothesis that should be pointed out. The first one regards to the fact that AI tools are created specially to

optimize the time that humans spent performing a specific activity. Therefore, in a scenario where the parties would pay per time spent by the AI performing a certain activity (*e.g.* reading documents), the costs would plummet, given the fact that AI tools are much faster than humans.

However, said scenario is unlikely to be verified in practice. It is much more probable that the costs of an AI tool are based only on the licensing fees, either per use (for each arbitration) or monthly/yearly subscription, which lead to the second situation. Ultimately, the price would be settled by the AI's developers or owners. The different AI tools provided by the market would then compete not only on the basis of efficiency, but also of their price. In any case, as it already happens, the parties would be responsible for bearing such costs.

A decision-making AI could be held by specialized bureaus of AI arbitrators or by the Chambers. In any case, the costs related to the licensing of the robot from the creator would probably be the same regardless if the case demands more or less time a day for the work.

Notwithstanding the positive aspects to this issue, some consequences of the implementation of AI-powered tools must be considered when evaluating the pros and cons of applying it, as it is analysed in the section below.

2.2. Important issues involving AI in arbitration

The assessment of issues that might arise from the use of AI in arbitration has two primary stages. Firstly, it is necessary to identify the limits of the arbitration agreement. Secondly, parties must define the role that AI will perform in the proceeding - whether as an auxiliary tool or as a decision-making arbitrator. Other issues might arise depending on what is verified in the first two stages.

Regarding the limits of the arbitration agreement, the main aspects to bear in mind refer to (a.) the basis of judgment (by law or equity); (b.) the composition of the arbitral tribunal (that is, who can be part of it and the number of arbitrators) and the applicable legislation; and (c.) the confidentiality of the proceedings.

a. Basis of Judgment

Concerning the arbitration "by law", the concern is the process through which the AI will apply the applicable law in order to reach a decision. There are at least two possible alternatives: AI could be pre-programmed with a logical formula (syllogism) such as "*rule plus facts yields conclusion*"; or it could function through the machine learning concept, which is mostly based on prediction[19].

In the first one, the decision-making process would consist in subsumption of the given facts to the logical reasoning contained in the algorithm following, therefore, the formalist idea of the application of the Law[20]. Facing a specific fact, the AI would search its database for adherent rules and apply the predicted conclusion. This approach can be considered a formalistic standpoint of a decision-making process.

In the second one, the decision-making process would rely on the observable data that formed the algorithm, which is the product of the AI's analysis of previous cases, as an action of the machine learning tool. In this sense, the machine learning system would "learn" from its previous experiences in order to improve its future performances and, consequently, the algorithm itself, in an inverse approach. Thus, ruling a specific dispute, the AI would research in its database the most probable conclusion to render the award, considering the known previous experiences. This is a more realistic approach of a decision-making process.

The difference between both examples is that whereas in the first possibility the conclusion shall always be the same to the cases that subsume in the same facts in the pre-programmed syllogism, in the second one, the conclusions may be different depending on the "learning process" the AI was previously exposed to.

Albeit both alternatives allow the use of AI in the decision-making process of the arbitral award, none of them ensures that AI will effectively perform in a trusted manner and be able to replace the human arbitrator. This is evidenced by the fact that neither syllogism nor probability may be enough to decide a hard case that was never presented to the AI-system before. Apart from the debate involving the realistic and formalist decision-making theories, any analysis of predictability made by a robot, considering past cases, would fall within at least three philosophical queries.

Firstly, how would a decision-rendering AI fill in general concepts and standards such as "good faith" and "unjust enrichment"? As a matter of fact, the decision-making process goes beyond the realistic and formalistic approaches. H. Hart[21] differentiates at least three levels of judicial reasoning, being the third one the need to observe determined standards (provided by the legal system) in order to allow the assessment and justification of the decision among those affected by that decision. In other words, this level would then be the moment in which the decision could be evaluated as correct or incorrect. The fulfilment of general concepts requires not only a syllogistic reasoning, but also (and most importantly) the management of previous case law and of the facts and context under analysis. This appears to be a goal not yet reached by decision-making robots.

Secondly, as pointed out by M. Scherer[22], even considering ever-improving algorithms, the robots probably will adopt a conservative approach. This is because the machine will only have access to data that already exists, whereas the human decision-maker is part of the events generating/improving such data. Thus, no matter how fast the machine learning tool can evolve, it will hardly be as fast as the changes of life and probably it will not promote any social/community disruption by means of a decision.

Lastly, the predictability tool will need to carry a percentage to decide between the possible outcomes. For instance, in a contractual claim, it may request 80%

probability of breach to condemn the respondent to the payment of damages. However, this leads to questions such as *who* will decide the appropriate threshold and guided by *which criteria*.

With regards to the arbitration "by equity", which means that the arbitrator "*shall decide according to an equitable rather than a strictly legal interpretation*"[23], it is disputable *how* a sense of equity could be taught to a machine. In this sense, the machine does not have naturally human characteristics such as "*empathy, morality and the ability to explain decisions*"[24]. Besides the use of machine learning tool to law, it would also be possible to apply the concept of machine learning to equity. Nevertheless, this would also raise the question *whether* the information fed to the machine would be reliable and sufficient to develop an acceptable morality sense in order to render an award on the basis of equity.

b. The composition of the arbitral tribunal and the applicable legislation

In relation to the possibility of appointing AI as an arbitrator and the limits imposed by Law, the parties can, by their mutual consent, establish that the arbitral tribunal should be of one or three arbitrators. Moreover, depending on its composition, they may choose a full human arbitrator's tribunal or even create a mixed tribunal with humans and machines.

With regards to this topic, Christine Sim accurately presents some of the questions that are likely to arise from the possibility of an AI arbitrator[25]:

"*(1) Would two human arbitrators simply ignore the AI? (2) Should AI be the president of a tribunal? Would it be programmed differently? (3) In a panel of three, if there is a disagreement between two human arbitrators, would the AI break the deadlock? (4) If two AIs are appointed, with a human as the president, would the award be issued and signed by the human arbitrator or certified by all? (5) What happens if the human arbitrator disagrees with both AIs?*"

The main issue here relates to the limits imposed by the national Law elected by the parties in the arbitration agreement. In this sense, some national arbitration acts expressly refer to the arbitrators as a "natural person" or "individuals", such as the Civil Procedure Codes from France (article 1450) and the Netherlands (article 1023)[26] and the Portuguese Arbitration Law (article 9.1). Other legislations refer to arbitrators as "people" and/or require them to act by their own and full capacity (which means they shall not be assisted by someone else when performing their role), such as the Arbitration Acts of Brazil (article 13), Peru (article 20), Ecuador (article 19) and Colombia (article 7)[27].

In this sense, considering the provisions of the national Arbitration Acts, if the parties appoint an AI arbitrator, they could face difficulties to enforce the arbitral award in the territory of those countries.

c. The confidentiality of the proceedings

The implementation of AI in the decision-making process has two consequences regarding confidentiality. The first one relates to the confidentiality of the arbitral proceeding in itself and of the information disclosed by the parties in the proceedings. The relevance of this issue will thus depend on the kind of arbitration the parties are subject to.

In investment arbitration, confidentiality is not the rule and, therefore, the confidentiality issue is less likely to become a problem. However, in commercial arbitration nearly all proceedings are conducted under the veil of confidentiality. In fact, this aspect is of great importance to many parties when deciding the dispute resolution method they will submit any dispute to.

What might concern the parties is the fact that the AI will sometimes be dealing with private information and documents that might be leaked through hackers, for example. In addition, it is important to notice that implementing AI requires technical knowledge from third parties. Consequently, it would be necessary to take measures to guarantee that such third parties would not have access to the confidential information or, in case they have access, that they would not be able to use or disclose it to others[28].

The second consequence derives from the lack of publicly available information due to the confidentiality of proceedings. In the case of AI that depends on data feeding (which happens with machine learning tools), it is fundamental that said data is available[29]. Therefore, in a context where proceedings and awards are secret, the AI lacks its fundamental component.

As mentioned above, secrecy is the norm and public decisions are the exception in commercial arbitration. This does not completely prevent the possibility of AI in this context though. Considering that there are initiatives in place to make commercial awards public[30] and because arbitral institutions could also obtain approval to provide the necessary information to feed the AI system, the information may become more accessible in the future.

But even if there is available data, it does not mean that the AI will be able to satisfactorily perform the decision-making process. That is because the AI's learning process is extremely reliant on the volume of data. Therefore, if the volume of publicly available information is insufficient, the algorithm will be inefficient. Thus, even in the case of investment arbitration, where the majority of proceedings is conducted publicly, the efficiency of AI could be compromised due to the small number of cases[31].

3. Conclusion: are we on the verge of seeing AI-rendered arbitral awards?

Since the algorithmic process is usually a result of mathematical formulas and data processing, apart from the multiple issues already presented in this paper, currently the main obstacle that seems to prevent AI from rendering awards in arbitral proceedings (or even in State Courts) is its inability to explain how it reached a decision[32].

In this sense, it could be argued that AI still faces great challenges before being considered as capable of rendering fair decisions that the parties understand, accept and feel abided by.

In addition, as seen in the second section of this paper, the parties that usually intend to arbitrate might have specific concerns regarding the implementation of decision-rendering AI in arbitration. The particular type of claims currently submitted to arbitration is often deemed as "hard cases" and seems to be still far from being decided by AI arbitrators.

However, considering the AI/machine learning initiatives mentioned in the first section of this paper, such as the Estonian robot judge and eBay's Resolution Centre, the implementation of low-cost AI decision-makers already is a reality for small claims[33].

On the other hand, the hard cases that usually are subject to arbitration still demand high levels of technical knowledge and especially the capacity of balancing and evaluating facts with sense of fairness. This capacity, it is relevant to state, might not be easily input to a robot and consequently replaced by an AI tool, at least in the near future.

In conclusion, the future of AI in arbitration is still questionable and its application in the decision-making process will depend on the development of the technology in order to overcome the aforementioned issues. Among those, AI's apparent inability to explain decisions alongside the supposed impossibility of teaching a machine humans' sense of justice could be decisive when considering the possibility to appoint an AI-arbitrator to render an award.

Daniele Verza Marcon, Erika Donin Dutra
and Lukas da Costa Irion

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The Jeronimos Monastery at sunset in Lisbon, PT | Paolo Querci

RECOVERABILITY OF COSTS IN ENGLISH-SEATED ARBITRATIONS

By Tarik Sharif[1]

Introduction

Arbitration can be big business; for the arbitrators and the institutions concerned but particularly for the lawyers retained to conduct the arbitration. But like the old saying goes, one person's profit is another person's cost. It is perhaps no secret that legal fees and other expenses account for the majority of a party's costs in bringing or defending an arbitration claim. In 2015, the International Chamber of Commerce ("**ICC**") reported that party costs (including lawyer's fees and expenses and expenses related to witness and expert evidence and other costs) made up the majority of the overall costs in the proceedings (on average, 83%). Whereas arbitration costs, being the Tribunal's fees and the administrative expenses in institutional arbitrations, made up a much smaller proportion of the overall costs (around 17% on average)[2].

Arbitration is often perceived as (and can sometimes be) a cheaper alternative to resolving a dispute through traditional court proceedings. The reality however is that if the dispute is of a sufficient complexity and / or lawyers and other professionals are actively involved in the preparation and conduct of the case, the costs are going to be substantial and may, particularly in smaller arbitrations, become a considerable issue in their own right. A party can seek assistance from its representatives, professional funders and insurers to finance these costs but seeking to recover the cost of such funding can be problematic (particularly where the arrangement provides for an uplift in the case of success).

This article will examine the various and seemingly ever-increasing categories of "party costs" which fall to be considered by tribunals and their recoverability in English-seated arbitrations. It will also touch briefly on how factors such as the conduct of the parties and settlement offers can have an impact on a tribunal's decision to allocate costs. Other types of costs, such as the fees of the arbitrators or institutions or other expenses incidental to organising the arbitration such as the costs of hiring a hearing venue or transcription provider (which tend to be less controversial) will not be discussed in any detail.

General principles of costs recovery in English-seated arbitrations

Under the English Arbitration Act 1996 (the "**Arbitration Act**"), arbitrators can only make awards as to costs which are "recoverable"[3].

The fundamental arbitral principle of party autonomy is at the heart of the provisions in the Arbitration Act dealing with costs. English arbitration law provides that parties are free to make whatever agreement they wish about what costs of the arbitration will be recoverable[4].

Subject to the parties' agreement, arbitral tribunals generally have a wide discretion to determine how costs will be dealt with. The scope and exercise of that discretion will be informed by the law of the seat of the arbitration and any applicable rules.

Similar to costs in civil proceedings before the English courts, costs in English-seated arbitrations will typically be awarded in accordance with the general principle that costs follow the event (i.e. in accordance with the result of the case)[5]. Arbitrators are entitled to (and do) depart from the general principle where the circumstances of the case warrant it. For example, a successful party can be deprived of a portion of its costs if it has behaved unreasonably (such as pursuing certain arguments which it knew or ought to have known lacked merit or due to the manner in which it has conducted the proceedings more generally[6]). In exceptional cases, the successful party may even be ordered to pay the other party's costs despite the fact that the other party has been unsuccessful on some or all of its case.

The Arbitration Act does expressly confer a power on tribunals to limit the recoverable costs to a specific amount[7]. Such a power is likely to be used sparingly however i.e. in cases where the sums claimed are modest or where the tribunal has concerns that the parties are generating a volume of work for one another and the tribunal and therefore, costs.

The Arbitration Act adopts a tiered approach to the determination of whether certain categories of costs are recoverable and if so, in what amount[8]. Put simply:

(1) The parties are free to agree what costs are recoverable[9];

(2) If there is no agreement, the tribunal can determine the recoverable costs on whatever basis it thinks fit but it must specify its reasoning;

(3) If the tribunal does not determine the costs, a party is entitled to apply to the English court to determine the issue. The English court similarly has a broad discretion and must specify the basis of its decision.

If no other basis is agreed by the parties or considered appropriate by the tribunal or court, the costs will only be recovered to the extent that the amount is reasonable and they were reasonably incurred. This will be the usual basis of assessment in most cases.

The Arbitration Act is silent on the concept of "proportionality" (i.e. the amount of the costs claimed relative to the amount in dispute) which has become a defining feature of the English court's enquiry into costs and how parties conduct their case particularly following the civil litigation / Jackson reforms in 2013. Tribunals may take account of the principles on which the English courts deal with costs and in particular whether the costs were proportionate but they are not bound to do so. English rules of civil procedure and the English courts' custom as to what costs may or may not be recoverable do not operate as a fetter on the tribunal's powers to allocate costs. In the landmark decision of *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd*[10], discussed further below, the English court acknowledged that "*both arbitration and litigation are forms of formal dispute resolution and there are many similarities, but it is crucial to keep in mind that the* [Arbitration Act] *was designed to be and is a complete code as to the conduct of arbitration…the approach taken by the courts under the* [Civil Procedure Rules] *as to what can and cannot be Awarded by way of costs is of little direct relevance here. The relevant context is thus the Act itself and the wide scope of procedural powers conferred upon the arbitrator*".

External legal and non-legal costs

The Arbitration Act expressly identifies the legal costs of the parties as a cost of the reference[11]. The fees paid to external counsel (solicitors and barristers as well as counsel from foreign jurisdictions) for legal representation and advice in connection with or incidental to the arbitration are therefore clearly recoverable unless they are unreasonable.

It is also well accepted that fees paid to non-legal professionals (not experts which is discussed further below) such as, for example forensic, accountants, IT specialists, investigative agencies or other consultants for the purposes of preparing or developing a party's case are also recoverable.

Costs of factual and expert witnesses

Costs incurred in order to compensate a factual witness for their out of pocket expenses (and in appropriate circumstances, their professional time or lost earnings) in providing assistance is generally accepted to be recoverable. Expert witnesses will similarly be reimbursed for out of pocket expenses but routinely (unlike factual witnesses) will charge a fee for the service provided (i.e. provision of an expert report and their attendance at the hearing).

It is important that whatever costs are incurred on account of factual and expert witnesses is kept reasonable not only to maximise the prospect of recovery but also to avoid calling into question the witness' independence or intention to tell the truth.

Internal costs

Internal costs have traditionally been regarded as one of the more controversial categories of costs claimed and tend not to be recoverable. In its guidelines for arbitrators on making costs awards (which assumes the seat of the arbitration is in

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England and Wales or Northern Ireland), the Chartered Institute of Arbitrators suggests that these costs "*are normally irrecoverable on the general principle that the lay client's time in instructing those who conduct the proceedings is not allowable*" although "*an arbitrator has discretion to allow an element of costs in respect of such work if he is satisfied that the work done internally obviated the need for others to do it and hence led to an overall saving of costs*"[12].

In certain cases, however, it may be possible for a party to recover its costs in respect of the time spent by its directors, management and employees (including the members of its in-house legal team)[13]. Any dispute, whether it proceeds by way of an arbitration or civil court proceedings, is invariably going to require the involvement of management or other personnel of the party in question. A substantial amount of time may be dedicated by these individuals towards preparation of the party's case in collating evidence, instructing external legal counsel, assisting with submissions and serving as factual witnesses; therefore the internal costs (particularly in construction and project disputes which are technical and document heavy) can be significant.

Management and staff time

Having said that, the instances where a party has recovered its costs on account of management and staff time are rare. The view often taken by tribunals and arbitration practitioners is that these costs, even if potentially significant, are part and parcel of running a business or other organisation[14].

In addition to this, other factors are likely play on the minds of arbitrators when considering whether to award such costs. The loss to the business that these costs represent are usually difficult to quantify. Due process paranoia and the concern that an award of these costs will result in or provide a respondent with further ammunition to challenge an award is also a probable factor. For some arbitrators, awarding these costs may simply be seen as a "step too far".

It is possible as a matter of English law however to claim wasted management or staff time as damages if the party can demonstrate that staff were significantly diverted from their usual business activities[15].

In-house counsel

The above considerations are also relevant to in-house counsel. However tribunals may be more receptive to a claim for costs based on the time spent by in-house lawyers, particularly if their efforts have led to a reduction of the work which otherwise would have to be undertaken by an external legal provider whose hourly rates are higher and whose costs would be recoverable.

Record keeping

Irrespective of which of, and precisely how, these costs are claimed, parties would be well advised to keep adequate and contemporaneous records of the time spent and activities undertaken by management and other staff (and in-house counsel if applicable) in order to substantiate and justify a claim to the tribunal at the appropriate time.

Third party funding

The arbitration community has witnessed a proliferation in the use of third party funding in arbitration in recent years.

In the context of arbitration, a third party funder is an entity which is not party to the arbitration proceedings and underlying agreement but provides financial support to fund the legal costs and other expenses of a person or entity which is a party to the arbitration. In return and assuming its funded party is successful,

the funder receives a share (including a premium on the funds advanced) in the spoils of the arbitration.

Whether the sums advanced by the funder and the funder's return can be recovered from the other party in the arbitration will depend on the terms of the arbitration agreement, the national law governing the arbitration and its procedure and the applicable arbitral rules.

Although one of the findings by the ICCA-Queen Mary Task Force on Third-Party Funding was that it is generally not appropriate for arbitral tribunals to award funding costs (such as the funder's success fee) [16], English common law recognises the recoverability of such costs.

In *Essar*, the English High Court held that "other costs" within the meaning of section 59 of the Arbitration Act could include third party funding costs. *Essar* concerned an application to set aside the fifth partial award of the sole arbitrator. The award in question dealt with the question of interest and costs (the earlier awards having already addressed the issues of liability and the substantive relief sought). In the award, the arbitrator held that that the costs of funding the arbitration (namely, the sum advanced to the claimant to enable it to bring the arbitration and the funder's success fee) could be recovered from the opponent. Essar filed an application with the English court to set aside the relevant award on several grounds, including that under the Arbitration Act, "other costs" did not include the costs of obtaining third party funding and accordingly the arbitrator had no power to allocate such costs. Essar's challenge failed and the English court held that "other costs" could include the costs of obtaining funding and the allocation of such costs was a matter of discretion for the tribunal. The court held that "[c]*ertainly, where a party to an arbitration is funding it by obtaining specific litigation funding which is now available in a variety of forms, so as to enable him to specifically enforce his legal rights, it is very hard to see how that is excluded for all purposes from the expression "other costs*"". The basic requirement therefore appears to be whether the costs have been incurred in order to bring or defend the claim; if they have, they would necessarily relate to the arbitration and therefore fall within the meaning of "other costs".

Legal expenses insurance

After the event ("**ATE**") insurance, although a form of third party funding, typically serves a distinct purpose from that of typical arrangements with a funder. As its name indicates, ATE insurance is obtained after the events giving rise to the dispute have occurred and is designed to safeguard against the risk of being in the position of losing the arbitration and therefore being exposed to an order to pay the successful party's costs.

The recoverability of the premium on an ATE insurance policy was left open in *Essar* but if a party has incurred the cost of an ATE insurance premium and it satisfies the basic requirement in that it relates to the arbitration, then applying the rationale in *Essar*, it ought be recoverable in principle.

In stark contrast, the position in English court litigation is that the premium on an ATE policy taken out on or after 1 April 2013 is not recoverable[17].

Before the event ("**BTE**") insurance, as the nomenclature suggests, is a form of legal expenses insurance which is in place before the events giving rise to the dispute occur. It does not typically provide cover against the risk of an adverse costs order but rather funds a party's costs in bringing or defending a claim. A successful party seeking to recover the cost of a BTE insurance policy is likely to be faced with an argument by the opposing side that the very nature of the cover (i.e. it is in place before the dispute and therefore arbitration occurs and the fact that it is often sold as a package with other types of insurance such as car or home insurance) prevents it from being properly claimed as a cost of the arbitration.

Conditional and contingency fee arrangements

There are various arrangements a party can enter into with its legal representative which provide that (i) payment of some or all of the legal representative's fees is conditional on whether its client is successful and (ii) if the client is successful, the legal representative is paid a "success fee" (usually calculated as an uplift on the representative's normal hourly rates or as a proportion of the amount recovered from the other party).

Like the premium on an ATE insurance policy, success fees are not recoverable as a cost from the other party in English litigation where the conditional fee agreement is entered into on or after 1 April 2013.

On the basis of the English court's reasoning in *Essar,* there does not appear to be an absolute restriction on the recoverability of lawyers' success fees in arbitration[18].

Some commentators have previously expressed the view that, unless the parties have agreed otherwise, costs such as success fees under conditional fee arrangements (as well as ATE premiums, discussed above) are not recoverable in English-seated arbitrations because English law does not currently permit recovery of those sums in court proceedings. However in light of the wide discretion afforded to tribunals to determine costs (which is a statutory conferred power) and the decision in *Essar*, the author's view is that those ought to be recoverable.

The impact of offers to settle on costs

A number of institutional rules make express provision for the tribunal's power to have regard to the conduct of the parties when it comes to costs allocation[19]. A 2012 survey revealed that 96% of respondents thought that improper conduct by a party or its counsel during the proceedings should be taken into account by the arbitrators[20]. The ICC's 2015 report on decisions on costs in international arbitration found that the procedural behavior of the parties and their attempts to amicably avoid the arbitration were two factors (amongst others) which were commonly taken into account by tribunals when making decisions as to costs.

The English legal system actively encourages parties to settle their differences without resorting to the pursuit or continuation of formal proceedings. Offers to settle the arbitration, if deployed correctly, can have an especially tangible effect on costs assessment. Settlement offers enable a party to ramp up the pressure and focus their counterparty's mind on the weaknesses of its case and the risk of costs shifting in the event that it loses. In English-seated arbitrations, settlement offers generally proceed by the making an open offer (i.e. one that attracts no privilege and is available for all to see), a "sealed offer" or a "Calderbank offer"[21]. A sealed offer is an offer to settle the arbitration which is expressed to be "without prejudice save as to costs". The offer is placed into a sealed envelope and placed in the hands of the tribunal, to be opened only once it has disposed of the substantive issues in the arbitration and is in a position to consider the issue of costs. The arbitrators are therefore aware of the existence of the offer but not its terms.

Calderbank offers are very similar but the primary difference is that with a Calderbank offer, the tribunal is not put on notice of the existence of a settlement offer until it has made its rulings on liability and quantum. The effect of the two methods, insofar as how they inform the tribunal's discretion to determine costs, is however principally the same. The key question for the arbitrators in exercising this wide discretion is whether the offeree has achieved more by rejecting the offer and carrying on with the arbitration than it might have done if it had just accepted the offer[22]. In deciding whether the offeree has achieved more by rejecting the offer, the costs awarded by the tribunal are disregarded[23]. If, for example, a claimant receives a sealed / Calderbank offer from the respondent and fails to obtain an outcome at the end of the arbitration which is more favourable to it than the terms offered by the respondent in its settlement offer, the tribunal may decide that the respondent should only be made to pay for the claimant's costs up to the date of the offer (on the basis that if the claimant had accepted the offer, the costs subsequently incurred could have been avoided). In that scenario, the tribunal is also likely to order (and the respondent would have good grounds to request) that the claimant pay the respondent's costs (in spite of the fact it has been the successful party) from date of the offer. It is important to stress however that this approach is the general rule; exactly how the tribunal exercises its discretion will depend upon the facts of the particular case.

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2 ICC Commission Report, "Decisions on Costs in International Arbitration", ICC Dispute Resolution Bulletin 2015, Issue 2.

3 Section 63 of the Arbitration Act.

4 Certain arbitral rules limit or exhaustively determine the types of costs which are recoverable. See, for example, the definition of costs in Article 38 of the UNCITRAL Arbitration Rules 2010, the rules of the Swiss Chambers' Arbitration Institution or the Russian Arbitration Association (both of which largely follow the definition laid down by the UNCITRAL Rules) and the German Arbitration Institute's 2018 Rules (Article 32). However, most rules tend to concentrate more on the fees of the arbitrators and bodies providing administrative services and provide little or no guidance on party costs.

5 Section 61(2) of the Arbitration Act. Most of the provisions dealing with costs in the Arbitration Act are non-mandatory in that they may be disapplied by the agreement of the parties (including by virtue of any provisions of any arbitral rules incorporated into the agreement).

6 See, for example, *Heaven & Kesterton Ltd v Sven Widaeus A/B* [1958] 1 Lloyd's Rep 101, in which the claimant, although successful, was ordered to pay the respondent's costs because the claim advanced was deliberately exaggerated; see also *Tramountana Armadora v Atlantic Shipping Company SA* [1978] 2 All ER 870; *Unimarine SA of Panama v Canadian Transport Co of Vancouver BC (The Catherine L)* [1982] 1 Lloyd's Rep 484 (unreasonable or obstructive behaviour or unnecessarily wasting costs). See also *Matheson & Co Ltd v A Tabah & Sons* [1963] 2 Lloyd's Rep 270.

7 Section 65 of the Arbitration Act.

8 Section 63 of Arbitration Act.

9 Subject to one caveat: for policy reasons, the parties cannot enter into an agreement after the dispute has arisen the effect of which is that one party is to pay some or all of the costs of the arbitration (even if that party has been successful). See section 60 of the Arbitration Act.

10 [2016] EWHC 2361 (Comm).

11 Section 59 of the Arbitration Act.

12 Chartered Institute of Arbitrators, "Practice Guideline 9: Guideline for Arbitrators on Making Orders Relating to the Costs of the Arbitration".

13 In *Essar*, the court stated obiter "[s]*ubject to the question of assessments of, for example, proportionality and reasonableness and the like, conventional legal costs in the sense of lawyer's fees and disbursements are incurred in order to bring or defend the claim in question. There can be other costs also incurred to the same end. These could be management time and they could also be the costs of obtaining funding for the dispute*".

14 Redfern & Hunter, Law and Practice of International Commercial Arbitration 6th Edn (2015), 9.92.

15 *R+ V Verischerung AG v Risk Insurance and Reinsurance Solutions SA* [2006] EWHC 42 (Comm).

16 Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, April 2018.

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18 See also *Protech Projects Construction (Pty) Ltd v Al-Kharafi & Sons* [2005] EWHC 2165 (Comm).

19 See Article 28.4 of the LCIA Rules (2014): "*The Arbitral Tribunal may also take into account the parties' conduct in the arbitration, including any co-operation in facilitating the proceedings as to time and cost and any non-co-operation resulting in undue delay and unnecessary expense*; Article 38(5) of the ICC Rules (2017): "*In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner*"; Article 50 of the Stockholm Chamber of Commerce 2017 Rules: "*The Arbitral Tribunal may in the final award, at the request of a party, order one party to pay any reasonable costs incurred by another party, including costs for legal representation, having regard to the outcome of the case, each party's contribution to the efficiency and expeditiousness of the arbitration and any other relevant circumstances*"; Article 38(2) of the Vienna International Arbitral Centre 2018 Rules: "*The conduct of any or all parties as well as their representatives...and in particular their contribution to the conduct of efficient and cost-effective proceedings, may be taken into consideration by the arbitral tribunal in its decision on costs*".

20 QMUL and White & Case LLP, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process.

21 Calderbank offers have developed as a prominent feature of litigation and civil practice in England following the English court's seminal decision in *Calderbank v Calderbank* [1975] 3 All ER 333. Although sealed and Calderbank offers are the most common methods of making settlement offers in English-seated arbitrations, there is nothing to prevent the parties from agreeing to apply the provisions of Part 36 of the English Civil Procedure Rules (which provides strict rules and a distinct procedure for settlement offers and their cost implications) to the arbitration.

22 *Tramountana Armadora v Atlantic Shipping Company SA* [1978] 2 All ER 870.

23 *Everglade Maritime Inc v Schiffahrtgesellschaft* [1993] QB 780 CA.

São Paulo, Brasil | Aurelio Scetta

A comparative approach of the Selection and Recusals of judges and arbitrators under the ICJ and the ICSID Convention from the perspective of sovereign equality

By Isabela Luciana Coleto

Introduction

In the aftermath of the Second World War, in 1945, 51 countries committed to maintaining international peace and security founded the United Nations [1]. Today, 193 States ratified [2] the most important document of the Organization, the Charter of the United Nations. Due to this massive ratification, the assumption, for the purposes of this article, is that the UN Charter remains one of the cornerstones of Public International Law and of International Relations.

The first two "Purposes" of the UN, as listed in Article 1 of the UN Charter are "to maintain international peace and security" and to "develop friendly relations among nations" [3]. To that end, the Organization is based on the principle of sovereign equality of all its Members [4]. Sovereign equality is the concept according to which every sovereign state possesses the same legal rights as any other sovereign state in international law [5].

Sovereign equality is particularly important for the purposes of the UN for two reasons. First, when engaging in international relations, states representing distinct interests and values will have the same capacity. Second, the protection of weak political communities from over-bearing projections of power by strong foreign states will be secured [6].

According to Article 2(3) of the UN Charter [7] all Members shall settle their disputes by peaceful means, in a manner that international peace and security, and justice, are not endangered. International Courts and Tribunals serve that purpose, stressing the importance of litigation as an alternative to the use of force. In this context, the importance of States recognizing International Dispute Settlement as a legitimate mechanism to resolve their disputes is crucial to the International Organizations' systems. This paper will argue that the principle of sovereign equality contributes to upholding this perceived legitimacy of international organizations and, therefore, should be upheld.

More narrowly, this paper will situate the matter of selection and recusals of judges and arbitrators as a crucial element of sovereign equality to assess the rules and practices of the International Court of Justice in this regard. The objective with that is to make the argument that the International Centre for Settlement of Investment Disputes (ICSID) rules and practices towards selection and recusal of arbitrators should be in a manner to, similarly to the ICJ, nourish the sovereign equality principle.

For the above purpose, the study will first address why the selection and recusals of judges matters for sovereign equality, in the second chapter. The third chapter delves into the rules for the selection of judges along with the practises in the event of challenges and recusals of them in the most prominent international organization; the International Court of Justice to demonstrate how the Organization acts in nourishing the sovereign equality principle. In the fourth chapter, the provisions and practice of arbitrations under the International Centre for Settlement of Investment Disputes are analysed. Regarding practice, three cases of repeat appointments of arbitrators will be given. At the end of the chapter, it will demonstrate that, similarly to the ICJ, the ICSID foster the sovereign equality principle in its activities and regulations.

The conclusion of the article is that, in the ICJ, the sovereign equality principle is upheld, being that one of the reasons why the Court is overall recognized by the States as an impartial and legitimate avenue for the settlement of disputes. Similarly, in the much-criticized system of Investor-State Arbitration [8], both provisions and practice have been contributing to upholding sovereign equality and should not be subject to changes in the event of a reform of the system [9].

2. The Relevance of the Selection and Recusals of Judges and Arbitrators for the functioning and effectiveness of Tribunals

Selection and Recusals of Judges and Arbitrators play a fundamental role internally and externally for the functioning of a Court. Internally, once a Tribunal is established, the manner that judicial selection procedures are designed and operate in practice impacts directly on the judgments issued. Externally, it also influences perceptions of the legitimacy of the tribunal, "as users and observers of the tribunal assess the way in which its work reflects their interest and values and make their own judgments about its members" [13].

In terms of selection, there is not a single model of judicial selection across international courts and tribunals, therefore, generalization of the practise cannot be assumed. However, the most typical form of judicial selection procedure involves the nomination of candidates by a state, and the election of judges from among those candidates by an intergovernmental body [14]. Recognizing that the selection of judges is an inherently political act taken by States in the context of multilateral cooperation, the *Institut de Droit International* stated, "the selection of judges must be carried out with the greatest care. Moreover, States shall ensure an adequate geographical representation" [15]. In the same grounds, the International Bar Association prescribed that a candidate's ethnic background should be considered "where this is relevant to constituting the court or tribunal with Judges of a background appropriate to the constitution of an international court or tribunal" [16].

As the selection of judges reflects a political will of States, similarly, their removal ought to be also in accordance to carefully designed measures. In this sense, Judges may only be removed from office if in accordance with the relevant statutory provisions of the court in question and, in most international courts, by a resolution of the other judges in the court [17]. These provisions are also reflected in the two aforementioned guidelines documents [18].

Within the spectrum of removals are the challenges by the parties to judges and arbitrators. The article argues that tantamount to the perceived legitimacy of an institution is the possibility of States to challenge procedures and ensuring the independence of judges and arbitrators. Therefore, an attempt by the parties to disqualify the judges reflects on/is an exercise of State sovereign that, in the context of international relations, is an exercise of sovereign equality.

As seen in this chapter, selection and recusals of judges interplays with sovereign equality. The next sections of the article will analyse the statutory provisions of the ICJ and their implications to the recognition by States of its legitimacy therein in State practice.

3. The International Court of Justice

The International Court of Justice provisions for selection and recusals of judges aims at preventing bias. For that, standards related to sovereign equality are crucial for the perception of the States of an impartial Court, as proven by relevant State practice in this regard.

3.1. Provisions for selections and recusals upholding sovereign equality in the ICJ

Under Article 9 of the ICJ Statute, at every election the electors shall take into consideration that the body as a whole should be represented by all of the main forms of civilization [19]. In fact, the list of current members to the Tribunal shows a good balance in terms of geographical and geopolitical representation [20].

How countries perceive this representation is as far-reaching as the representation itself as to conduct its work in a satisfactory manner the Court relies on Countries to accept its jurisdiction [21]. In this sense, in 2017, when the Court was on the verge of the renewal of a third of its judges, a representative of Bolivia stressed in the General Assembly the importance of geographical representation for countries [22].

In terms of removal, Article 18 of the Statute requires that a member of a pannel may only be dismissed in the case that the other Judges unanimously agree that he has ceased to fulfill

the required conditions of exercising its duty impartially and conscientiously [23].

An additional feature of the ICJ Statute, intended to provide States with equality in the litigation of parties [24], is the ability of parties to nominate a judge to participate in the decision of the dispute [25]. The Judge *Ad hoc* [26] participates in the procedure on terms of complete formal equality with the regular, or titular, judges. This provision was adopted under the remarks that:

"Countries will not in fact feel full confidence in the decision of the Court in a case in which they are concerned if the Court includes no Judge of their nationality, particularly if it includes a Judge of the nationality of the other party" [27].

This consideration was also endorsed by the members of the *Institut de Droit International* when they considered possible amendments to the Statute of the International Court in 1954 [28].

Whether or not these provisions amount for the perceiving of the member states of the Court as an impartial one as reflected in challenges and practises of them in the ICJ is going to be addressed in the next sub-chapter. However, remarks should be given that the ICJ is established under the principle of jurisdiction based on consent [29]. Thus, the current caseload [30] of the Court could be indicative of the trust that States put on the Institution.

3.2. States' Practice in Selecting and Recusing Judges in the ICJ

In terms of recusal, in seeking for impartiality and independence of the judgments the ICJ Statute provides for both self-recusals [31] and removals of judges from the bench [32]. The most common practice in this regard has been the former [33]. The latter, although less common [34], has been representing an attempt by the parties to disqualify the judges, which reflects an exercise of State sovereign, therefore, the most important for the purposes of this article. Nevertheless, the fact that in only three cases of the whole history of the ICJ has challenges being demanded should reflect the perception of the countries of equality before the system.

In the case of self-recusal, Judges make a self-assessment of reasons for which they could be perceived as biased in their judgments. Although not all Judges have given reasons for self-recusing to be a member of the bench for a particular judgment [35], none of the reasons given refer to the principle of equality of parties in the Court or to perceived illegitimacy of the Court, rather, participation as litigator in previous and related cases being the most compelling reason for that [36].

On the other hand, attempts of parties to disqualify the judges of the ICJ are rare. All three cases that the Court has had to deal with in this subject relate to alleged prejudgment of the case and to past diplomatic actions at the United Nations. Additionally, the fact that the challenges were not upheld did not interfere in the willingness of the parties to remain in the dispute [37].

In turn, a common state practice has been appointments by countries of judges *ad hoc.* From the 26 advisory opinions and 130 contentious cases that the Court has dealt with [38], in 119 of the times the parties appointed judges *ad hoc* [39]. Some scholars [40] claim that provisions for judges *ad hoc* are unnecessary, since the ICJ judges, once selected, cease to be identified as citizens of their respective countries to become impartial when judging the cases assigned to them, as according to Article 20 of the ICJ Statute. Nevertheless, given the fact that ICJ's caseload depends on States bringing their disputes before it, they agree that although this sovereign equality may appear more formal than real, the provision for judges *ad hoc* encourages countries to bring their claims to the Court as it is perceived as an impartial avenue for dispute settlement [41].

The importance of a judge *ad hoc* in this counter-balance – or, at a least, appearance of a counter-balance -- is illustrated in the *South West Africa Case* [42] in which the judge *ad hoc* took part in the decision over the plead by South Africa relating to the composition of the Court. Another example would be the emblematic case of *Military and Paramilitary Activities in and Against Nicaragua* [43] in which the only vote indicating that the United States of America didn't act in breach of its obligations towards the Republic of Nicaragua came from an American Judge, while the Judge *ad hoc*, indicated by Nicaragua, voted with the majority [44].

Although it might be difficult to compare how the ICJ's system would be perceived by the States in the absence of the aforementioned provisions and practices, the current caseload of the Court in combination with the seldom challenges it faces are strong evidence of the success of its whole apparatus, including, in that, the provisions upholding states' sovereign equality. The next section will compare the ISDS system to the ICJ's in this regard.

4. Investor-State Arbitration

If in one hand, the ICJ has faced 3 cases of challenges of judges, on the other, under the ICSID Convention [45], among the arbitration cases concerning Investor-State Arbitration, 84 applications for disqualification of arbitrators were received [46]. This reflects a tendency of increased challenges that, according to the Secretary-General of the ICSID "will likely continue in the near future" [47]. This trend is particularly alarming from the sovereign equality perspective, affecting the legitimacy of the regime, as will be addressed in the following sections of the article.

4.1. The Rules of the International Convention for Settlement of Investment Disputes on sovereign equality

The International Centre for Settlement of Investment Disputes (ICSID), although not the exclusive, is the premiere venue for the settlement of disputes between foreign investors and the sovereign states that host their investments [48]. For

that reason, its provisions related to sovereign equality will be analysed.

The ICSID is an Arbitral Tribunal. As such, party autonomy is fundamental to the function of the system. According to the Rules of the ICSID, each Contracting State may designate to each Panel four persons who may -- but need not -- be its nationals. Using the same rationale, the Chairman may designate ten persons to each Panel, each having a different nationality [49]. Article 14(2) [50], similarly to Article 9 of the ICJ Statute [51], states that the Chairman, in designating persons to serve on the Panels shall pay due regard to the importance of assuring representation on the Panels of the main forms of economic activity and of the principal legal systems of the world.

Additionally, parties are free to appoint conciliators and arbitrators from outside the Panels, according to paragraph 21 of the Report of the Executive Directors on the Convention [52]. However, by doing so, while the Convention does not restrict the appointment of conciliators with reference to nationality, the rule that the majority of the members of an Arbitral Tribunal should not be nationals of the State party to the dispute or of the State whose national is a party to the dispute as according to Article 39 of the Convention should be observed [53].

Article 37 of the Convention sets the rules on the Constitution of the Tribunal. Accordingly, the Arbitral Tribunal shall be constituted of a sole arbitrator of any uneven number of arbitrators appointed as the parties shall agree or, in the absence of an agreement by the parties, it shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties [54]. In the latter case, the parties shall name a person as the arbitrator appointed by them, who shall not have the same nationality as nor be national of either party [55].

Article 52 of the Convention [56], on annulment of the award, states that on the receipt of the request for annulment the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons, none of them shall be of the same nationality as a member of the Tribunal which rendered the award.

Challenge procedures under the ICSID regulation follow the rules enshrined in Article 57 of the Convention [57]. Under this Article, a party may propose the disqualification of an arbitrator "on account of any fact indicating a manifest lack of the qualities" required to be nominated. The qualities, as enumerated in Article 14(1) require an arbitrator to be independent and impartial in addition to the aforementioned nationality requirements.

4.2. States' Practice in Selecting and Recusing Arbitrators under the ICSID Arbitration

In ICSID's practice, when challenging arbitrators, the term "manifest" has generally been strictly applied to mean "obvious" or "evident" and highly probable, not just possible [58]. According to some scholars, the threshold to challenge arbitrators is higher than in alternative regimes [59]. While the reason for that statement will be addressed later in this section, first it will be argued that the fact that the threshold is high is a positive feature as this indirectly upholds the principle of sovereign equality, further fostering legitimacy to the system.

First, it is worth noting that eighty-three of the eighty-four challenges have been addressed, while one of them is pending in a suspended case. In the eighty-three resolved challenges, twenty-one arbitrators resigned from the case, three proposals were withdrawn or discontinued prior to a decision being rendered, and fifty-nine decisions were issued. Four of the fifty-nine decisions upheld the challenge and fifty-five declined the challenge. While only four decisions have disqualified an arbitrator, the composition of the tribunal changed in 30% of the cases where a disqualification application was brought [60]. These numbers reflect the fact that whether or not in the presence of a decision of the Tribunal, challenges often do change the constitution of the Arbitral Tribunal, hence, the importance of studying the topic.

Second, it is also worth noting the grounds for disqualification in practice. In practice, the most frequent ground for a challenge is independence or impartiality. In this sense, lack of independence has been seen as external control over the arbitrator, whereas partiality has been seen as a perceived bias toward a party [61].

Under this category of challenges to arbitrators, the so-called cases of repeat appointments is becoming more of a common [62] reason for challenges. Since the growing of cases combined with the small community of experts in the field of international investment law contribute to the feature, the prediction is that these grounds for arbitrators' challenge will be more and more common in future arbitrations. Therefore, three recent cases concerning this issue will be analysed in order to make the argument for sovereign equality.

4.2.1. Tidewater

In *Tidewater Inc., et al v. Bolivarian Republic of Venezuela* [63], a challenge was brought by the investor against Professor Brigitte Stern after in the past six years Venezuela had appointed her four times as arbitrator and three times as a counsel for its cases. The panel held that repeat appointments alone do not call for disqualification unless the applicant can point to other factors demonstrating that the arbitrator is not independent and impartial [64].

Importantly, this occasion, Professor Stern made an argument for States' sovereign, indicating that if the States cannot nominate the same arbitrator in several cases this would undermine the freedom of the States to choose their arbitrators [65].

4.2.2. OPIC Karimum

In *OPIC Karimum Corp. v. Bolivarian Republic of Venezuela* [66], the challenge was against the appointment of Professor

Philippe Sands QC, on the grounds that he had been appointed by Venezuela for counsel or arbitrator five times over a period of five years [67]. Again, the panel found that repeat appointments by themselves are insufficient to meet the threshold of "manifest" lack of independence and, thus, the challenge was not upheld.

4.2.3. Universal Compression International Holdings

Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela [68] involved, again, a challenge to Venezuela's appointment of Professor Stern, on the grounds that she had been appointed by Venezuela in at least three other pending ICSID cases, including *Tidewater,* and by the counsel of Venezuela on two prior occasions.

In this decision, the Chairman of ICSID's Administrative Council emphasized that, under Article 57 of the Convention, "the notion of impartiality is viewed objectively" and the term "manifest" imposes a "relatively heavy burden of proof on the party making the proposal" [69]. In this occasion, he further upheld the argument made in *Tidewater* that the investment arbitration framework cannot function if arbitrators are forestalled from addressing similar issues in subsequent arbitrations [70].

4.2.4. Concluding Remarks

The fact that none of the aforementioned challenges were upheld and that nor are the majority of the challenges proposed to the panellists under ICSID arbitrations leads to criticism of an over-protective model for arbitrators. Article 57 of the ICSID Convention requires the existence of "facts", in contrast to "appearances" or "circumstances", indicating a manifest lack, in opposition to reasonable lack, of the qualities of an arbitrator. In that, scholars argue that under ICSID Arbitration, there is a higher threshold for a successful challenge than under alternative regimes [71]. In this regard, if compared to the ICJ's provisions on the topic, as addressed in section 4 [72], indeed, the threshold is higher.

However, the power to choose the terms and procedures of the arbitration is precisely what attracts and retains its users. Yet, when in the context of international investment arbitration, the issues often have broader public significance and transcend the interests of the parties [73]. In this scenario, the matter of challenges to arbitrators not only affect the golden principle for arbitration of parties' equality, but transcends to affect one of the cornerstones principles in Public International Law: sovereign equality.

The sovereign equality principle is upheld by the ICJ, being one of the reasons for its perceived success as a legitimate avenue for international dispute settlement. In this sense, the fact that the threshold for challenges of arbitrators is high under the ICSID Convention and that the panellists take that into consideration when addressing the issue should not be a reason for criticism of the system, rather, this should uphold the perception of the Countries of an impartial and credible avenue for settling their disputes.

5. Conclusion

Sovereign equality is an important principle nourishing the peaceful settlement of disputes. Reflecting the principle is the matter of selection and recusals of judges and arbitrators. In this regard, both ICJ and the ICSID have been cautious when dealing with the matter under their auspices. Whereas the former is being complimented for the broad recognition of legitimacy among countries, the latter is being criticized on the same grounds. While other aspects of the ICSID Convention were not analysed in the paper, the fact that the threshold for challenges under the Convention is high should be seen as a positive feature as it upholds sovereign equality, a pivotal principle in international relations and one of the features for ICJ's perceived legitimacy.

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[1] (http://www.un.org/un70/en/content/history/index.html), last visited (05-02-2019).
[2] (https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=I-1&chapter=1&lang=en), last visited (05-02-2019).
[3] United Nations, Charter of the United Nations (UN Charter), Articles 1(1), 1(2).
[4] *Id*., at Article 2(1).
[5] S. Besson, Sovereignty, international law and democracy 376 (2011).
[6] B. Roth, Sovereign Equality and Moral Disagreement 5 (2012).
[7] *Supra*, note 3, UN Charter, Article 2(1).
[8] A list of discontents coming from states led the United Nations Commission on International Trade Law to promote a meeting in October 2018 in which it was decided to reform the system. (https://uncitral.un.org/en/working_groups/3/investor-state), last visited (28/01/2019).
[9] *Id.*
[10] R. Mackenzie, The Selection of International Judges 737 (2014).
[11] *Id.,* at 738.
[12] Institut de Droit International, Resolution on the Position of the International Judge, 6 Res En Final (2011), Article 1(1).
[13] International Bar Association, International Bar Association's Human Rights Institute Resolution on the Values Pertaining to Judicial Appointments to International Courts and Tribunals (2011), Section D(2).
[14] *Supra* note 13, R. Mackenzie, at 762.
[15] *Supra* note 9, Institut de Droit International, Article 2(2) ; *supra* note 10, International Bar Association, Section E.
[16] International Court of Justice, Statute of the International Court of Justice (ICJ Statute), Article 9.
[17] The 15 judges composing the body of Members of the Court represent each geographical part of the world, having the most prominent economies, such as the United States and the European Union, as well as developing countries, being represented. (https://www.icj-cij.org/en/current-members), last visited (06-02-2019).
[18] The ICJ is established under the principle of jurisdiction based on the consent of the parties to bring the claim before the Court, as not all Member States have accepted the Court's compulsory jurisdiction without reservations. The list of Countries that declared recognizing the Court's compulsory jurisdiction can be found at: (https://www.icj-cij.org/en/declarations), last visited (06-02-2019).

[19] (https://www.un.org/press/en/2017/ga11965.doc.htm), last visited (06-02-2019).
[20] *Supra* note 19, ICJ Statute, Article 18.
[21] I. Scobbie, *"Une heresie en matiere judiciaire"? The Role of the Judge AD HOC in the International Court*, 4, Brill NV 421 (2005).
[22] Article 31 of the Statute of the International Court of Justice states that Judges of the nationality of each of the parties have a right to sit in the case before the Court. *Supra* note 19, ICJ Statute, Article 31(1).
[23] *Supra* note 24, I. Scobbie, at 422.
[24] *Id.* at 434.
[25] Institut de Droit International, 54 Annuaire de l'Institut de Droit International, 1, 502, 524 and 537 (1954).
[26] *Supra* note 21.
[27] President and Delegates agreed on the Seventy-Second Session of the Plenary of the General Assembly that "An increase in the number of cases deferred to the International Court of Justice only reaffirmed Member States' faith in the judicial body". *Supra*, note 22.
[28] Article 24(1) reads: "[i]f for some reason a member of the Court considers that he should participate in the decision of a particular case he shall inform the President." *Supra* note 19, ICJ Statute, Article 24(1).
[29] Article 24(2) reads: "[i]f the President considers that for some special reason one of the members of the Court should not sit in a particular case, he shall give him notice accordingly." *Supra* note 19, ICJ Statute, Article 24(2).
[30] Judges have exercised their prerogative of self-recusal in 26 cases. C. Giorgetti, The Challenge and Recusal of Judges at the International Court of Justice, in Challenges and Recusals of judges and Arbitrators in International Courts and Tribunals (Ed.), 18 (2015).
[31] There were three cases, challenging five judges and none of the challenges were upheld. *Id.,* at 30-32.
[32] Of the 26 cases of self-recusal, three were without reason. C. Giorgetti, *supra* note 28 at 31.
[33] For a thorough analysis of the cases *see* C. Giorgetti, *supra* note 33.
[34] *Id*.
[35] (https://www.icj-cij.org/en/list-of-all-cases), last visited (11-02-2019).
[36] (https://www.icj-cij.org/en/all-judges-ad-hoc), last visited (11-02-2019). Note also that in the Western Sahara Advisory Opinions (1975 ICJ Rep. 12), in the Namibia proceedings, the Court refused to allow South Africa to appoint a judge *ad hoc*.
[37] *Supra* note 24, I. Scobbie, at 463.
[38] *Supra note 24, I. Scobbie, at 463.*
[39] South West Africa cases (Ethi & Liber. *v*. S. Afri.), Order Relating to Composition of the Court, Order of 18 March 1965 ICJ Rep. 4.
[40] Military and Paramilitary Activities in and Against Nicaragua (Nicaragua *v*. United States of America),Merits, Judgment 1986 ICJ Rep. 14.
[41] *Id.* at para. 292.
[42] International Centre for Settlement of Investment Disputes, ICSID Convention, Regulation and Rules (ICSID Convention), ICSID/15 (2006).
[43] The present study builds on C. Giorgetti, *supra*, note 11 at 226. The relevant information is obtained primarily from Newly Posted Awards, Decisions & Materials, ITALAW,(http://www.italaw.com/), last visited (15-02-2019).
[44] M. Kinnear, *Challenge of Arbitrators at ICSID – An Overview*, 108, Cambridge University Press 412 (2014).
[45] UN Conference on Trade and Development, Investor-State Dispute Settlement: Review of Developments in 2015 1, 4, UNCTAD/WEB/DIAE/PCB/2016/2 (2016) ("About two[-]thirds of last year's [investor-state dispute settlement] cases were filed with the International Centre for Settlement of Investment Disputes, either under the ICSID Convention Rules or under the ICSID Additional Facility Rules". L. Sobota, Repeat Arbitrator Appointments in International Investment Disputes, in Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals (Ed.), n. 216 (2015).
[46] *Supra*, note 46, ICSID Convention, Article 13(1) and 13(2).
[47] *Id.* ICSID Convention, Article 14(2).
[48] *Supra*, note 19, ICJ Statute, Article 9.
[49] International Centre for Settlement of Investment Disputes, ICSID Convention, Regulation and Rules, Report of the Executive Directors on the Convention, ICSID/15 (2006) at para. 21.
[50] *Id*. at para 36.
[51] *Supra*, note 46, ICSID Convention, Article 37(1), 37(2)(a) and 37(2)(b).
[52] International Centre for Settlement of Investment Disputes, ICSID Convention, Regulation and Rules, Arbitration Rules, ICSID/15 (2006) Rule 3 (1)(b)(i).
[53] *Supra* note 46, ICSID Convention, Article 52(3).
[54] *Id.* at Article 57.
[55] *Supra* note 11, at 217.
[56] J. Crawford, Challenges to Arbitrators in ICSID Arbitration, in Practising Virtue: Inside International Arbitration 596, 604–06 (2015).
[57] M. Kinnear & F. Nitschke, Disqualification of Arbitrators under the ICSID Convention and Rules in Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals, Brill Nijhoff 37 (2015).
[58] İçkale İnşaat Limited Şirketi v. Turkmenistan, ICSID Case No. ARB/10/24; ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30; Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19; Burlington Resources Inc. v Republic of Ecuador, ICSID Case No. ARB/08/5; Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26; Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/13; Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5.
[59] C. Giorgetti, *supra* note 11, at 208.
[60] Tidewater Inc.,v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5.
[61] *Id*. at para 64.
[62] *Id*. at paras 25-27.
[63] OPIC Karimum Corp. v. The Bolivatrian Republic of Venezuela, ICSID Case No. ARB 10/14.
[64] *Id*. at para 18.
[65] Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/9.
[66] *Id.,* at para 71.
[67] *Id.,* at paras 78-83.
[68] Crawford, *supra* note 60, at 1.
[69] *Supra* notes 31-32. In the text, "considers" gives margin to application to "appearances", as reflected in the State practice of the Organization (*Supra*, notes 36 -37).
[70] Sobotta, *supra* note 49, at 293.

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PARTY REPRESENTATION IN ARBITRATIONS SEATED IN PORTUGAL

By Joana Granadeiro

Introduction

The approach to the topic of party representation in arbitrations seated in Portugal is based on the identification of contrasts. First, the contrast between the rules disciplining party representation in general dealings between private parties, on the one hand, and the rules disciplining the representation of parties before jurisdictional bodies, on the other.

With regards to the former, a broad principle of party autonomy applies, and private parties are generally free to elect any person to act on their behalf, to the extent that such person gathers the capacity to understand and want required for the act or contract to be executed (v. article 263 of the Portuguese Civil Code).

With regards to the latter, the amplitude of parties' discretion is more restricted, as it encloses the difficult equilibrium between the specificity of legal representation before jurisdictional bodies (in relation to other forms of legal representation), the protection of the sphere of action and influence of the legal profession (the exercise of which is subject to the control of public disciplining bodies), the fact that legal representation before courts is constitutionally established as *«an essential element to the administration of justice»*[1], and, finally, the no less important space of freedom that should be given to parties to conduct themselves their legal dealings or to choose a person they trust to do so on their behalf.

Having identified in the preceding paragraphs this first contrast, this article purports to identify, at least, two others. Specifically, this article explores the differences between the rules applicable to the representation of parties before judicial courts, and the rules applicable when such representation takes place before arbitral tribunals, and, finally, the contrast (if any) between the rules that apply when the arbitration is domestic, as opposed to those that apply when the arbitration is international and seated in Portugal.

In sum, this article seeks to explore the concrete limits on parties' freedom in the choice of their legal representatives and the way in which the balance of interests and values that the applicable legal rules enshrine, originally conceived for the representation of parties before judicial State courts, is nowadays applicable to arbitrations, both domestic and international, located in Portugal.

Representation of parties in civil proceedings before Portuguese judicial courts:

In addressing this subject, it is worthy to briefly describe the rules governing the representation of parties in the civil

proceedings before judicial courts, insofar as they constitute the basis upon which the rules governing party representation in arbitration were presumably established and in light of which they must be therefore analyzed.

Pursuant to article 40 of the Portuguese Code of Civil Procedure ("**CCP**"), representation by legal counsel is mandatory (*i*) in proceedings falling within the jurisdiction of courts with *alçada* where an ordinary appeal is admissible (which corresponds, generally speaking, to the cases where the amount in dispute is higher than € 5,000.00[2]), (*ii*) in proceedings where an appeal is always admissible regardless of the amount in dispute[3] and (*iii*) in appeals and proceedings filed before higher courts[4].

The criterion followed by the legislator appears to have been, as Lopes dos Reis points out, that of «*the possibility … of intervention of a higher court, either by way of appeal or at the first instance*»[5].

In these cases, and as provided in article 41 of the CCP, the lack of legal counsel by the claimant will determine the dismissal of the proceedings without prejudice (*absolvição da instância*) or, if the lack of counsel is on the part of the respondent, the ineffectiveness of the defense possibly presented, the proceedings going forward by default (à revelia).

From the combined reading of article 40 of the CCP, article 66 of the Statutes of the Portuguese Bar Association[6] ("**SPBA**"), and article 1(1) and (5) of the Law of Reserved Acts ("**LRA**") [7], results clear that, in judicial proceedings taking place in the Portuguese territory and where any of the above-listed situations apply, the parties must mandatorily be represented not by any legal representative, but rather by an attorney or solicitor duly admitted to the profession in Portugal, or by a trainee lawyer, with the limitations and restrictions that are provided by the SPBA[8].

That will be the case of not just the attorneys admitted to the Portuguese Bar Association but also of attorneys from Member States of the European Union that practice law in Portuguese territory with their professional title of origin[9], on an occasional basis (in the terms prescribed by article 205(1) of the SPBA and having given notice of such activity to the Portuguese Bar Association[10]), or on a permanent basis (which depends upon the registration before the Portuguese Bar Association in the terms prescribed by Article 205(2) of the SPBA[11]).

Notwithstanding the above, it must be noted that, whenever the representation of parties before Portuguese judicial courts is undertaken by attorneys of Member States of the European Union with their professional title of origin, it must be carried out «*under the orientation of an attorney admitted to the Bar Association*», as provided in article 204 of the SPBA[12].

Finally, in proceedings where representation by legal counsel is not mandatory, article 42 of the CCP prescribes that parties may plead on their own behalf before the court or be represented by a trainee attorney or a solicitor[13].

As such, and if parties choose not to plead on their own behalf in the limited cases where they are allowed to do so, they may only trust their legal representation to legal professionals: either by a trainee attorney or a solicitor, or by an attorney (although, as stressed previously, they do not necessarily have to choose one). Consequently, in such scenarios parties may not be represented by third parties that are not legal professionals.

Party representation in domestic arbitrations:

The first question to be addressed is whether representation by legal counsel is in any circumstance mandatory in domestic arbitration. The answer seems to be negative, for the reasons that follow.

First, because neither the Portuguese Arbitration Law ("**PAL**") [14], nor any other legal diploma, imposes such an obligation of representation by legal counsel. In the absence of a legal provision prescribing legal representation as mandatory, and moreover considering that arbitration is a dispute resolution method anchored and legitimized by party autonomy, it can be concluded that representation by legal counsel is not mandatory in domestic arbitration, except where parties agree otherwise.

Second, the rationale underpinning the cases of mandatory representation by legal counsel in civil proceedings before Portuguese judicial courts, provided under article 40 of the CCP, is in no way applicable to arbitration. Indeed, the possibility of intervention of a higher court has no parallel in a mechanism that is chiefly recognized by the absence of a system of appeals, safe where parties expressly agree otherwise[15], which only rarely occurs[16].

In sum, both arguments above point towards the conclusion that in domestic arbitrations representation by counsel is never mandatory, and thus parties may elect to plead for themselves or, alternatively, to be represented by someone else.

The second question is, then, whether parties who opt for being represented in a domestic arbitration, are bound to choose a legal professional in the same terms prescribed for the civil proceedings in judicial courts or, on the contrary, are free to choose whomever they desire.

As a preliminary point, it must be noted that the current PAL is silent on this issue, but that that was not always the case.

In fact, article 17 of the old PAL – Law No. 31/86, of 29 August – provided that «[t]*he parties may choose the person to represent or assist them before the tribunal*». However, the existence of an express provision on this subject was not enough to dissipate all doubts as to how it should be interpreted and diverging views subsisted among scholars.

On the one hand, Dário Moura Vicente understood this provision to mean that legal counsel was not mandatory in arbitration, but that when parties opted to be represented in arbitral proceedings the relevant provisions of the Code

of Civil Procedure nonetheless applied. As such, parties were free to choose between pleading before the tribunal or being represented by legal counsel, in the terms prescribed for party representation before civil judicial courts[17].

On the other, Lopes dos Reis found that «*had the legislator wanted to declare legal representation in arbitration as optional, the PAL would have provided just that*» and that, instead, the legislator had gone further and established the freedom of parties to choose whomever they wanted to represent them before the arbitral tribunal. For this author, article 17 of the PAL allowed parties «*to plead personally for themselves or be represented or assisted by any person, regardless of whether that person is a member of the legal profession*»[18].

In any case, the fact of the matter is that the PAL currently in force does not contain any reference to the issue[19]. Notwithstanding this, it must be noted that the legislator, when disciplining the acts reserved to attorneys in 2004 through the approval of the Law of Reserved Acts, had clarified that legal representation of parties before jurisdictional bodies is an act reserved to attorneys and that it includes representation before both judicial courts and arbitral tribunals[20].

Being an act reserved to attorneys under the LRA, legal representation of parties before arbitral tribunals may only be undertaken by attorneys «*validly registered before the Bar Association*» or those who, in the terms allowed by the SPBA, gather the conditions necessary to acquire that professional title[21].

Considering all of the above, and in particular what is provided under articles 1(5) and 2 of the LRA, it can be concluded that representation of parties in domestic arbitrations in Portugal is subject to rules analogous to those that discipline the representation of parties before judicial courts. That means that, in case parties opt to be represented before the tribunal, they are bound to choose a legal professional as their representative.

As such, and similarly to the exercise of legal representation before judicial courts, the rules of the SPBA described in the previous section, that allow the exercise of legal representation in Portugal, either on an occasional or permanent basis, by attorneys admitted in other jurisdictions, are also applicable in the context of legal representation before domestic arbitral tribunals.

In sum, the conclusion to be drawn from the law appears to be that, except in those limited circumstances, based either on the basis of membership in an internal market of services or on the basis of comity, legal representation of parties by attorneys admitted to foreign jurisdictions in domestic arbitrations in Portugal is not permitted.

Party representation in international arbitrations seated in Portugal:

Having gone through the rules applicable to legal representation of parties in the context of domestic arbitrations in Portugal, it is now time to address the rules that govern legal representation of parties in international arbitrations seated in Portugal.

In relation to these, the question presents itself in different terms and consists in determining whether the provision from the LRA that limits parties' autonomy in the choice of their legal representative forms part of the *lex arbitri*.

However, before addressing this question one must first advance the notion of international arbitration that is provided under the PAL, and the reasons why this question is posed on different terms and assumes particular relevance in that context.

Article 49 of the PAL prescribes that an arbitration is deemed international when «*international trade interests are at stake*»[22]. International arbitration is therefore characterized by the fact that the underlying dispute has elements of contact with more than one jurisdiction[23].

Moreover, experience shows that it is not uncommon in international arbitrations seated in Portugal for some or even all arbitrators to be foreign nationals, the proceedings to be conducted in foreign languages, notably in English, and a foreign substantive law to be applicable to the merits of the dispute[24].

Notwithstanding the above, these arbitrations do not exist in a legal vacuum[25], and thus the anchoring of a certain international arbitration to a specific jurisdiction is made through the choice of the legal seat, which may be determined either by the agreement of the parties or, in its absence, by the arbitral tribunal[26] or by the arbitral institution charged with administering the proceedings[27].

When referring to international arbitrations seated in Portugal, it is thus to this notion that we refer to: arbitrations that either by choice of the parties or by determination of the tribunal or the arbitral institution, are deemed to be legally located or seated in Portugal

In the context of international arbitration, the choice of seat of the arbitration is extremely consequential for several reasons, but perhaps mostly because it also determines, in the vast majority of cases, the choice of the *lex arbitri*[28].

The *lex arbitri* corresponds, in turn, to the set of rules that discipline the arbitral process as well as the jurisdiction of the judicial courts of the seat in assisting and supervising the arbitrations seated in that jurisdiction. These rules are in most cases mandatory, notably when they govern fundamental aspects of the process, but in some other cases are subject to derogation by agreement of the parties[29].

In most cases, the *lex arbitri* is embodied in the diploma that specifically regulates arbitration in the jurisdiction where the arbitration is seated, which in the case of Portugal corresponds to the PAL. But it does not have to be that way.

Indeed, States are free in how they regulate arbitration[30]. Some States have opted for regulating arbitration in their codes of

civil procedure, as a 'special regime' in relation to the discipline of the process that takes place before judicial courts, others have opted for regulating arbitration in one sole legal diploma, covering domestic and international arbitration – as was the case of Portugal, Spain and the United Kingdom -, and, finally, other States have regulated international arbitration in a separate diploma from where they regulated domestic arbitration, as was the case of Switzerland[31].

That said, it could be argued that the absence of any provision in the PAL imposing restrictions on the parties' freedom to choose their legal representatives means that, in international arbitrations seated in Portugal to which the PAL applies, the parties are free to choose whomever they want to represent them before the arbitral tribunal. Such somewhat formalistic approach would then end of this discussion.

However, it can be equally argued that the mere fact that a subject that was, until 2011, disciplined by the PAL and thus presumably deemed to fall within the scope of the *lex arbitri*, having subsequently ceased to be disciplined in the PAL, does not in itself determine that the matter no longer subsumes to the scope of the *lex arbitri*, *i.e*. of the fundamental set of rules framing all arbitrations seated in Portugal. In this vein, it may be argued that article 2 of the LRA (which states that legal representation before jurisdictional bodies, an act reserved to attorneys, encompasses representation before not only judicial courts but also arbitral tribunals), despite being a separate diploma dealing predominantly with matters that do not relate to arbitration, forms part of the *lex arbitri* of the Portuguese seat and thus limits the parties' freedom to choose their representatives in international arbitration.

That is why it is important to seek conclusions in view of the principles that underlie the system and of the material reasons that advocate for the alternative possible solutions. In particular because it is precisely in the context of international arbitration that parties may want to appoint as legal counsel attorneys from foreign jurisdictions, perhaps unfamiliar with Portuguese law, but certainly well-versed in the idiosyncrasies of the arbitral process. It is also possible that such attorneys are not admitted to the Bar Association of a Member State of the European Union and do not, therefore, gather the conditions to exercise the legal mandate occasionally or permanently in Portuguese territory, in the terms prescribed by the SPBA.

Having outlined the issue, one must now explore the arguments that support, on the one hand, the position that the provision of the LRA that limits the exercise of the legal mandate in domestic arbitration shall also apply to international arbitration, as well as, on the other, the position that such provision does not apply to international arbitration, insofar as it falls outside the scope of the *lex arbitri* of the Portuguese seat.

In support of this latter position, it can be argued that the absence of an express provision in the PAL imposing restrictions to the exercise of the legal mandate in international arbitrations seated in Portugal, results, *a contrario*, in the recognition of the parties' freedom of choice on this matter. Under this reasoning, had the legislator wanted to impose such restrictions in 2011, it would have made that option clear and express in the new law. By not doing so, it relegated this matter to the realm of party autonomy.

This position finds support in a dualistic interpretation of the discipline of arbitration in the PAL. Indeed, scholars like António Menezes Cordeiro[32], who state that the PAL enshrines a dualistic discipline of arbitration whereby the regime governing domestic arbitration is different from that that governs international arbitration, will be more receptive to the idea that article 2 of the LRA was not thought for nor applies to the representation of parties in international arbitrations.

Also in support of this position stand the various examples that, from a comparative law perspective, demonstrate a certain tendency towards liberalizing party representation in international arbitration.

By way of example, the English Arbitration Act of 1996 provides parties with total freedom in this respect, stating in its section 36 that «[u]*nless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the proceedings by a lawyer or other person chosen by him*».

The evolution observed with the Spanish arbitration law, can also be considered as illustrative of this tendency. While the arbitration law of 1988 [33] provided, in its article 21(3), that parties could opt between pleading on their own behalf or being represented by an attorney, the new law passed in 2003[34] eliminated that provision, and it can thus be argued that the legislator intended to leave this subject to the parties in the exercise of their autonomy.

The Brazilian arbitration law also grants parties broad freedom, providing that «[t]*he parties may be represented by an attorney, and their prerogative to designate the person to represent or assist them in the arbitral proceedings shall always be respected*»[35].

From across the Atlantic comes the example of California, where in July 2018 the State Senate unanimously passed an amendment to the State's code of civil procedure, expressly allowing parties to be represented by attorneys from other States of the Union as well as from foreign jurisdictions, in international arbitrations seated in California, without requiring any kind of prior registration before the State's Bar Association[36].

Finally, and although the UNCITRAL Model Law is silent on this issue, i tis worth noting that such omission is likely attributable to the fact that article 5 of the 1976 UNCITRAL Arbitration Rules already provided that «[e]*ach party may be represented or assisted by persons chosen by it*».

The examples supporting the understanding that parties should enjoy ample freedom in the choice of their legal representatives in arbitration – regardless of whether that person is admitted to practice in the jurisdiction of the seat of the arbitration - are thus significant and compelling.

Notwithstanding that, this position is also anchored in the overarching principles of the system. Authors such as Matti S. Kurkela e Santtu Turunen, point to the principle of party autonomy and the eminently fiduciary nature of the relationship between a party and its representative, as decisive factors that advocate for the recognition of ample freedom of parties in the choice of their legal representatives in international arbitration[37].

Indeed, as Lopes dos Reis writes, «*arbitration is contractual in nature and is justified by party autonomy, in the breath that the law grants it*»[38]. In international arbitration, that freedom is even wider: parties are free to submit the resolution of their disputes *ex aequo et bono*[39], and arbitrators do not necessarily have to be legal professionals[40].

Additionally, and as affirmed by the Portuguese Supreme Court, the exercise of that autonomy by the parties in the choice of their legal representatives does not collide with other fundamental principles, namely the principle of equality and the adversarial principle. Significantly, the Portuguese Supreme Court has stated that:

«*This situation does not result in the violation of the principle of equality between the parties – the parties are exactly in the same circumstances – nor in the violation of the adversarial principle, since it does not appear … that the fact that the party's representative is not a lawyer resulted in him being deprived of procedural powers that were, conversely, granted to the legal representative of the opposing party.*

…

The principle of equality and the adversarial principle that must be observed in the process (article 980(e) of the CCP) refer to the exercise of the procedural acts, and not to personal differences, namely differences in the quality of performance of those intervening in the process, differences inherent to the human condition; therefore, having been accepted by the arbitral tribunal that the representation would be undertaken by a non-legal professional, after the party waived the services of an attorney and opted to be represented by a director, the position of equality between the parties is safeguarded, and the qualitative difference between that representation, if it existed, is of the appellant's responsibility.»[41]

Finally, and in view of the reasons that lie behind the imposition of legal representation by counsel in the context of civil judicial proceedings, and also in the context of domestic arbitration, one may argue that such imposition should not extend to international arbitration insofar as those reasons find no parallel in the latter context.

Indeed, and as stated by Antunes Varela, the reasons that are typically advanced to justify the imposition of legal representation by counsel are both psychological and technical. On the one hand, it is believed that having those directly involved in the dispute pleading before the court may deprive them of the «*serenity indispensable to the effective defense of one's position*». On the other, it is generally understood that most people lack «*the experience and the technical knowledge necessary to the proper evaluation of their claims under the applicable law*»[42].

Now it can be argued that the distancing between the litigant and the dispute resolution proceeding that the first set of reasons seems to recommend can be guaranteed simply with the involvement of a representative that is a third party to the dispute, regardless of whether it is an attorney or not. In this regard, having parties represented by an attorney from a foreign jurisdiction would achieve the desired distancing just as well as if that representative were an attorney of the seat.

When it comes to the second set of reasons, it can also be argued that in international arbitration an attorney admitted to practice in the jurisdiction of the seat may not necessarily be the most equipped to frame the party's claims under the applicable law, particularly if the law applicable to the substance of the dispute does not coincide with the substantive law of the jurisdiction of the seat – a scenario that is not at all uncommon.

Finally, one may also advance an argument of a more practical nature, which relates to the fact that «*compliance with such an imposition would not even be susceptible of effective control*»[43].

Indeed, arbitration is a private dispute resolution method, characterized by the duty of confidentiality that binds all its participants under article 30(5) of the PAL[44].

For these reasons, it can be argued that the imposition of representation by legal counsel in international arbitration is hardly susceptible of effective enforcement and moreover creates the risk, to which Lopes dos Reis alerts, of «*leading parties to prefer other countries to locate their arbitrations*». Ultimately, it could also give rise to situations of mere appearance of legal representation by attorneys admitted at the seat, which «*would not be dignified nor dignifying*»[45] to the process and those involved in it.

Having gone through the arguments that, in our view, support the position that parties enjoy broad freedom in the choice of their representatives in international arbitrations seated in Portugal, one must now present the possible arguments to support the contrary position.

First, it can be argued that the fact that the legislator left this topic out of the new Portuguese Arbitration Law in 2011 is not sufficient to conclude that there was a shift in the paradigm that existed up until then, particularly because the regime that was passed in 2004 with the approval of the Law of Reserved Acts remains in force. As such, it can be argued that this matter remains, by its nature, within the scope of the *lex arbitri* of the Portuguese seat and the relevant provisions of the LRA thus apply to international arbitrations seated in Portugal, regardless of the fact that they are inserted in a separate diploma.

Indeed, neither the PAL nor the SPBA distinguish between legal representation before domestic arbitral tribunals, from that before international arbitral tribunals, and it can thus be argued that the interpreter should not differentiate where the legislator did not do so.

Moreover, had the legislator wanted in 2011 to establish a legal regime that was different for international arbitration

and that would set aside the regime that existed since 2004 for arbitration in general, it would have done so. Indeed, article 49(2) of the PAL is clear in its affirmation that «[n]*otwithstanding what is provided in the present chapter, the provisions of this Law on domestic arbitration shall apply to international arbitration, with the necessary adjustments*»[46].

Secondly, the entry into force of Law No. 63/2019, of 16 August, which subjected consumer disputes to mandatory arbitration or mediation and established a duty to inform the consumer of its right to be represented by an attorney or a solicitor, may equally be interpreted as sign of the legislator that, where parties opt for being represented before a tribunal, they are bound to elect an attorney or a solicitor for that purpose.

Thirdly, comparative law also offers examples from other legal orders where this position prevails. Indeed, the Italy is among the examples commonly cited by commentators as one where representation by legal counsel from the forum is almost always mandatory, except for cases pending before the peace courts (*Giudice di Pace*) and for some employment matters[47].

Finally, this position is also backed by substantive considerations that underlie the Portuguese legal system and stem from the fact that the Portuguese Constitution characterizes arbitral tribunals as proper jurisdictional bodies[48], as well as from the fact that the attorney is constitutionally seen as being an essential element in the administration of justice.

The starting point on this matter is indisputably the acknowledgement that the Portuguese Constitution devotes its article 208 entirely to legal representation before jurisdictional bodies and provides that «[t]*he law grants attorneys the immunities necessary to the exercise of legal representation and regulates legal representation as an essential element to the administration of justice*».

The constitutional relevance of the subject is further reinforced by the establishment, in article 20(2) of the Portuguese Constitution[49], of a right to a public defender as a dimension of the general guarantee of effective judicial protection.

Although it is true that the right to a public defender is a dimension of effective judicial protection, «*from that right does not result a duty of parties to be represented by legal counsel in every judicial proceeding*». According to the Portuguese Constitutional Court, «[t]*he Constitution grants the legislator broad freedom to regulate on the universe of proceedings where representation by legal counsel is mandatory*»[50].

Notwithstanding the foregoing, it seems uncontested that legal representation before jurisdictional bodies has a pivotal role in the administration of justice, which is evidence by the fact that the State bears the responsibility of allowing everyone access to the courts in equal conditions and assuring for that effect a system of public defenders for those who demonstrate a financial inability to support the costs of legal representation, in the terms prescribed by Law No. 34/2004, of 29 July[51].

It is precisely the relevance of the matter that explains why legal representation, differently from other kinds of representation, is subject to its own rules of ethics and professional responsibility, that bind the attorney to various duties (some of which largely extrapolate the relationship with the client) and that subject the attorney to the supervisory and disciplinary power of the Bar Association.

Indeed, it can be argued that there is a public interest in having professionals equipped with the adequate technical and ethical qualifications participating as essential elements in the administration of justice, which justifies that only attorneys admitted to practice at the seat may represent parties in international arbitrations in analogous conditions to legal representation before state courts.

In light of the above, there are obvious advantages in ensuring that, in an adjudicative procedure that enjoys the protections of the law of the seat, and which will lead to an arbitral award that is equated to a court decision, certain minimum requirements, deontological and technical, are respected in the representation of parties.

Conclusion

In conclusion, it seems that the representation of parties in domestic arbitrations follows the same rules that apply to the legal representation of parties before judicial courts, with the necessary adaptations that the differences between the two dispute resolution methods require. As such, legal representation in domestic arbitration is never mandatory to parties, but if they opt to be represented, they are bound to choose a legal professional.

Now, in relation to international arbitrations seated in Portugal, the question does not appear to be unequivocally settled and there are valid and persuasive arguments in support of the two possible positions explored in the previous section.

In fact, the question boils down to determining whether parties in international arbitrations seated in Portugal, where the law applicable to the merits may not even be Portuguese law, must be represented by an attorney admitted to the Portuguese Bar Association or by a foreign attorney, with the restrictions and strictly within the terms prescribed by the SPBA, which may notably require that such representation be conducted «*under the orientation of an attorney admitted to the Bar Association*»[52], or if, on the contrary, parties are free to choose a representative they trust, whoever that may be.

We take the view that parties enjoy broad freedom in the choice of their legal representative in international arbitrations seated in Portugal. It is our understanding that that is the solution that stems from the law and is further confirmed by the limited court decisions that have touched upon this matter.

First, we gather that the absence of any provision on this matter in the PAL currently in force, means that the Portuguese

legislator does not perceive this matter as forming part of the basic and mandatory legal framework that applies to all international arbitrations seated in Portugal.

Secondly, we find it significant that even when the legislator dedicated one article to the topic of legal representation in the old PAL, it decided to enshrine a principle of freedom (article 17 of the olf PAL provided that «[t]*he parties may choose the person to represent or assist them before the tribunal*»), without establishing any qualifications or limitations to the parties' freedom to choose. While there were at the time different interpretations among commentators as to how this provision should be read, the reality is that no limitations resulted directly from the express terms of the provision.

Thirdly, we take note of the fact that the suppression of the then article 37 from the PAL in 2011 was not accompanied by any sort of explanatory note and was not even mentioned in the projects that preceded the approval of the current PAL, which further consolidates the idea that the Portuguese legislator does not perceive this matter as falling within the scope of the basic legal framework of the *lex arbitri*.

Notwithstanding this, it is ultimately the deontological dimension of legal representation that appears decisive in advocating for having attorneys with some connection and ties to the seat, pleading on behalf of parties in international arbitrations seated in Portugal.

Qualified attorneys admitted to the Portuguese Bar Association, similarly to attorneys from other jurisdictions, are bound by multiple duties, such as the duty not to plead against the Law, the duty not to resort to illegal endeavors, not to represent conflicting interests. The affirmation of these duties in the context of international arbitration is particularly important at a moment where its legitimacy and its adequacy as an alternative to State courts are being scrutinized and, in some instances, challenged by civil society groups. The demands for more transparency are legitimate and should be met with real efforts of subjecting all those intervening in the process to professional rules of ethics.

Notwithstanding the conclusion reached, which unequivocally postulates for the recognition of broad freedom to the parties, we nevertheless take the view that it is desirable that legal representatives acting on behalf of parties in international arbitrations seated in Portugal be subject to deontological rules proper of the legal profession. The Code of Conduct for Lawyers in the European Union[53] and the International Bar Association International Principles on Conduct for the Legal Profession, are examples of instruments that constitute a common denominator to various States and could thus effectively serve that purpose.

1 Article 208 of the Portuguese Constitution.

2 Pursuant to Article 629(1) of the CCP, an ordinary appeal is admissible where the amount in dispute is «*higher than the* alçada *of the court from which the appeal is made and where the decision is unfavorable to the appellant in an amount that is greater than half of that court's* alçada*, taking into account, in case of doubt in relation to that amount, solely the amount in dispute*». Article 44 of Law No. 62/2013 of 26 August (Law of the Organization of the Judicial System) provides, in turn, that in civil matters «*the* alçada *of the courts of Appeal is (euro) 30,000.00 and that of the courts of first instance is (euro) 5,000.00*».

3 Notably in the cases prescribed in article 629(2) and (3) of the CCP.

4 In this regard, it is important to note that some authors go even further, advocating that representation by legal counsel should be mandatory in all proceedings that following the ordinary form of process and also that the judge should be free to require the parties to be represented by legal counsel even in proceedings where such representation would not be legally mandatory, through the analogical application of Article 38(2) of Law No. 78/2001 (Justices of Peace Law). See Almeida Rodrigues, Carlos E. P., *Uma análise sobre a obrigatoriedade do patrocínio judiciário no âmbito do processo declarativo comum*, ROA, 2015, III-IV, p. 693.

5 Lopes dos Reis, João Luís, *Representação Forense e Arbitragem*, Coimbra Editora, 2001, p. 15.

6 Article 66 (1) SPBA: «*Without prejudice to what is provided under article 205, only attorneys validly registered before the Bar Association may, in the national territory, perform acts reserved to the legal profession, in the terms defined in Law No. 49/2004 of 24 August*».

7 Law No. 49/2004, of 24 August.

8 Pursuant to article 66(4) of the SPBA, trainee lawyers may only perform acts reserved to the legal profession in the terms prescribed by the SPBA. Pursuant to article 196 of the SPBA, upon completion of the first phase of the internship, the trainee lawyer may perform all acts within the competence of solicitors and provide legal advice under the guidance of his/her supervising attorney and may perform all other acts that are reserved to the legal profession provided that he/she is effectively accompanied by the respective supervising attorney.

9 Without prejudice to the possibility, provided under article 204(3) of the SPBA and disciplined in articles 30, 31 and 31 of Regulation No. 913-C/2015 (Regulation of Registration of Attorneys and Trainee Lawyers), of attorneys from Member States of the European Union exercising in Portugal their activity subject to prior registration before the Portuguese Bar Association. In addition to the attorneys from Member States of the European Union, article 201 of the SPBA also allows attorneys from other States to register before the Portuguese Bar Association on the basis of comity: to the extent that their country of origin grants Portuguese attorneys in the same circumstances an identical possibility of registering. Finally, the law specifically prescribes that the same goes for attorneys from Brazil that have graduated from Brazilian or Portuguese universities, insofar as Portuguese lawyers are given identical possibilities before the Brazilian Bar Association. In all these sets of cases, these attorneys may, once registered before the Portuguese Bar Association, perform all acts reserved to the legal profession in Portugal without any restrictions.

10 Law No. 9/2009, of 4 March disciplines, in its article 5, the terms of such written declaration and the documents that must accompany it. Under article 5(2), that declaration is valid for a year and may be renovated for additional periods.

11 In this regard, Law No. 9/2009 of 4 March also provides, in its article 10, that whenever the exercise of a regulated profession within the national territory is subject to the possession of certain professional qualifications, the competent authority shall allow its exercise to the applicant who holds the declaration of competency or the academic title required by its Member State for the exercise of that same profession.

12 As clarified by article 207 of the SPBA, whenever attorneys from Member States of the European Union provide legal services in Portugal, they shall naturally be subject to the professional and ethical rules applicable to Portuguese attorneys and to the disciplinary power exercised by the Portuguese Bar Association, without prejudice to the rules from their State of origin that they must comply with.

13 It is worth noting in this regard that, under article 40(3) of the CCP, in proceedings where representation by legal counsel is not mandatory and parties have opted not to be represented by one, the «*examination of witnesses is made by the judge, who shall also adequate the process to the specificities of the situation*».

14 Law No. 63/2011, of 14 December.

15 There is an increasing number of institutional arbitration rules providing parties, through a system of opting in, the possibility of appealing the arbitral award (in relation to both the tribunal's findings on the law and on the facts) to a second arbitral tribunal. As for the appeal to state courts, it has long been admitted by some national laws, such as the Italian and the British.

16 Pursuant to article 39(4) of the PAL, parties may agree on the possibility of appeal of the arbitral award that decides the dispute or that puts an end to the arbitral proceedings, to state courts, as long as the decision in question is not rendered on an *ex aequo et bono* basis nor constitutes an amicable settlement of interests between the parties.

17 Moura Vicente, Dário, 'L'évolution récente du droit de l'arbitrage au Portugal', *Revue de l'Arbitrage*, Comité Français de l'Arbitrage 1991, Volume 1991, Issue 3, pp. 426-427: «*La représentation des parties devant le tribunal arbitral est, d'après l'article 17 de la Loi, facultative. Les parties peuvent donc plaider elles-mêmes devant le tribunal arbitral; mais elles ne peuvent se faire représenter que par des avocats, des avocats-stagiaires ou des avoués (article 34 CPC), dûment munis d'un pouvoir, sauf s'ils ont été investis dans leur mandat par une déclaration verbale prêtée devant le tribunal par la partie pour laquelle ils se présentent (article 35 CPC)*».

18 Lopes dos Reis, João Luís, op. cit. p. 118.

19 In the preparation works presented by the *Associação Portuguesa de Arbitragem* to the government in 2009 and in 2010, there no longer was any reference to this topic.

20 Article 5 of Law No. 49/2004, of 24 August.

21 Article 5(1) of the SPBA.

22 As explained by Dário Moura Vicente in his annotation to this provision, the definition of international arbitration on the basis of this objective criterion results in a wide definition, that comprises not only the «*disputes where the parties are established in different countries*», but also the «*disputes emerging from economic transactions that involve the circulation of goods, services or capital across borders*», MOURA VICENTE, Dário (coordenador), *Lei da Arbitragem Voluntária Anotada*, 3ª Edição, Almedina, Coimbra, 2017, p. 159.

23 «*International arbitration, unlike its domestic counterpart, usually involves more than one system of law or of legal rules*», *in* 'Chapter 3. Applicable Laws', in BLACKABY, Nigel, PARTASIDES, Constantine, et al., Redfern and Hunter on International Arbitration, 6th edition, Oxford University Press 2015, p. 157.

24 This is often motivated by parties' will to have the arbitration seated in a neutral jurisdiction. To that effect, see 'Chapter 3. Applicable Laws', in BLACKABY, Nigel, PARTASIDES, Constantine, et al., ibid, p. 166: «[w]*here parties to an international arbitration agreement choose for themselves a seat of arbitration, they usually choose a place that has no connection with either themselves or their commercial relationship. They choose a 'neutral' place*».

25 «*Like a contract, an arbitration does not exist in a legal vacuum. It is regulated, first, by the rules of procedure that have been agreed or adopted by the parties and the arbitral tribunal; secondly, it is regulated by the law of the place of arbitration. It is important to recognise at the outset—as even distinguished judges and commentators sometimes fail to do—that this dualism exists*», Ibid, p. 156.

26 As provided under the UNCITRAL Arbitration Rules, for exemple.

27 As provided under the ICC Rules, for example.

28 Pursuant to the so-called seat theory, which consists in the idea that «*arbitration is governed by the law of the place in which it is held, which is the 'seat' (or 'forum', or locus arbitri) of the arbitration*», and which gathers ample support in international arbitration, see Blackaby, Nigel, Partasides, Constantine, et al., op. cit., pp. 171-172.

29 Which can also be defined as «*the law governing the existence and proceedings of the arbitral tribunal (the lex arbitri)*», ibid, p. 157.

30 To that effect: «*Each state will decide for itself what laws it wishes to lay down to govern the conduct of arbitrations within its own territory*», ibid, p. 167.

31 In Switzerland, the discipline of domestic arbitration is found in Part 3 of the 2008 Code of Civil Procedure, whereas the discipline of international arbitration is found in Chapter 12 of the Private International Arbitration Act of 1987.

32 This author supports the view that the PAL embraced a soft dualist system, partly due to the influence of the French tradition. See MENEZES CORDEIRO, António, *Tratado da Arbitragem, Comentário à Lei 63/2011, de 14 de Dezembro*, Almedina, 2015, p. 483.

33 Law No. 36/1988, of 5 December. The example of Spain was even cited by Lopes dos Reis in 2001 as an isolated case, in stark contrast with what was the trend in most jurisdictions. Lopes dos Reis, João Luís, op. cit., p. 121.

34 Law No. 60/2003, of 23 December.

35 See article 21, paragraph § 3 of Law No. 9.307, of 23 September 1996.

36 See Senate Bill No. 766, available at www.leginfo.legislature.ca.gov. Note, however, that for legal representation by a foreign attorney, or by an attorney admitted to practice in another State of the Union to be permitted under this Law, it is required that one of the following five conditions be met: «*(1) The services are undertaken in association with an attorney who is admitted to practice in this state and who actively participates in the matter. (2) The services arise out of or are reasonably related to the attorney's practice in a jurisdiction in which the attorney is admitted to practice. (3) The services are performed for a client who resides in or has an office in the jurisdiction in which the attorney is admitted or otherwise authorized to practice. (4) The services arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the attorney is admitted or otherwise authorized to practice. (5) The services arise out of a dispute governed primarily by international law or the law of a foreign or out-of-state jurisdiction*».

37 KURKELA, Matti S., TURUNEN, Santtu; Conflict Management Institute (COMI), *Due Process in International Commercial Arbitration*, 2ª Edição, Oxford University Press, 2010, p. 191: «*A party being able to choose its own counsel is important in two ways. First, it allows the party to effectively enforce its substantive and procedural rights to the extent it decides to do so and in a manner that it wants. Second, there is an intrinsic value in having the right to choose legal help as trust is important, and the procedure may only be fair if a party can trust the counsel conducting it on the party's behalf*».

38 Lopes dos Reis, João Luís, op. cit., pp. 123-124.

39 Under article 39(1) of the PAL, «[t]*he arbitrators shall decide the dispute in accordance with the law, unless the parties agree that they shall decide ex aequo et bono*».

40 Indeed, article 9 of the PAL does not prescribe any requirement of such nature.

41 Decision by the Portuguese Supreme Court, dated 09.07.2015, rendered in case No. 36/14.4YRLSB.S1. This decision was rendered in the context of proceedings initiated for the recognition and enforcement of a foreign arbitral award rendered in an international arbitration seated in Paris, France, and conducted under the auspices of the International Chamber of Commerce. Among the grounds invoked by the respondent to oppose the recognition and enforcement of the award in Portugal under article 56(1)(a) of the PAL was that the arbitration agreement was null because it had not been informed about the impossibility of resorting to public defense services and having a public defender nominated to represent it. The respondent explained that at a certain point in the proceedings it was no longer able to afford the fees of its attorney and was henceforth represented by one of its directors, whereas the claimants were always represented by legal counsel, which amounted to a violation of the adversarial principle and the principle of equality between parties. The Portuguese Supreme Court rejected this argument, affirmed that those who enter into an arbitration agreement subject themselves to a non-public system of administration of justice and thus accept the advantages and costs inherent to that option, and finally that parties to an arbitration agreement are not under a duty to inform the counterparty of the procedural consequences and costs of arbitration.

42 Bezerra, José Miguel, Sampaio e Nora, and Antunes Varela, João de Matos, *Manual de Processo Civil de acordo com o Dec.-Lei 242/85*, 2ª Edição Reimpressão, Coimbra Editora, 2006, p. 190. As such, and by contrast with the foregoing, the non-imposition of legal counsel in a certain type of cases was certainly influenced by the fact that «*in light of their low value and apparent procedural simplicity, the imposition on parties of mandatory representation by legal counsel and the payment of attorney's fees would be a burden too heavy on the exercise of the right of action*», in ALMEIDA RODRIGUES, Carlos E. P., op. cit., p. 665.

43 Lopes dos Reis, João Luís, *Representação Forense e Arbitragem*, Coimbra Editora, 2001, p. 127.

44 This provision states that: «[t]*he arbitrators, the parties and, where applicable, the entities that promote on an institutional capacity the conduction of voluntary arbitrations have the duty to keep confidential all information obtained and documents that they become aware of through the arbitral process, without prejudice to the parties' right to make public the procedural acts that are necessary to the defense of their rights, and of the duty imposed by law to inform or reveal procedural acts to the competent authorities*».

45 Lopes dos Reis, João Luís, *Representação Forense e Arbitragem*, Coimbra Editora, 2001, footnote 127.

46 It is also worth noting that this interpretation seems to have gained traction among some foreign commentators. Indeed, MARGARET MOSES cites the example of Portugal as being a case where «*it appears that to represent a party in an international arbitration, one must be admitted as a lawyer in Portugal, although there is apparently no court decision on the subject*», see MOSES, Margaret, *The Principles and Practice of International Commercial Arbitration*, Third Edition, Cambridge University Press, p. 179.

47 Almeida Rodrigues, Carlos E. P., *Uma análise sobre a obrigatoriedade do patrocínio judiciário no* âmbito do processo declarativo comum, ROA, 2015, III-IV, p. 660, footnote No. 19.

48 See Article 209 of the Portuguese Constitution.

49 Article 20(2) of the Portuguese Constitution: «*All persons have a right, under the terms of the law, to legal information and consultation, to a public defender and to be accompanied by an attorney before any authority*».

50 Decision by the Portuguese Constitutional Court No. 91/2009, rendered in case No. 276/08.

51 This Law should be read and applied together with Ministerial Order No. 10/2008, of 3 January.

52 As prescribed in article 204 of the SPBA.

53 Adopted at the plenary meeting of the *Conseil des Barreaux européens* (CCBE) on 28 October 1988 and approved in its Portuguese version by Deliberation No. 2511/2007.

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EXHAUSTION OF LOCAL REMEDIES IN INDIA: Is it a BIT too Exhausting?

By Rubanya Nanda

Abstract

The rule of Exhaustion of Local Remedy (hereinafter the ELR) is a qualification that needs to be complied by the investor. This rule is a part of the customary international law. Various Bilateral Investment Treaties (hereinafter BITs) have included the ELR rule in their texts. The Indian Model BIT is one such instance where the exhaustion of ELR is ´expressly required´. This Model BIT is considered as a departure from the previous ISDS regime in India. This thesis aims to focus on the aspect of Exhaustion of Local Remedies as included in the Model BIT of India. The ELR criteria is one of the prominent requirements in this Model BIT. The initial chapters of this thesis analyze the principles, scope of ELR rule in general. Then there is a brief note on the Model BIT of India. Subsequently, specific scope of ELR rule in the model BIT of India is discussed. The aspect of time period of ELR rule, the futility exception has also been dealt therein. There has been a comparison of ECHR´s ELR provision to ELR rule in the Model BIT of India. This thesis is an attempt to understand the application of ELR rule both in general context as well as within the purview of Model BIT of India.

Acknowledgement

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Chapter 1: Introduction

The investor state dispute settlement mechanism is perceived as a necessity rather than something offbeat in contemporary times. With the advent of international arbitration, the investors have become more confident in investing in previously unexplored jurisdictions. The general principles of public international law govern the settlement of investor state disputes. The evolution of the international investment regime can be credited to transnational trade, aspects of globalization and increase in cross-country capital expenditure[1]. The spurt in international investment meant the rise of international investment agreement as well.

The International Investment Agreements (IIAs) are drafted keeping both the rights and obligations of investors and states in mind. Bilateral Investment Treaties (BITs) are the sub set of IIAs. As implied by its name, these treaties are concluded between two states. The BITs provide certain protection for investors like Fair and Equitable (hereinafter FET) standards and protection against unlawful expropriation. The BITs include dispute resolution clause which ensures the adjudication by a tribunal.

India is one of the fastest growing economies with an ample scope for foreign investment.The World Bank in its most recent report has predicted the economic growth of India to 7.5 in the financial year 2019-20[2]. In the recent years, there has been substantial increase in the Foreign Direct Investment (FDI) in India.[3] The increase in FDI indicates the interest of foreign investors to invest in India. Thus, the Model BIT of this growing economy has an important role to play.

India introduced its Model Bilateral Investment Treaty in 2016.In contrast to previous BITs, this Model BIT has a distinct structure and substance. One such distinct provision is the ELR rule. The ELR rule in a BIT plays an important role as it directs to exercise of jurisdiction of domestic court. Since in a BIT, there is an involvement of a foreign investor, the role of domestic courts in the dispute play a distinct premise.Therefore, it is essential to analyze the scope of ELR so as to understand the protection given to foreign investor.

Research Question

The main research question posed herein is:

What is the scope of the Exhaustion of Local Remedies clause in the Model Bilateral Investment Treaty of India?

By virtue of ELR principle, the investor needs to approach the domestic courts and administrative tribunals with the claim for a specific period before resorting to international arbitration. The model BIT of India has an elaborate qualification requirement that needs to be complied with. The exhaustion of local remedies mandates the investor to exhaust the ELR for a period of five years.

Hypothesis

The researcher presumes that the current provision in the Model BIT of India dealing with exhaustion of local remedies can be a problem for foreign investors. The investors need to spend a considerable amount of time and resources in trying to get the desirable remedy. As mentioned in the title of this thesis, the whole procedure might be *exhausting*. This might vitiate the purpose of investment.

Research Methodology

The thesis adopts a doctrinal form of methodology. Since the issue of ELR in Model BITs is a niche area of law, the research also aims to draw on various other related sources. There is a reference to various instruments of treaty interpretation, legislations, secondary sources, instruments and supplementary documents of intergovernmental organizations. The text of the Model Bilateral Investment Treaty of India[4]has been taken as a reference in this thesis. This thesis involves the study of the dispute settlement aspect of international investment law. Needless to say, the Vienna Convention on the law of treaties (hereinafter VCLT) is applied to the treaties between States.

1.1) Model BIT- Scope and definition

Bilateral investment treaties are the international investment agreements that set reciprocal terms and conditions between two States.[5] The model BITs are used as a template by one or both the countries as a starting point of negotiation. The Model BITs promote consistency of approach.[6] They represent "*an expression of the investment policy of a state along with its negotiating position on the protection of foreign investments.*"[7]

The Model BITs generally aim to cover these main facets:[8]

a) To define the various terms relating to the standards of protection available to the investors. The aim is to avoid any kind of overly broad interpretations by the arbitral tribunals.

b) To define the commitments of the host State as well as the investor which includes environmental protection, the protection of the rights of host state's citizens, and corporate social responsibilities.

1.2) The negotiation of Model BITs

Before signing the agreement, there are elaborate rounds of negotiations that take place between the two States. The negotiation[9] of a BIT includes numerous rounds of bargaining, exchange of drafts and counter drafts along with face-to-face negotiations. This negotiating aspect is important as it also focuses on rules governing the investment. The 1998 report of UNCTAD[10] categorically concludes, *"the key point to be stressed is that each [BIT] negotiation is a unique and peculiar process requiring flexibility and accommodation*". This applies to model BITs as well. The negotiation aspect includes a certain amount of flexibility and compromise from both the participating states. In other words, both the capital exporting and the capital importing States take active part in the negotiation of a BIT.

Thus, due regard has been given to the requirement of exhaustion of local remedies by the investor. The negotiation

of the ELR requirement takes place in consideration of existing principles of international law. However, there is no denying the fact that substantial deviation from the Model BITs is generally undesirable. This is because the BITs indicate the interpretation of investment treaties by parties.[11]

1.3) Negotiation of the Model BIT of India:

A research by the World Trade Institute in Bern and the Graduate Institute in Geneva, has shown favorable results for India. The research used the mapping software that compares the BITs.[12] In the finding of this research, India has been shown to have a durable, well-negotiated Model BIT.[13] It indicated that the country has been a rule maker rather than a rule taker in many BIT negotiations.[14] However, it also pertinent to point that the model BIT is not an absolute document. Its negotiating capacity largely depends on the bargaining power of the other state.[15] It is pertinent to note that India can insist on the provisions of Model BIT with some specific states but not all states.[16] As mentioned earlier, Model BIT is not an absolute document but a template.[17]

1.4) Effectiveness of Model BITs

Jeongho Nam in his article[18] on Model BIT has stated that though the model BIT creates a very efficient way of facilitating investments between the countries, it may not be the most idealistic approach.[19] In the article, Nam specifically cites the scholarly work of A.T Guzman[20] to demonstrate that a party to the Model BIT is more likely to commit a breach of it than a specifically drafted BIT. It is essentially because a specifically tailored BIT considers the contracting parties[21]´ status and circumstances[22]. The author has also cited Guzman to imply that:

"A typical Model BIT is provided to the parties often fully drafted, similar to the terms and agreement a consumer agrees to when buying a product online, with the critical difference being that a consumer, or host state that is party to a BIT, is more likely to breach the agreement due to its inherent power of sovereignty."[23]

To substantiate his inferences, the author has used the Model BIT of the United States as a prototype. He stresses upon the fact of differences in interpretation of legal theories, legal institutions, territorial capacity and economic capacity. The Model BITs are used as template.[24] However, there should be abundant caution in adopting it. There needs to be a successful negotiation pattern by the contracting parties to a Model BIT. This will help in avoiding disputes in the future.

1.5) India´s Model BIT- A brief Background

The investment treaty regime of India can be termed as a recent one. It had its initiation in the early 1990s. It was a part of the new economic policy introduced in the year 1991. The India-UK BIT was the first bilateral investment treaty to be signed by India. This BIT served as a basic template for India in its other treaty negotiations.[25] During the period of 1994 to 2011, more than 80 BITs were signed by India.[26] Investor State dispute settlement wasn´t given much attention by the Indian government. This changed after the award of the *White Industries case*[27]. In this case, there was a contractual dispute between Coal India and White Industries. The award was granted in favor of White Industries, but Coal India approached the Calcutta High Court to set aside the award. The Calcutta High Court granted the relief to Coal India. White Industries, appealed to the Supreme Court of India against the decision of Calcutta High Court. This happened in the year 2004.[28] Eventually, White Industries referred the matter to arbitration. It cited inordinate delay by the Indian courts and violation of rights of investor in the India-Australia BIT. The tribunal held that[29]:

Para 11.4.19

"…… Tribunal has no difficulty in concluding the Indian judicial system's inability to deal with White's jurisdictional claim in over nine years, and the Supreme Court's inability to hear White's jurisdictional appeal for over five years amounts to undue delay and constitutes a breach of India's voluntarily assumed obligation of providing White with "effective means" of asserting claims and enforcing rights."[30]

Thus, the inordinate delay in the giving out a judgment led to the violation of the India-Australia BIT. The tribunal held that the borrowing of effective means provision from the India-Kuwait BIT by relying on MFN provision in India-Australia BIT was valid. The White industries case was used as precedent by another foreign investor. Thus, a number of investor state proceedings were initiated against India. The White Industries award brought acted as a wakeup call for the Indian government. It led to a number of regulatory changes by India. This subsequently culminated into introduction of Model BIT in 2016.

Chapter 2: Exhaustion of local remedies

The previous chapter dealt with the general scope, application and negotiation of Model BITs. This chapter would deal with the scope of the Exhaustion of Local Remedies rule. There is an inclusion of scholarly articles along with case law jurisprudence herein.

2.1) Definition

This rule[31] mandates that a foreign investor alleging harm committed by the Host State must submit to the jurisdiction of the domestic and administrative courts of that State until the rendering of final decision.[32] The investor can then seek diplomatic protection or initiate international proceeding (such as international arbitration) against such host state.[33] The principle of exhaustion of local remedies is derived from the law of diplomatic protection. The ILC (International Law Commission), in its draft of 2006 considered ELR as a principle of the general international law. Thus, ELR is an integral part of the customary international law as well. [34] It founds itself on the principle that the State is the requisite opportunity to address the issue by its own means within its own domestic jurisdiction. The *Interhandel*[35] and the *ELSI*[36] cases determined important elements of the principle of exhaustion of local remedies (defined previously, hereinafter ELR rule. The *Interhandel* case concluded that:

"ELR is applicable, according to the court, when domestic proceedings are pending and when both the domestic and international proceedings "are designed to obtain the same result." [37]

Thus, the usage of domestic and international proceedings to obtain the same results is the main criteria for application of the ELR. Similarly, the court concluded in the ELSI case:

The local remedies rule does not, indeed cannot, require that a claim be presented to the municipal courts in a form, and with arguments, suited to an international tribunal, applying different law to different parties: for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.[38]

Concisely, the inclusion of claims of similar nature in both domestic forum and international arbitration is requisite for the ELR. The usage of the words *as far as permitted* in the ELSI case indicates that genuine efforts should be made by the investor to get the local remedies until the highest court of appeal. However, this factor ultimately depends upon the particular facts and circumstances of the case.

2.2) Substantive Nature versus Procedural Nature of ELR

There has been a considerable amount of debate on the nature of the ELR rule. It was initially referred as procedural in nature.[39] Considering the subject as procedural would imply that the arbitral claim could not be admitted without exhausting local remedies.[40] On the other hand, treating this rule as a substantive aspect might lead to losing of the case by the claimant on merits. The reason being a lacuna in the violation of rights of the claimant. This incoherence in conclusions has led to development of two sets of jurisprudence. One corpus of jurisprudence aims towards the procedural nature of the requirement, whereas the other set aims towards the substantive nature of the ELR rule.

2.2.1) Cases on the procedural nature of the ELR requirement

Abaclat v. Argentina[41] concluded that the ELR requirement implied the requirement to *"relate to the conditions for implementation of Argentina's consent to ICSID jurisdiction and arbitration, and not the fundamental question of whether Argentina consented to ICSID jurisdiction and arbitration."*[42]

Similarly, in Hochtief AG v. The Argentine Republic,[43] the tribunal concluded that it was the discretion of Argentina to accept or pardon the claimant for not adhering to the ELR rule. It furthermore held that the requirement must be considered as "*as a condition relating to the manner in which the right to have recourse to arbitration must be exercised—as a provision going to the admissibility of the claim rather than the jurisdiction of the Tribunal."*[44]

The tribunal in cases such as Daimler and ICS[45] interpreted the ELR as a mandatory condition of the concept. According to the tribunal, if the investor fails to exhaust the local remedies available in the host state, there would be a dismissal of the case. This dismissal would be on the grounds of jurisdiction. On the same note, the tribunal in the case of Ömer Dede and Serdar Elhüseyni v. Romania,[46] held that it did not have jurisdiction as the claimant failed to comply with condition given in the 1996 BIT between Romania and Turkey. The claimant also did not comply with the one-year period of litigation in the domestic courts.

2.2.2) Case law on the Substantive Nature of the ELR

a) In the context of denial of justice claims

Mondev v. United States was one of the first cases to discuss the ELR rule as being substantive in nature. The tribunal interpreted the Fair and Equitable[47] standard under article 1105(1) and held that *"under NAFTA it is not true that the denial of justice rule and the exhaustion of local remedies rule 'are interlocking and inseparable."*[48] This decision was later on criticized by the scholars who stated that under North American Free Trade Agreement (hereinafter NAFTA)the investor does not need to exhaust local remedies to bring a claim of denial of justice.[49] The Loewen[50] case in contradiction concluded that for "*a court decision to amount to a denial of justice at the international level, that decision must be final, issued by a court of last resort of the state's judiciary; decisions by lower courts, where effective and adequate appeals are reasonably available, could not engage a state's international responsibility."*[51] The tribunal aimed to the fact that there needs to be an exhaustion of local remedies in the highest court of domestic appeal so as to bring a denial of justice claim. Other tribunals have concluded that ELR is a requisite in the denial of justice claim but they have distinguished it. The tribunals indicated that these claims aren´t subjected to the same requirement. A standard of effective means is independent in customary international law based on denial of justice.

b) Exhaustion of local remedies in the context of expropriation

One of the prominent cases in this aspect is Generation Ukraine v. Ukraine[52] where the tribunal held that there might be a dismissal of the claims of investor *"not because there is a requirement of exhaustion of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable—not necessarily exhaustive— effort by the investor to obtain correction*."[53] The tribunal in this matter indicated that local remedies might be a substantive requirement for proving expropriation. Thus, in the context of local remedies, the tribunals have taken different approaches. Nevertheless, there is no denying the fact that the exhaustion of local remedies rule remains an important issue in both substantive and procedural aspects.

Chapter 3: Exhaustion of local remedies in Model BIT of India

The previous chapter dealt with the existing jurisprudence and theories of the ELR rule. This chapter will deal with the specific scope of the local remedies rule in the Model BIT of India.

Article 15.1 of the Model BIT[54] of India deals with the aspect of exhaustion of domestic remedies.

It states that investor must first submit its claim:

a) *To the relevant domestic courts or administrative bodies of the defending party for exhausting the domestic remedies. The measure sought must be the same or must contain similar factual matters for which the breach is claimed.*

b) There is a specific time for submission that is 1 year from when the investor or investment should have acquired knowledge of the measure in question. The investor or investment should also have knowledge of the loss incurred because of that measure.

My brief note to this clause-It should be noted that the estimation of loss or knowledge of loss is something that is very objective. It may pave the way for confusion as the timing of the measure and the loss incurred may not be harmonious. The actual loss may occur at a later point of time, which may exceed the 1-year criteria.[55]

c) *The provision also has a conditional "if clause" which mentions:*

The local requirement to exhaust local remedies shall not be applicable if the investor or the locally established enterprise can demonstrate that:

There are no available domestic legal remedies that are capable of reasonably providing relief with respect to the same measure or similar factual matter for which the breach[56] *of treaty is claimed by the investor.*[57]

The qualifications: Thus, for instituting a claim under the dispute settlement section under the model BIT, article 15.1 prescribes the exhaustion of local remedies in the domestic courts and administrative tribunals. There is also a requirement of knowledge factor. The claimant needs to submit the claim to relevant domestic courts within one year of having the knowledge of such breach.

3.1) Rationale behind the clarification attached to article 15.1

The usage of the words "*doesn´t apply*", "*different party*", "*and different cause of action*" implies the effort of India to avoid situations like the *CMS v. Argentina case*[58] where the tribunal attained jurisdiction. In the case of *CMS v. Argentina*, the BIT contained a fork in the road provision[59]. The local subsidiary of the investor resorted to domestic arbitration. Afterwards, the investor initiated international arbitration under the treaty provisions. However, the tribunal proceeded with the arbitration by stating that different parties brought the claims before it. According to the tribunal, these claims were also based on different cause of action. India seemingly aims to avoid the *CMS* result. India wants to ensure that the investor doesn´t evade the ELR rule. For instance,[60] the subsidiary of the investor might use the ELR and the holding company might resort to arbitration citing that there is a different cause of action. There might be difference in the cause of action in domestic forum and cause of action in a treaty-based dispute.

Clarifications to 15.1 and the triple identity tests

The clarifications to the article 15.1 states that the foreign investors cannot assert that *the obligation to exhaust local remedies* does not apply to them.[61]There is a continuation of the clarification. It states that investor cannot claim the compliance to ELR rule simply by citing difference of party or cause of action.[62] The clarification is an indication of an attempt to refer to the triple identity test. Various tribunals with respect to fork in the road approach have interpreted this triple identity test. This provision appears to be a reference to situations such as in CMS v. Argentina.[63] I have dealt with the fork in the road provision in the subsequent chapters. The triple identity test traditionally asserts the doctrine of *lis pendens,*[64] and the adjudication of tribunals on same claim[65]. The tribunals initially determined it by three elements i.e. - the cause of action, the parties involved and the object of the disputes.[66] In the contemporary times, the tribunals have taken a liberal approach in determining the *lis pendens*. In this context, even the international tribunal for the law of the sea cases have adopted this approach.For example, in the case of *Southern Bluefin Tuna*[67], the UNCLOS Annex VII tribunal took an approach, which was categorized as *laissez faire* in its treatment of every obligation and circumstance in the case as distinct. I use the aforementioned case to imply that tribunals (across various fora) have adopted the flexible approach in applying the triple identity tests.

Article 15.2 of the Model BIT

Article 15.2 deals with further qualification in addition to Exhaustion of Local Remedies:

"It mandates the exhaustion of local remedies for at least a period of five years from the date of which the investor first acquired knowledge of the measure in question. If a satisfactory resolution is not reached, then the investor may proceed for resorting to arbitration." [68]

This implies that the investor needs to exhaust the available domestic remedy for a substantial amount of time i.e. five years. This might serve as a difficulty[69] for a foreign investor as there is a rigid pre-qualification requirement.

The ambiguities in articles pertaining to local remedies in the Model BIT

3.1.1) Article 15.1

Nature of the administrative bodies

Though, this article talks about "*submission of claim before relevant domestic courts and administrative bodies"*, there is no further clarification regarding it. In India, the administrative bodies are distinguished according to their nature.[70] The draft Article 14(5) of the ILC[71] mentions the exhaustion of administrative remedies as well.[72] It states that the injured alien may only exhaust administrative remedies if it leads to a binding decision. This

implies that administrative bodies need to be judicial in nature.[73] There is no exact definition of the term administrative body in the Model BIT, but it defines the term law[74]. It includes the decisions by *"administrative institutions having the force of law."*[75] In India, the administrative bodies are predominantly quasi-judicial in nature.[76] . This might be an indication of the efforts of India to expand the scope of administrative bodies. This creates a problem, as the decisions of these administrative bodies might not be binding.

3.1.2) Analysis of Futility Exceptions

The article 15.1 of the Indian Model BIT also states that investor is excused from pursuing the local remedies, if *there are no domestic legal remedies capable of providing any relief.*[77] This exception resonates with the futility exception,[78] which has its ethos embedded in customary international law. In this regard, there is a need to understand the scope of the futility exception in the context of exhaustion of local remedies.

The article 15 of the draft articles on diplomatic protection by the ILC talks about the futility exception[79]. It is in the context of international law. It carves out the exceptions to the local remedies rule. The volume II of the 2006 Year Book of the International Law Commission explicitly describes the conditions for exceptions.[80] It states these conditions (which are important to this discussion)

a) The local remedies are obviously futile[81] (otherwise called as the obvious futility test) and offer no reasonable prospect of success;

b) There is no prospect of effective remedies by the ELR;

c) The factor of undue delay caused by the respondent State in the conduct of the domestic proceedings.

The Year Book goes on to expand the scope of para a) of Article 15 and concludes that the test *"is whether the municipal court of the respondent is reasonably capable of providing effective relief."*[82] That must be determined in the context of the domestic law along with the circumstances. This question needs to be decided by the international tribunal, which is examining the question on the ELR. There should be reasonable prospect of success.[83]The reasonably capable factor is again subjected to various interpretations. However, due consideration is given to existing local rules of remedy of the respondent.

3.1.3) Futility exception in Article 15.1 of the Model BIT:

Futility exception justifies noncompliance to ELR rule. It is based on the grounds that adherence to local remedies rule would prove as futile.[84] The claimant is successfully able to prove the remedy available in domestic law is futile and not helpful.[85]The usage of the word *"reasonably"* and *"any relief"* indicates the intention of India to give scope to futility exceptions. India has approximately 17000 judges to deal with 30 million open cases[86]. The foreign investors willing to invest a huge amount of money become skeptical of the justice system.[87] There is no denying the fact that the process of judicial adjudication in India is very slow.The investors might use the futility exception as mentioned in the Article 15.1 for every claim against India. They might contend that the domestic remedies available are not enough to provide any reasonable relief within five years. The resort to the futility exception seems like a more practical approach.

3.1.4) Relevant case laws on the Futility exception

In Abaclat v. Argentina[88], the tribunal held that insisting on domestic litigation requirement would not adversely affect Argentina. However, the investors would be in added disadvantage, as it would deprive the access to arbitration.[89] The tribunal furthermore reasoned that "*none of the local remedies available would have been able to effectively resolve the dispute in 18 months, and that they would have been burdensome and caused delays."*[90] It was ultimately held that the non-compliance of the ELR requirement by the investor wouldn´t act as a barrier to resort to arbitration. The concept of fairness and efficacy was also elaborately discussed in the award.

Similarly, in the case of Urbaser v. Argentina,[91] the tribunal held that *"a proceeding that can in no reasonable way be expected to reach that target is useless and unfair to the investor."*[92] Therein the tribunal analyzed the available domestic remedies available. It concluded that none of the available remedies was suitable for reaching a decision on substance within the given time limit.

The tribunal in the case of ICS v. Argentina analyzed the obvious futility factor.[93] It held the futility exception to be implicit. Moreover, it cited obvious futility, where the relief sought is patently unavailable.[94] It found no compelling reasons to exempt the investor from complying with the ELR rule.[95]

3.1.5) The fairness and efficacy factor

As discussed in the *Abaclat* decision

In the para 579 of the award, the Tribunal held- "*The system put in place by Article 8 is a system aimed at providing the disputing parties with a fair and efficient dispute settlement mechanism. As such, the idea of fairness and efficiency must be taken to account when interpreting and determining how the system is supposed to work and what happens if one part of the system fails or is otherwise disregarded by one party."*[96] It gave a certain clarity on the time limitation in the rule of the ELR. Thus, apart from the pre-defined terms in the treaties, the tribunal in certain circumstances may include the efficacy factor as well. This can be further elaborated by the following conclusions of the tribunal in the same award. In the paragraph 584, the tribunal further held that:

"It is not about whether the 18 months litigation requirement may be considered futile; it is about determining whether Argentina's interest in being able to address the specific claims through its domestic legal system would justify depriving Claimants of their interests of being able to submit it to arbitration."[97] Thus, the effective addressing of the remedy in the domestic legal system needs to be determined to test futility exception.

In this regard, the foreign investor in India might resort to the futility exception of the Model BIT before the expiry of five years. The investor can claim that exhausting local remedies (including all appeals) for five years in complex investment disputes is against efficiency and fairness. Given the situation of the colossal backlog of cases in India, the foreign investor might use the futility exception in every claim. The repeated resort to this exception might vitiate the objective of the time limitation in Article 15.1.

3.1.6) Possibility of repeat of the White Industries fiasco?

In the White industries decision, the investor won the case by effectively resorting to the MFN or the Most Favored Nation[98] clause. Therein the tribunal found India in breach of the BIT due to lacuna in the Indian judicial system. The tribunal held that the judiciary was not able to adjudicate the claims of the investor even after the exhaustion of nine years.[99] There is a possibility that with the current mandatory criteria of five years, there are chances of a repeat of the White Industries scenario.This will create a massive burden on the exchequer of India. The investors tend to circumvent the futility exception in the model BIT for its own advantage.

3.1.7) Lack of differentiation between the ELR and Fork in the road provision:

It is my contention that the Model BIT seems to blur the difference between fork in the road and ELR provision. In this regard, it is important to analyze the intricacies of the fork in the road provision.[100] A fork in the road provision obligates the investor to make a final choice. The choice is either to pursue the investment protection claim before the domestic court or before an arbitral tribunal.[101] These clauses determine the final choice of the investor with respect to exercise of remedies. The usage of fork in the road doesn´t mandate the ELR rule before resorting to arbitration.[102] The fork in the road provision simply makes the choice of dispute settlement binding for the investors. The ELR on the other hand, obligates the investor to resort to domestic remedies before seeking international arbitration.It is my suggestion that in order to prevent any further discrepancies, it is necessary to define the fork in the road provision in BIT´s text. It is also important to detach any terminology that may give rise to fork in the road provision from the ELR rule.

3.2) Article 15.3 and 15.4 of the Model BIT

The aforementioned articles talk about the notice of dispute that needs to be after filed exhaustion of local remedies. The notice is sent in case, there is no satisfactory resolution after expiry of five years. Article 15.4 talks about the resolution of dispute amicably by the process of negotiation, consultation or other third-party disputes. This process has to be pursued no less than six months after receiving the notice of dispute.[103] In this regard I argue that the usage of amicable dispute settlement tools has limited usage in investment disputes. To strengthen my argument, I am citing the article of Micheal Reisman titled '*International Investment Arbitration and ADR: Married but Best Living Apart.*[104] Here the author tries to put emphasis on the fact that though ADR[105] techniques have proved effective in transnational transactions that involve commercial aspects but their use in investment disputes is limited. The author has also given the example of negotiation techniques. [106] The author has pointed out issues of transparency that can arise by using the ADR techniques in investment disputes. To quote the author:

"An additional problem with expanding the use of ADR modalities in international investment disputes is, paradoxically, the demand for transparency. Mediation in private disputes can be conducted under conditions of confidentiality that are unbeknownst to a subsequently established tribunal should the ADR initiative fail. Ensuring confidentiality in international investment law is much more difficult, not simply because governments are often "leaky" but also because within States there is often popular concern over the possibility of corruption."[107]

Furthermore, the Centre for International law at the National University of Singapore conducted a survey. It focused on the Obstacles to settlement of Investor- State disputes.[108] The results seem to point out that not all investor state disputes are suitable for amicable settlement.[109] India is mostly a capital importing country. Thus, the investors who invest in India are from capital exporting countries. Given that fact, the investor tends to invest substantial amount of money in the investment, the usage of mediation techniques prolongs the process.

3.3) Article 15.5 of the Model BIT:

It deals with the procedures that needs to be adopted in case the amicable settlement efforts don´t work out. It describes the additional qualification to be included in the notice of arbitration. They are:

i) not more than six years should have elapsed from the date on which the investor first acquired or should have acquired knowledge of the measure in question[110]

ii) not more than 12 months should have elapsed from the conclusion of the proceedings of the domestic courts

iii) as aforesaid, before submitting the claim to arbitration, a minimum of 90 days' notice has to be given to host state[111]

iv) The investor must waive the '*right to initiate or continue any proceedings*' under the domestic laws of the host state.[112]

v) In addition to the above qualifications, if there is a claim by the disputing investor for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the disputing investor owns or controls, that enterprise has waived its right to initiate or continue before any administrative tribunal or court under the law of any Party.[113]

Thus, apart from putting a limitation of five years before resorting to arbitration, the Model BIT also mandates the aforementioned additional qualification before going for international arbitration. In the subsequent chapter, I try to analyze the practical connotations of the additional qualifications to ELR rule in the BIT.

Chapter 4: Practical Problems in the Application of ELR Rule of the Model BIT

The previous chapter analyzed the specific articles dealing with the exhaustion of local remedies in India. It can be seen that there are many qualifications before the investor can resort to arbitration. This leads to many practical problems. This chapter addresses the difficulties and problems that may arise by ELR in the Indian Model BIT.

When the whole time period in the aforementioned provisions is taken into consideration, it can be found that, merely exhausting the local remedies for a substantial period of five years is not sufficient. The investor needs to spend an additional 9 months (for six months is needed for resorting to mediation and negotiation techniques and three months is the notice of arbitration period[114]). This sums up the total period to five years and nine months. This is the time period if every step is followed diligently with according to the provisions. However, there is another catch herein, as the article 15.5 (i) of the Model BIT states the following:

"not more than six (6) years have elapsed from the date on which the disputing investor first acquired, or should have first acquired, knowledge of the measure in question and knowledge……. damage as a result."[115]

Thus, the BIT mandates the time limitation to be six years in total. Beyond this period, the investor cannot submit to arbitration. As already explained, five years and nine months coupled with the rigid six years criteria makes things unfavorable for the investor. This is because the investor only gets a small margin of three months to successfully submit a claim of arbitration.[116]

Adhering to these time frames act as an inhibitor to the investor. The time frame coupled with the already explained time consuming adjudication by the local courts further complicates the situation. These are some practical problems that foreign investors have to address. By using the ELR rule in its Model BIT, it seems that India aims for the investor to rely on its domestic courts for dispute settlement. This puts the foreign investor at a disadvantageous position, as it ultimately demands more time, energy and resources for resolving investment disputes.

Furthermore, the UNCITRAL published a compiled report on the investor state dispute resolution.[117] In that report, it exclusively stated that the option exclusive reliance on domestic dispute resolution ultimately affects the investment.[118]

4.1) Flexible Approaches Taken by Tribunal:

In the case of TSA v. Argentina[119], the investor-initiated arbitration after pursuing local remedies for 15 months instead of the 18 months criteria mentioned in the BIT. The tribunal held that:

"since only three months out of the eighteen months remained after the decision of the Ministry for Federal Planning, Public Investment and Services had been notified to TSA, it is most unlikely that a decision by a court giving TSA satisfaction could have been obtained before the expiry of the eighteen months. The eighteen-month period would thus have elapsed without any resolution of the dispute, after which ICSID arbitration could have been instituted in full conformity with Article 10(3) of the BIT."[120] As, reasoned by the TSA tribunal, it would be highly *formalistic* to reject jurisdiction just based on the 18 months criteria.

Thus, the tribunal adopted flexibility in applying the exhaustion of local remedies rule. Even if there is a strict time limit criterion in the BIT, it might be possible to contend that the ELR criteria has been duly complied If the disputing party has reasonably pursued the ELR, then it can resort to arbitration. I strongly support the flexible approach taken by some tribunals[121].

Chapter 5: Comparison with the ELR provisions of ECHR

This chapter analyses the ELR provision of the European Convention on Human Rights (hereinafter referred to as the ECHR) and the relevant jurisprudence. The ECHR model has seen success in the recent times. I take the example of the ELR provision in the ECHR to demonstrate the interpretation of the tribunal. The aim of this chapter is to determine as to how other international instruments deal with the exhaustion of local remedies. Specifically, this chapter deals with the comparative analysis of the existing Model BIT of India with ECHR.

Article 35 of the ECHR deals with the admissibility of the claim. It states

"The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken."[122]

The usage of the terms *generally recognized principles of international la* indicate that the convention accepts the principles embedded in customary international law.[123] The Convention gives the States the opportunity to exercise the power of adjudication in domestic law. The laws prevalent in the domestic scenario are given due consideration under the ECHR.[124] The commission and court in their various reports and judgments have emphasized that the applicant needs to make ´normal use´ of the remedies that are likely to be `effective and adequate´[125]. As already explained in the previous chapters, the element of fairness and efficacy has been duly regarded by the ECHR as well.

5.1) Effective remedy - Interpretation through case law jurisprudence

In the case of Cardot v. France[126], the court interpreted the principle of exhaustion of local remedies "*with some degree of flexibility and without excessive formalism"*[127]. This is a part of the effective protection of the rights enshrined in the convention. In addition to that, the ECHR in the case of Deewer v. Belgium[128], the court held that the term effective protection implies that "*there is no requirement that an applicant should pursue remedies which would relieve the consequences of an act alleged to be a violation of the Convention without providing a remedy for the act itself."*[129] This

implies that if there is no foreseeable remedy in the domestic law, then the applicant needn´t go for the exhaustion of local remedy. Hence, the interpretation of effective protection and effective remedy includes facets of

a) No formalism

b) Flexibility

c) Availability of a remedy that is reasonable

5.2) Futility Exception in the ECHR– Relevant case laws

The court via its decided judgments has acknowledged the factor of futility while exercising ELR. In the case of *De Wilde, Ooms and Versyp v. Belgium*[130] , the court held that:

"as regards the complaints concerning the detention orders, the Government's submission of inadmissibility on the ground of failure to observe the rule on the exhaustion of domestic remedies is not well-founded." It indicated that the ELR requirement could be waived by demonstrating evidence that pursuing a particular remedy would be futile. Thus, futility exception and its application has also found place in the practice of courts in international forums as well. As already mentioned in the previous chapters, a claimant can effectively use the futility exception by giving sufficient proof that the ELR wouldn´t have resulted in fair and effective remedy. The foreign investor would presumably take the stand that the time period as mentioned for Exhaustion of Local Remedies is not reasonable and can be futile. Hence, the futility exception would be utilized by the foreign investor.

5.3) ELR in ECHR and comparison with Model BIT of India:

The ECHR mandates six months of ELR. However, at the same time, the court has been open to interpretation dealing with factors of flexibility, efficacy and futility. As indicated by the diverse jurisprudence, it is concluded that international law gives sufficient scope to the claimant to exercise the exception to ELR. India accepts the jurisdiction of international law in its BIT. Like the ECHR, it also has the ELR and futility exception. Thus, being substantially different in terms of their objectives, the ECHR and India´s model BIT have the same rationale as ELR requirements. Hence, the interpretation of the ELR rule in the Model BIT (like the ECHR) needs certain amount of flexibility. This flexibility would ultimately benefit the investment regime in this capital importing country.[131] The ECHR can be used as an instance by the tribunals when they are interpreting the ELR requirements of the Indian Model BIT. Since, all these principles derive their origin from public international law, the efficacy factor has a strong standpoint.

Chapter 6: Conclusion

India being a country with a massive population until very recently had investment dispute settlement off its main agenda. The Indian government paid attention to the matters pertaining investor State dispute settlement only after the White Industries case. As an aftermath of the White Industries,India came up with the Model BIT.

A careful perusal of the text of the Model BIT indicates that India has tried to curb giving major advantage to the investors. Nevertheless, it should be taken into consideration that it is a Bilateral Investment Treaty, which implies that the provisions are applied equally to both the High Contracting Parties. An Indian investor investing in the territory of another contracting party needs to also exhaust the local remedies. The Indian investor has to go through a number of compliances before submitting to arbitration.

As already stated in the hypothesis, the application of the ELR provision in the Model BIT is exhausting for the investor. It gives the investor the motivation to use other legalities instead. This doesn´t either way solve the purpose of ELR provision.

In this regard, it is submitted that the ELR principle embedded in Model BIT instead of acting as a channel of convenience ends up as a regressive policy decision. It not only affects the investor but also affects the inflow of FDI in the country. As I have indicated in the previous chapters, the five years criterion gives the scope and reason to investors for seeking futility exception. The foreign investor tends to use this exception in every claim, as five years is not a reasonable amount of time. Added with the fact that the domestic courts take considerable time to adjudicate the dispute, the investor can very well be successful in the claim. As elucidated, the tribunals have applied flexibility of interpretation of ELR rule, which puts the respondent State at a disadvantage. This is again supported by international legal courts like the ECHR, which has criticized the formalistic approach in interpretation of the ELR principles.

With the current rise of investor state disputes and the EU establishing a world investment court, India needs to aggressively revamp its existing ELR rule in its Model BIT. Being one of the fastest growing economies, India cannot afford to miss substantial inflow of FDI due to certain rigid provisions. India has a lot of potential to be a hub of investments. The Model BIT of India should act as a channel of economic growth of the country. Therefore, the provisions of the Model BIT shouldn´t discourage a foreign investor to invest in India.

I understand that a Host State needs to balance the interest of its public as well as strive for economic development. At times, in the pursuit of maintaining that balance, the Host State introduces certain stringent regulations. As already analyzed in the previous chapters, the ELR provision of the Model BIT of India puts the foreign investor in a fix. The foreign investor has to go for ELR before going for arbitration, but the time period of exhaustion is not reasonable. On the other hand, there is a possibility of delay in getting remedy if the domestic remedies are exhausted. This adds to the plight of a foreign investor. It makes me reminisce the old saying *"Justice delayed is justice denied"*.[132] Thus, this ELR provision needs to be amended so that it satisfies the objective of Host State along with protecting the interest of the investor.

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31 Rule of Exhaustion of Local Remedies
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34 The customary international law context of "before a state may exercise diplomatic protection, the foreign national must have sought redress in the host state's domestic legal system" (Newcombe & Paradell, 2009, p. 6)
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40 *Id.*
41 Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility. Retrieved from http://www.italaw.com/sites/default/files/casedocuments/ita0236.pdf
42 *Id.*, para. 496
43 ICSID Case No. ARB/07/31, Decision on Jurisdiction, para. 48 (Oct. 24, 2011), retrieved from http://www.italaw.com/sites/default/files/case-documents/ita0405.pdf ("There would be no question under Article 10(3) of the effectiveness of the available remedies: recourse would be obligatory even in cases where it was perfectly clear that the courts could provide no remedy—for example, in cases where legislation has effectively left the court with no option except to decide the dispute against the Claimant.")

44 Hochtief, *Id.*, para. 96
45 Daimler Financial Services AG v Argentine Republic, ICSID Case No ARB/05/1, Award, para. 193 (Aug. 22, 2012), retrieved from http:// www.italaw.com/ sites/default/files/case-documents/ita1082.pdf; ICS Inspection and Control Services Limited v. The Argentine Republic, P.C.A. Case No. 2010–9, Award on Jurisdiction, paras. 262, 326–327 (Feb. 10, 2012), retrieved from http://www.italaw.com/sites/default/ files/case-documents/ita0416.pdf.
46 Agreement between the Government of Romania and the Government of the Republic of Turkey on the Reciprocal Promotion and Protection of Investments, Rom.–Turk., (Jan. 24, 1991), art. 6, para. 4. Retrieved from http://investmentpolicyhub.unctad.org/Download/ TreatyFile/2986
47 [FET] standard basically ensures that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances, and that it is a means to guarantee justice to foreign investors. References taken from :-
Swisslion DOO Skopje v. Former Yugoslav Republic of Maced., ICSID Case No. ARB/09/16, Award, ¶ 273 (July 6, 2012), http://www.italaw.com/sites/ default/files/case-documents/ita1080.pdf.
48 Mondev International Ltd. v. United States of America, ICSID Case No. ARB (AF)/99/2, Award, para. 96 (Oct. 11, 2002). Retrieved from http://www.italaw. com/documents/Mondev-Final.pdf
49 (*Iisd.org*, 2019) <https://www.iisd.org/sites/default/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf> accessed 15 May 2019.
50 The Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF) 98/3, Award, para. 169 (June 26, 2003). Retrieved from http://www.italaw.com/sites/default/files/case-documents/ita0470.pdf.
51 Loewen, para 169. References taken from *Supra, note* 28
52 Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award, para. 20.30 (Sept. 16, 2003). Retrieved from http://www.italaw. com/sites/default/ files/case-documents/ita0358.pdf.
53 *Id.* para. 20.30
54 (*Dea.gov.in*, 2019) <https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf> accessed 15 May 2019.
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56 Article 3 of the Model BIT deals with the treatment of investments
3.4 In considering an alleged breach of this article, a Tribunal shall take account of whether the investor or, as appropriate, the locally-established enterprise, pursued action for remedies before domestic courts or tribunals prior to initiating a claim under this Treaty.
57 *Supra,*note 52
58 *CMS v. Argentina*. CMS Gas Transmission Co. v. Republic of Argentina, ICSID Case No. ARB/01/8.
59 The fork in the road aspect is analyzed in the subsequent chapters of this dissertation
60 Ranjan, Prabhash and Anand, Pushkar, Investor State Dispute Settlement in the 2016 Indian Model Bilateral Investment Treaty: Does It Go Too Far? (May 18, 2017). Prabhash Ranjan and Pushkar Anand, 'Investor State Dispute Settlement in the 2016 Indian Model Bilateral Investment Treaty: Does it go Too Far?' in Luke Nottage and Julien Chaisse (Eds) International Investment Treaties and Arbitration Across Asia (Brill/Nijhoff: Leiden: 2018) Available at SSRN: https://ssrn.com/abstract=2970364 or http://dx.doi.org/10.2139/ssrn.2970364
61 Clarifications to the article 15.1 states that:-
For greater certainty, in demonstrating compliance with the obligation to exhaust local remedies, the investor shall not assert that the obligation to exhaust local remedies does not apply or has been met on the basis that the claim under this Treaty is by a different party or in respect of a different cause of action.
62 'The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction' (2019) Volume 38 Northwestern Journal of International Law & Business <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1824&context=njilb> accessed 17 May 2019.
63 ICSID case no. ARB/01/8, in that case, the investor's local subsidiary had commenced domestic court proceedings before the investor launched its BIT arbitration. However, the relevant BIT contained a "fork-in-the-road" clause, preventing arbitration from proceeding if the investor had already taken the claim to local courts. Despite this, the tribunal allowed the arbitration to proceed on the grounds that the domestic and international claims were technically brought by different parties and were based on different causes of action.
64 The strict application of lis pendens can also be noted in other examples. The Committee established under the Optional Protocol to the International Convention on Civil and Political Rights is governed by the strict lis pendens rule of Article 5 (2) forbidding the examination of any communication from an individual unless it has ascertained that it is not being examined elsewhere.
References taken from (*Arbitration-icca.org*, 2019) <https://www.arbitration-icca.org/media/4/32472823740148/media012224290630120lis_pendens_ arbitralis.pdf> accessed 20 May 2019.
65 See, e.g., CME v. Czech Republic, *Supra* note 171; ICSID, Pantechniki v. Albania, Award, 30 July 2009, ICSID Case no. ARB/07/21; ICSID, H & H Enterprises Investment Inc. v. Arab Republic of Egypt, Decision on Objections to Jurisdiction, 5 June 2012, ICSID Case no. ARB/09/15.
66 *Id.*
67 UNCLOS Annex VII Tribunal, Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility, Decision of 4 August 2000, paras 52, 59
68 Article 15.2 of the Model BIT of India
69 As previously mentioned in the Hypothesis
70 For more details refer generally to the national portal of India, can be retrieved from the following link-
(*Dea.gov.in*, 2019) <https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf> accessed 15 May 2019
71 International Law Commission, Legal.un.org. (2019). *International Law Commission*. [online] Available at: http://legal.un.org/ilc/ [Accessed 22 May 2019].
72 '44' (*Legal.un.org*, 2019) <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf> accessed 18 May 2019.
73 Jarrod Hepburn & Ridhi Kabra (2017) India's new model investment treaty: fit for purpose?, Indian Law Review, 1:2, 95-114, DOI: 10.1080/24730580.2017.1366774
74 Article 1.6 of the Model BIT
75 *Supra*, note 55
76 Singh, M. (1979). DUTY TO GIVE REASONS FOR QUASI-JUDICIAL AND ADMINISTRATIVE DECISIONS. *Journal of the Indian Law Institute, 21*(1), 45-73. Retrieved from http://www.jstor.org/stable/43950620
77 Article 15.1 of the Model BIT
78 The 'futility exception' to the doctrine of exhaustion of local remedies requires that the local remedies not be exhausted when 'there are *no reasonably available local remedies* to provide effective redress, or the local remedies *provide no reasonable possibility* of such redress' - see *Draft Articles on Diplomatic Protection with Commentaries*, [2006] II:2 Y.B. Int'l. L. Comm'n pt.2, at 26, UN Doc A/61/10 (2006), Grant Hanessian & Kabir Duggal, *The 2015 Indian Model BIT: Is This Change the World Wishes to See* 30:3 ICSID Rev. — Foreign Inv. L.J. 729 (2015).
79 Int'l Law Comm'n, Rep. on the Work of Its Fifty-Eighth Session, U.N. Doc. A/61/10, at 15- 21 (2006)
80 '44' (*Legal.un.org*, 2019) <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf> accessed 18 May 2019.
81 *Id.*, explanation to para a) to the article 15 of ILC
82 *Id.* , page 48
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86 A *report* by the Wall Street journal<https://www.wsj.com/articles/six-hours-of-chaos-a-wild-day-inside-indias-overrun-courtrooms-1501512106> accessed 18 May 2019.
87 *Id.*
88 ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, para. 247 (Aug. 4, 2011). Retrieved from http://www.italaw.com/sites/default/files/ casedocuments/ita0236.pdf.
89 (*Iisd.org*, 2019) <https://www.iisd.org/sites/default/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf> accessed 18 May 2019, Page 19
90 *Supra*, note 66
91 ICSID Case No. ARB/07/26
92 Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Decision on Jurisdiction, paras. 194, 202–203 (Dec. 19, 2012). Retrieved from http://www.italaw.com/sites/default/files/casedocuments/italaw1324.pdf

93 *ICS* Inspection and Control Services Ltd (UK) *v*. *Argentina*, Award on Jurisdiction, PCA Case No. 2010-9 (February 10, 2012)
94 *Supra*, note 66
95 ICS Inspection, *Supra* 77, paras. 265, 269, 273
96 Para 579 of the Abaclat award, can be retrieved from the following link:-
https://www.italaw.com/sites/default/files/case-documents/ita0236.pdf, last accessed 19.05.2019
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103 Article 15.4 of the Model BIT of India
104 W. Michael Reisman, International Investment Arbitration and ADR: Married but Best Living Apart, *ICSID Review - Foreign Investment Law Journal*, Volume 24, Issue 1, Spring 2009, Pages 185–192, https://doi.org/10.1093/icsidreview/24.1.185
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106 *Id.*, to quote the author, page 191-"allowing for, or even requiring, a period of negotiation prior to arbitration may produce a settlement that obviates arbitration, while simply replacing arbitration with negotiation would not assuage the concerns of the community of foreign investors whose interests are necessarily a central concern of international investment law"
107 S*upra*, note 88, page 191
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112 *Id.*, note 93
113 *Id.*
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119 TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, Award, paras. 108–112 (Dec. 19, 2008). Retrieved from http://www.italaw.com/sites/default/files/case-documents/ita0874.pd
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INVESTMENT COURT SYSTEM: The Evolution of the Traditional Investment Arbitration?

By Nuno Cruz

I. – Introduction

The Comprehensive Economic and Trade Agreement (CETA) concluded in 2016 between the EU and Canada brought significant innovations in the Investor-State dispute settlement arbitration (ISDS), between the Parties of CETA and investors with the nationality of one Party in the territory of the other Party. Recently the traditional investment arbitration (ISDS) has been subject of intense criticism and debate. The CETA's Investment Court System was the response given by the EU to those criticisms. The CETA's Investment Court System was replicated, with minor differences, in the international agreements concluded with Vietnam (EUVIPA),[1] in the same year, and later with Singapore (EUSIPA), in 2018[2]. In 2017 the European Commission, during the negotiations with Japan about a new EU-Japan trade deal, even declared that "for the EU, ISDS is dead"[3].

The criticisms about the ISDS system included both procedural aspects of the arbitration itself and the investment protection foreseen in the international treaties.

Regarding the investment protection provisions in the international treaties the most common criticisms were related to the interpretation of the notion of indirect expropriation, and the fair and equitable treatment (FET). In relation to the indirect expropriation the criticisms focused on the sole effects doctrine that equates expropriation to any interference of the Host State having the same effect, namely a regulatory measure. The sole effects doctrine would force the Host States to choose between regulating in the public interest, protecting, for instance, the public health or the environment, and compensating the investor for the lost profits caused by that regulatory measure, or not regulating in the public interest due to the economic unfeasibility.[4] With respect to the interpretation of the FET treatment the most problematic issue was the infringement of the legitimate expectations of the investor, interpreted in the way that included all the profits of the investment in accordance with the existing regulatory framework at the beginning of the investment. So again, according to this interpretation of the FET treatment the investor should be compensated for any kind of losses suffered due to a regulatory measure.[5]

The criticisms, as mentioned before, also concerned the procedural aspects of the arbitration itself, namely the suspicions of conflict of interests of the arbitrators, the lack of transparency of the proceedings, and the inconsistency of the arbitration awards, due to the lack of an appeal system capable of uniform the interpretation of each treaty.[6]

Even though some of the criticisms and fears of the negative aspects of the investment arbitration were exaggerated, namely the restriction of the regulatory function of the Host States, easily verified by the statistical data, there were plenty of reasons to debate a reform of the ISDS system.

There were essentially 4 different responses to all these criticisms and fears: (1) – a simple withdrawal from the ISDS arbitration; (2) – the creation of an Inter-State investment-related dispute settlement mechanism, similar to diplomatic protection[7]; (3) – renegotiate the international treaties, or replacing old bilateral investment treaties (BIT's) with new and better multilateral investment treaties (the current trend), maintaining the ISDS arbitration; and (4) – the creation of the Investment Court System.

(1) – As mentioned before, one response was to withdrawal from the investment arbitration, and terminate the BIT's with ISDS mechanisms, most of them, however, with sunset clauses of 10, 15, or even 20 years. This solution is a set-back in the progress that was made in the last 150 years in the resolution of this kind of disputes, and it doesn't inspire confidence to foreign investors to invest in those countries.

The USMCA (United States-Mexico-Canada Agreement), promoted by the Trump's Administration, concluded in 2018, is intended to be the NAFTA successor. The USMCA is also, in part, an example of that same approach, i.e., the termination, or restriction of the ISDS arbitration; in this case through a renegotiation.

The USMCA does not provide for arbitration for the settlement of conflicts related to the USMCA infringement between Canadian investors and USA, and vice versa, and between Canadian investors and Mexico, and vice versa. Both Mexico and Canada, however, are Parties to the CPTPP (Comprehensive and Progressive Agreement for Trans-Pacific Partnership), allowing the settlement of disputes between Canadian investors and Mexico, and vice versa, through the investment arbitration provided in the CPTPP.

The USMCA allows for certain types of disputes between US investors and Mexico, and vice versa, to be resolved by arbitration, but only after the final decision of the competent state court, or 30 months after a lawsuit is brought in the state court without a final decision (this condition does not apply to all disputes). And the claims based on indirect expropriation are excluded from this arbitration. As for the FET treatment, as in NAFTA, it is restricted to the customary minimum standard treatment (MST), but, like the indirect expropriation, claims based on the infringement of the USMCA FET are also excluded from the jurisdiction of that arbitration.

Consequently, the USMCA-based arbitration will be very limited and solely competent to resolve disputes between US investors and Mexico, and vice versa, arising exclusively from breach of national treatment, most-favoured-nation treatment, and direct expropriation.

(2) – Another response was the creation of an Inter-State investment-related dispute settlement mechanism, similar to diplomatic protection. It was the case of Brazil with several BIT's signed in 2015, 2018, and in 2019. At the present, only the BIT signed with Angola is in force though.[8] This model was replicated in the 2017 Intra-MERCOSUL Cooperation and Facilitation Investment Protocol.[9]

The Brazilian and Intra-MERCOSUL solution consists in an Inter-State settlement mechanism with the foreign investor´s participation and an ombudsman (a governmental entity designated by each State-Party, and not an independent entity) that among other responsibilities shall support investors from the other Party in its territory, and seek to prevent conflicts in investment matters. If the ombudsman fails to prevent the conflict the resolution of the conflict moves to a Commission representing the States Parties. The initiative of the procedure will be up to the State of the investor's nationality, but the investor may participate in it. If the conflict is not resolved in this way it will be transferred to the respective treaty's Inter-State dispute settlement mechanism.[10] This is a highly obscure and politicised method of doubtful effectiveness of solving this kind of conflicts, and a set-back in the progress that was made in the last 150 years.[11] In case of failure, there would be no other alternative to foreign investors to resort to local courts, or return to the transnational arbitration, if there is a specific agreement to that effect. The need for the foreign investors having to resort to state courts would result in their distrust, apprehension, and demotivation to invest in those countries, namely to their excessive slowness, lack of knowledge on the subject matter, suspicions about its impartiality, and a possible exclusive application of the law of the Host State which may breach international law, and disrespect previous contractual obligations.[12]

(3) – Another response was to renegotiate the international investment protection treaties maintaining the ISDS mechanisms but improving them, namely the transparency of the arbitral process, conflict of interests of the arbitrators, the prohibition of "double hatting", and the improvement of the material dispositions of the treaties, namely an explicit clear choice for the mitigated police powers doctrine, which was already the predominant doctrine chosen by the majority of the investment arbitration jurisprudence in the interpretation of indirect expropriation. This doctrine possibly consists already in a customary rule of international law, or at least is in the process of becoming one.[13] The mitigated police powers doctrine allows the Host States to regulate in a proportional way without having to pay damages to the foreign investors due to regulatory measures in the public interest. Also the FET treatment in the form of legitimate expectations recently has been explicitly restricted to distinct and reasonable investment-backed expectations

from the Host State, like a promise in a meeting, or in a letter of intent, or a contractual stabilization clause, and not in the merely regulatory framework at the beginning of the investment.[14]

(4) – The response of the European Union was also an improvement of the traditional ISDS mechanisms, but the improvements, or at least the modifications, were so substantial that the system was renamed as Investment Court System (ICS). This system was implemented bilaterally (with Canada, Vietnam, and Singapore, so far), but has the pretention of becoming a Multilateral Investment Court System, replacing not only the traditional investment arbitration (ISDS), but also each Bilateral Investment Court System.

II. – Investment Court System

The Investment Court System consists in 2 permanent courts, one of first instance and one appellate court. The members of the courts are designated by the State Parties (1/3 with the nationality of a Member-State of the EU, 1/3 with the nationality of the other Party to the respective treaty, and 1/3 with the nationality of a third country), but the principle of random allocation of cases (principle of the "natural judge" or "a lawful judge") is respected. So, not only the arbitrators are permanent, and random allocated (not chosen by the parties in conflict), but there is also an appellate court competent to correct wrong decisions and to ensure a uniform interpretation of the treaty. It was also created a Committee representing the Parties of the respective treaty, competent to interpret it, in a general and abstract way (not for a particular case), with mandatory effect to the courts.

The EUVIPA and EUSIPA treaties have they own ethical code of conduct for their ICS court arbitrators. CETA does not have yet its own ethical code of conduct, but meantime the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, approved on May 22, 2004, with the last amendment in 2014, will apply to them.

The arbitrators shall be independent, and shall not be affiliated with any government.[15] The arbitrators are not contracted on an exclusive basis and may continue to work in other jurisdictions (except when there is a conflict of interest), but they should put themselves available to perform their functions. The arbitrators are, however, prevented from putting themselves in a "double hatting" position, that is, they may not act as consultants, lawyers, experts, or witnesses designated by one of the parties to the dispute in new or pending investment dispute proceedings under any international treaty or national law. The practice of "double hatting" was not included in the non-waivable red list of the IBA Guidelines on Conflicts of Interest in International Arbitration. Its ban on the ICS system was, therefore, another improvement in the transparency of settling the disputes related to foreign investment.

The arbitrators of the ICS courts will be remunerated in addition to the provision of the service, through a monthly fee, to ensure their availability, to be paid by a fund to be created by the Parties of the respective treaty, but managed by the ICSID secretariat. If the situation justifies it, the arbitrators may be contracted on an exclusive basis, receiving a salary.

ICS courts will not have their own secretariat, at least in the beginning. The number of cases per year would not justify the costs of this secretariat. It was agreed in EUVIPA and in EUSIPA that both the court of first instance and the appellate court shall be assisted by the ICSID secretariat. The CETA only provides for the ICSID secretariat assistance for the court of first instance, and left the decision about the appellate court to be decided later by the CETA Joint Committee. The future Multilateral Investment Court System will probably have its own secretariat.

The ICS appellate courts will be able to modify or reverse an award from the respective first instance court based on: i) errors in the application or interpretation of applicable law; ii) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; iii) the grounds set out in Article 52(1) of the ICSID Convention (in so far as they are not covered by the previous grounds), i.e.: a) that the court was not properly constituted; (b) that the court has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the court; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.

The applicable law of the ICS system will be the respective treaty itself and other rules and principles of international law applicable between the Parties, namely the international customary law.

To protect the autonomy of the EU legal order ICS courts will not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of the respective treaty, under the domestic law of the disputing Party (EU law, EU Member-States law, Canadian law, Vietnam law, or Singapore law). In determining the consistency of a measure with the respective treaty the ICS courts may consider, as appropriate, the domestic law of the disputing Party as a matter of fact. In doing so, the ICS courts shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party, and any meaning given to domestic law by the ICS courts shall not be binding upon the courts or the authorities of that Party.

Also to protect the autonomy of the EU legal order the 3 said treaties expressly exclude its direct effect, i.e., the 3 said treaties cannot be invoked in the State Parties' courts, or in the EU court system.[16]

For those and other reasons the Court of Justice of the European Union (CJEU), in its opinion 1/7, of April 30, 2019, considered the CETA compatible with the EU legal order, unlike the decision of the case C-284/16, of 6 March, 2018, resulting from the request from the German Federal Court of Justice for a preliminary ruling concerning the compatibility of the EU legal order with the Intra-EU BIT's, concluding the CJEU with its incompatibility.[17]

The ICS courts will not be competent to resolve disputes arising merely from breach of contract. The ICS courts will be competent to resolve disputes arising from the violation of most of the protection given to the investors by the respective treaty, like transfers relating to a covered investment, the fair and equitable treatment or illicit expropriations.

Illicit expropriations, however, may include expropriations of contractual rights, for example, by cancelling a concession contract, a construction contract, an energy purchase, or sovereign debt. And despite the mitigated police powers doctrine there may be indirect expropriations of the same contracted rights through their public regulatory power, such as legislative measures related to taxes, the protection of the environment, currency devaluation, or intellectual property, namely if they are disproportionate.[18]

The FET was clarified and explicitly restricted to the following grounds: denial of justice; manifest arbitrariness; targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; abusive treatment of investors, such as coercion, duress and harassment; and a breach of any further elements adopted by the Parties of the treaties, through the respective Joint Committee. The breach of the legitimate expectations of the investor was restricted to distinct and reasonable investment-backed expectations from the Host State, and was not considered an autonomous ground for breach of the FET. The breach of the legitimate expectations of the investor may be taken into account but only in the context of one of the grounds mentioned before, like manifest arbitrariness.

As in the traditional investment arbitration, the investor may choose one of the following arbitration regimes, subject, however, to the amendments foreseen in the treaties, and to the conditions of the arbitration regimes themselves: the ICSID rules, ICSID Additional Facility Rules, UNCITRAL rules, or any other rules agreed by the claimant and the respondent.

As in the ISDS arbitration the competence of these ICS courts is subject to the consent of the claimant and the respondent. And the Parties of the respective ICS treaty give their consent in advance.

Therefore, the ICS system is a voluntary and an alternative dispute resolution system based on the consent of the parties in the dispute. It is an alternative to state courts, or the ICSID arbitration, or the transnational arbitration, if there is a specific arbitration agreement. Foreign investors, however, as mentioned before, may not invoke CETA, EUVIPA, or EUSIPA in a state court, or in the EU court system.

The investors before resorting to the ICS system may resort first to other instances to resolve the conflict (arising from the same facts), but not the way around. The investors may, for example, resort first to the Host State courts under its law, or other applicable law, and then resort to the ICS system under the respective international treaty. This is known as "no U-turn" clause. The ICS system also does not allow parallel proceedings with any other jurisdiction. If the same dispute (arising from the same facts) is already in progress in another jurisdiction the proceedings brought before an ICS court will only continue if the investor withdraws the request previously made in another jurisdiction.

Therefore, the investor may only submit a claim to the ICS courts if withdraws or discontinues any existing proceeding before another court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim, and must waive its right to initiate any claim or proceeding before another court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim.

The ICS system of CETA and EUVIPA is subject to the UNCITRAL rules on transparency, i.e., the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, of 2013, in force since April 1, 2014. These rules have been incorporated in the CETA and EUVIPA. However, the CETA and the EUVIPA treaties ensure an even more transparency of the arbitration. The EUSIPA treaty makes no reference to the UNCITRAL rules on transparency, but the rules provided in its annex 8 also ensure an increased transparency.

The ICS system, therefore, provides greater transparency than the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, of 2013. As a rule, not only will the hearings be public, but all the decisions taken by the ICS courts, and all the evidence produced, will also be public, with the exception of information that must remain secret, such as trade secrets, or confidential documents, according to the law of the Host State. All these public documents should be made available in a repository under the responsibility of the United Nations Secretary-General, through the Secretariat of the UNCITRAL.

The CETA, the EUVIPA, and the EUSIPA treaties only allow the enforcement of their final awards, that is, an award of the appellate court, an award of the first instance court after the final decision of the appellate court, or the award of the first instance court after the 90 days deadline for filing an appeal, without it being filed. It should be said that CETA treaty has a transitional regime before the CETA's appellate court enters in functions, unlike the EUVIPA, and the EUSIPA appellate courts that will enter in functions when the treaties come into force.

The respective ICS appellate court will be the only entity competent to review, set aside, annul, revise or do any other similar procedure regarding an award of the ICS first instance court. Each Party of the respective treaty shall recognise a final award rendered by the ICS courts as binding and enforce the pecuniary obligation within its territory as if it were a final judgment of a court in that Party. These provisions are identical to the provision of art. 54 (1) and (3) of the ICSID Convention. It should be said that EUVIPA treaty has a transitional regime in the first 5 years after it enters into force, allowing the final awards be recognized and enforced according to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Accordingly, the Parties to the CETA, EUVIPA, and EUSIPA treaties may not invoke any ground for the refusal of the recognition of a final award, and may only invoke the grounds

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for opposition to the enforcement of judgments of their courts, in accordance with their legislation, relating to the enforcement proceedings, and with subsequent facts that terminates or modifies the obligations of the parties in conflict.[19]

However, these provisions shall bind only the States Parties of the ICS system (res inter alios acta aliis nec prodest nec nocet). Hence the recognition and enforcement of an ICS final award by third States shall be made under the New York Convention (if they are Parties to the New York Convention). These awards may be considered arbitral awards for the purposes of the application of the New York Convention.[20]

The CETA, EUVIPA, and EUSIPA treaties also provide that a final award rendered by the respective ICS court shall be considered an ICSID award, for the purpose of its recognition and enforcement, when the applicable arbitration regime is the ICSID Convention. The Parties to these treaties have intended that the recognition and enforcement of a final award of their respective ICS court, by third States and Parties to the ICSID Convention, when the applicable arbitration regime is the ICSID Convention, would be considered, for that purpose, an ICSID award. But again, these provisions do not bind third States. Consequently, if the courts or other competent authority for the recognition and enforcement of an ICSID award by third States (to the ICS system), and Parties to the ICSID Convention, do not consider such awards to be ICSID awards, they shall be recognized and enforced according to the New York Convention (if they are also Parties to the New York Convention).

The international treaties establishing the Investment Court System differ from some fundamental features of the ICSID arbitration. The ICSID Convention is incompatible, for example, with the inability of the parties in conflict to choose the arbitrators. The ICS system is particularly incompatible with art. 53 (1) of the ICSID Convention, which states: "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention". This provision is not derogable by the parties in conflict.[21] Hence, most likely, these awards will not be considered ICSID awards for the purpose of their recognition and enforcement.

III. – Criticisms of the ICS System Itself

Confronting the criticisms of the ICS system itself, the following should be said:

I) – The fear of an increase of the costs due to the possibility of an appeal on the merits of the decision of the court of first instance appears to be overestimated due to the Loser-Pays principle (including, reasonable costs of legal representation and assistance) established in the treaties, the costs of the proceedings being co-financed by the Parties of the treaties, and to the existence of a special regime for small and medium investors (so far non-existent in the ISDS system).[22]

II) – The fear for an increase in the waiting time for a final decision, due to the creation of an appellate court, also appears to be overestimated. The EUVIPA and EUSIPA first instance courts shall issue an award within 18 months, and CETA first instance court shall issue an award within 24 months, calculated from the date of submission of the claim. If a court requires additional time to issue its final award it shall provide the disputing parties the reasons for the delay, together with an estimate of the period within which it will issue its award. And the EUVIPA and EUSIPA appellate courts shall issue a decision within 6 months. If the appellate court requires additional time to issue its decision, it shall also provide the disputing parties the reasons for the delay, together with an estimate of the period within which it will issue its decision, but that delay should not exceed 9 months.

In comparison the average time for a final award in the ICSID arbitration has been about 40 months, and in the case of UNCITRAL arbitration 48 months.[23]

Moreover, the advantages of correcting a wrong decision and to ensure a uniform jurisprudence far outweigh the disadvantages of any possible small loss of celerity that may occur. And in certain circumstances the ICS system may even lead to greater celerity (and at the same time a reduction of the costs), as the award rendered by the first instance court may be subject to a modification by the appellate court, not needing for its annulment and to institute a new arbitration.[24]

III) – The risks of unwanted politicization of the process due to the intervention of third parties in the proceedings, namely amici curiae are real. But, on the other hand, the intervention of amici curiae could provide greater transparency and legitimacy to the process, which has the purpose of settling disputes with a great public interest. In addition, there are rules in place to precisely mitigate such risks, like the intervention (in case of be spontaneous and not requested), may not exceed 15 pages, including annexes; the parties to the conflict may, by agreement, exclude such interventions; and the courts are not required to address or to comment on the interventions.

IV) – Finally, the fear that arbitrators of permanent courts, because they may not be chosen by the parties in conflict, in particular by the investors, may not correspond to the most qualified arbitrators or the most independent and impartial arbitrators, although it exists, it should also be devalued since there are certain guarantees in their appointment. The Parties of these treaties shall appoint arbitrators to the permanent courts, but not to a particular case. Hence, their choice will take into account not only their one interests, but also the interests of the investors (with their nationality). Moreover the arbitrators will have to have the qualifications under the law of the State of their nationality to exercise judicial functions, and for the ICS appellate courts the qualifications to perform the highest judicial functions. Alternatively, in both cases, the arbitrators may be jurists of recognized competence. This latter alternative has, in deed, some unwanted subjectivity.

The independence and impartiality of a member of any court should depend on: their selection method, by valuing they merit in objective criteria; their relative immovability; the sufficient duration of their appointment; their financial security; adequate financial and administrative resources to carry out their duties (including direct control of the secretariat); the method of assigning or distributing cases; a system of incompatibilities; and also a regime of privileges and functional immunities. And the collective composition of the courts, in particular the appellate courts, should be sufficiently diverse (age, gender, geographical origin, etc.) to avoid prejudiced decisions, due to human nature.[25]

A permanent court could also avoid problems in its constitution that may arise in the traditional investment arbitration, when its constitution depends on the collaboration of the parties, leading to delays in its constitution when such collaboration does not exist.[26]

Except for the duration of the ICS arbitrators' terms, which are not ideal but still acceptable, it should be concluded for an overestimate of the risks expressed. The importance of the choice of the arbitrators by the parties in conflict to resolve a particular dispute (a typical characteristic of arbitration) is not diminished, and its importance is acknowledge, but particularly when the interests are predominantly private, which is not the case with the disputes arising from foreign investment. A permanent arbitral court is more appropriate to safeguard transparency and legal certainty in such disputes. Coherence and legal certainty has proved indispensable for the very legitimacy of the investor-State dispute settlement. Public interest demands for legal certainty. The very idea of rule of law demands for sufficiently intelligibility, consistency, and predictability of law.[27]

IV. – Conclusions

The Investment Court System was the EU response to the criticisms and fears of the negative aspects of the traditional investment arbitration (ISDS). It improved and clarified the investment protection dispositions and brought explicit restrictions to that same protection due to public interest. It improved the transparency of the arbitration, and reduced the risks of conflict of interests of the arbitrators. It also brought judicial features to the procedure, namely the permanence of the courts including an appellate court, ensuring uniformity in the application of each treaty.

The bilateral ICS system is intended to be temporary and to be replaced by a future multilateral investment court. The international bargaining power of the European Union will probably lead to the celebration of sufficient bilateral agreements with an ICS system allowing the creation of a multilateral ICS system.[28] The multilateral investment court could come into operation with only a few States Parties. ICSID itself, for example, was initially operational with only 20 States Parties, and today it has 154 States Parties.[29]

A multilateral court with universal scope would also facilitate even more the recognition and enforcement of its awards, as is in the case with ICSID awards, and with the bilateral ICS system awards among its States Parties.

The establishment of a multilateral investment court is also being debated by the UNCITRAL since 2017, under the reform debate of ISDS arbitration. This reform aims to improve the current ISDS system in its consistency, predictability and correctness of its decisions, in the independence and impartiality of arbitrators, in its costs (including third party funding) and in the celerity of its awards. The reform also aims to improve the investment protection provisions in the international treaties, explicitly imposing limits to that same protection due to public interest, namely the right of States to regulate. This reform may or may not culminate in the creation of a multilateral investment court system. We'll just have to wait and see.

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ARBITRATOR CHALLENGES: A practical guide to an unwieldy issue

By Ekaterina and Louise Oakley[1]

1. A case for challenge

1.1 Nothing is more important in arbitration than the impartiality and independence of arbitrators.[2] Parties hand over their fundamental right to have their dispute heard to one or more individuals in the hope that they will get it right. Arbitrators enjoy extensive power to decide on the merits and, apart from some limited circumstances, nothing can be done if they get it wrong.[3] Faith in the fact that these individuals will decide the case impartially and independently is paramount. Due to the arbitrator's dual quality as a party creation and final adjudicator, there is nothing quite equivalent in other systems of dispute resolution.

1.2 A dreaded circumstance is where, unbeknownst to one side, an arbitrator (or several) have a clear preference for the other side. A fear mounts that the case will not be decided objectively but on the basis of prior knowledge of the issues, the parties, or their counsel, and that there may be a pre-disposition toward one side's arguments (whether consciously or not). Proving actual bias is very difficult. The test is one of apparent bias that is assessed objectively on the basis of all the circumstances.[4] Disclosure is key: we must avoid the unknown unknowns. That is the focus of the IBA Guidelines on Conflicts of Interest (the "**IBA Guidelines**")[5] and that was the focus of the Supreme Court case in *Halliburton v Chubb*, on which a decision is expected imminently.[6]

1.3 This article stands a practical guide for parties who wish to challenge one or more members of an arbitral tribunal (or defend a challenge). It looks at three sets of arbitral bodies: the LCIA, the ICC and ICSID. Although different in nature and scope, these have been chosen due to their popularity, the availability of data around challenges and because, together, they cover a wide range of disputes and both international commercial and investment arbitration.

2. The mechanics

Applicable rules

2.1 The process for bringing a challenge before arbitral bodies is fairly straightforward and, now, relatively

standardised.[7] A typical challenge requires for it to be made in writing by reference to specific grounds and accompanied by substantiating evidence. Once the challenge is made, the arbitration proceedings are suspended pending the decision on the challenge. Other parties, the arbitrator(s) subject to the challenge and any co-arbitrators are permitted to comment. If the challenge is rejected the arbitrator remains in *situ* and the arbitration resumes. If the challenge is accepted, one or more arbitrators are removed and another appointed in his or her place. The appointment of the replacement arbitrator(s) usually follows the same process as the one for the original appointment.

TABLE 1: The rules governing challenges to arbitrator(s) under the ICC Rules, the LCIA Rules and ICSID as at the date of writing.

	ICC 2017	LCIA 2014	ICSID 2006
TIME LIMIT FOR CHALLENGING ARBITRATOR(S)	**Article 14(2)** Within 30 days from notification of appointment or confirmation of the arbitrator, or within 30 days from becoming informed of relevant facts and circumstances.	**Article 10.3** 14 days from appointment or, if later, 14 days from becoming aware of grounds.	**Rule 9** Promptly, and in any event before proceeding is declared closed.
ABILITY TO CHALLENGE ARBITRATOR	**Article 14(1)** A challenge may be made to the Secretariat. **Article 15(2)** An arbitrator can be replaced on the ICC Court's own initiative if it decides the arbitrator is prevented from or is not fulfilling his/her functions in accordance with the Rules.	**Article 10.1** A party may make a written challenge to an arbitrator's appointment. The LCIA Court may revoke any arbitrator's appointment upon its own initiative, by reference to the grounds in Article 10.2.	**Article 57** A party may propose to the Tribunal that an arbitrator lacks a quality required by **Article 14(1).** A party may also propose the disqualification of an arbitrator on the ground he/she was ineligible for appointment under Articles 37 - 40.
PROCEDURE FOR PARTY CHALLENGE	**Article 14(1)** Written statement to be sent to the Secretariat, specifying the facts and circumstances on which the challenge is based. **Article 14(3)** The Secretariat will allow a suitable period of time for the other party/parties, the arbitrator concerned and/or the co-arbitrators to comment in writing. The ICC Court shall decide on the admissibility and merits of the challenge. **Article 15(1)** Upon acceptance of the ICC Court of a challenge, the arbitrator shall be replaced.	**Article 10.3** Written statement to be sent to the LCIA Court specifying the reasons for the challenge. **Article 10.4** The LCIA Court will allow a reasonable opportunity for the challenged arbitrator and the other parties to comment on the written statement. The LCIA Court may request further information from any party. **Article 10.5** If all parties agree to the challenge, the LCIA Court shall revoke that arbitrator's appointment (without reasons). **Article 10.6** In the absence of agreement or resignation of the arbitrator, the LCIA Court will decide the challenge and provide reasons in writing.	**Article 58** The decision on a challenge shall be taken by the other members of the Tribunal, unless they are equally divided, or where the challenge is against a sole arbitrator, or where the challenge is against a majority of the Tribunal, in which case the decision shall be taken by the Chairman (being the President of the World Bank-Article 5 of the ICSID Convention). If it is decided that the challenge is well-founded, the arbitrator shall be replaced.
REPLACING AN ARBITRATOR FOLLOWING A SUCCESSFUL CHALLENGE	**Article 15(4)** The ICC Court has discretion to follow the original nominating process or not. Once reconstituted, the arbitral tribunal shall determine if and to what extent prior proceedings shall be repeated before the reconstituted arbitral tribunal.	**Article 11.1** The LCIA Court may determine whether or not to follow the original nominating process or not. **Article 11.2** The LCIA Court may determine that any opportunity given to a party to re-nominate shall be waived if not exercised within 14 days, after which the LCIA Court shall appoint a replacement arbitrator.	**Rule 11(1) and 11(3)** The arbitrator shall be replaced in accordance with the requirements of Articles 37 - 40, and following the original nominating process unless no new appointment is made and accepted within 45 days of notification of vacancy, in which case the Chairman will make the appointment at the request of one of the parties.
OVERSIGHT	**Article 11(4)** The decisions of the ICC Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final.	**Article 29.1** The determinations of the LCIA Court with respect to all matters relating to the arbitration shall be conclusive and binding upon the parties.	**Article 52 and Rules 50, 52-55** Either party can request annulment of the award, including if the Tribunal was not properly constituted, there was corruption on the part of a member of the Tribunal, or there has been a serious departure from a fundamental rule of procedure.

Applicable law

2.2 In international commercial arbitration, the applicable law is likely to be the *lex arbitri* as supplemented, to the extent permitted, by the parties' chosen arbitration rules and often the IBA Guidelines.[8] Although the parties will be guided mostly by the content of the arbitration rules (and temporally any challenge may first need to be brought under these), the starting point for any challenge must be the law of the seat. The law of the seat and the courts of the seat would usually have the final say on matters of arbitrators' challenge; an imperative to preserve the integrity of the arbitration process.[9]

2.3 Where the seat of arbitration is in London, section 24 of the English Arbitration Act 1996 permits a party to apply to court to seek the removal of an arbitrator on the basis of a lack of impartiality, relevant qualifications, capacity or inappropriate conduct of the proceedings, once all of the remedies under the parties' chosen arbitration rules have been exhausted.[10] During the court's review, the arbitration proceedings may continue. When considering such an application, the court will apply the test of whether a fair-minded and informed observer, having considered the facts, would consider that there was a real possibility that the tribunal was biased.[11] The outcome of this process is likely to be the end of the road for any challenge.[12]

2.4 In an ICSID arbitration, and apart from the different terminology that is used for a similar set of processes, the key difference is that the *lex arbitri* is the ICSID Convention. It is an integrated system established under international law with ICSID as its own safeguard to the integrity of the arbitration process. The test that is applied to determine the challenge is an objective one, based on how a reasonable third party would evaluate the evidence (strikingly similar to the one set by the English courts) and if a challenge is refused, a party may still have the option to seek an annulment of the award if it can show that the Tribunal was not properly constituted, there was corruption on the part of a member of the Tribunal, or there was a serious departure from a fundamental rule of procedure.[13]

The grounds

2.5 Each of the three arbitral bodies allows for a challenge where there is doubt over an arbitrator's impartiality or independence. Each seeks to achieve confidence in the arbitration process. Under the ICC Rules the lack of independence or impartiality must be "alleged", under the LCIA Rules there must be "justifiable doubts", and under ICSID there must be a "manifest lack" of the qualities required of arbitrators. A plain reading suggests that there are different standards, with ICSID having the strictest threshold to be met by the parties, but the underlying test (although not expressly set out) is similar, that of an objective third party with the relevant knowledge.[14] Each institution also requires specific reasons to be articulated, which often emerge from the background of the appointment of the arbitrator, or the arbitrators' conduct during proceedings. These are frequently based on the IBA Guidelines discussed below.

TABLE 2: Comparative table between the grounds for challenge under the ICC Rules, the LCIA Rules and ICSID as at the date of writing.

	ICC 2017	LCIA 2014	ICSID 2006
GROUNDS FOR CHALLENGE	**Article 14(1)** An alleged lack of impartiality or independence, or otherwise.	**Article 10.1** [Where] circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence; AND **Article 10.2** The LCIA Court may determine that an arbitrator is unfit to act under Article 10.1 if that arbitrator: (i) acts in deliberate violation of the Arbitration Agreement; (ii) does not act fairly or impartially as between the parties; or (iii) does not conduct or participate in the arbitration with reasonable efficiency, diligence and industry.	**Article 57** Any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. **Article 14(1)** High moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.

3. Importance of disclosure

The IBA Guidelines

3.1 The IBA Guidelines do not form part of the *lex arbitri* and are seldom expressly chosen by the parties in their arbitration

London,UK | Iakov Kalinin

agreement. And yet, they are often (if not always) cited and relied on when a challenge is brought. First issued in 2004, they were last updated in 2015, and in their current introductory wording state that they have "*gained wide acceptance within the international arbitration community*". The IBA Guidelines are global in nature and have the goal of consistent application across common and civil law jurisdictions, commercial and investor state arbitration, in all industry sectors and whether or not the arbitrators are legally qualified persons. They seek to achieve uniformity across a disparate landscape.

3.2 Part I of the IBA Guidelines detail seven "General Standards", which set out the fundamental principles of an arbitrator being, and being seen to be, impartial and independent and discussing when a disclosure should be made. Disclosure, it is said, rests on the principle that the parties have an interest in being fully informed. Explanatory notes accompany each standard, setting out the motivation for the standard, or adding further detail to promote consistent interpretation and application.[15]

3.3 Part II, described as a "practical application" of the seven standards, explains the purpose of the categories and provides non-exhaustive examples of scenarios that are: (i) acceptable and unlikely to require disclosure (Green); (ii) potentially acceptable, but could objectively give rise to a concern over impartiality and independence, and therefore may require disclosure (Orange); (iii) serious circumstances that must be disclosed, but parties may permit the person to be or remain an arbitrator, so long as they are fully informed of the relevant detail (Red Waivable); and (iv) serious circumstances, deriving from the principle that no person can be his or her own judge, that cannot be ignored or waived, with the consequence that the arbitrator in question should not act (Red Non-Waivable).[16]

3.4 The examples provide helpful and illustrative context for the interpretation of Part I. Of course, no list could ever be exhaustive - nor should that be attempted. It is inevitable that no matter how well the guidelines are drafted, a degree of varying interpretation will persist, judged by differing standards, cultural norms and expectations.

TABLE 3: Summary of the current IBA Guidelines.

WHEN SHOULD AN ARBITRATOR REFUSE TO ACT OR CEASE ACTING	• If an arbitrator has any doubt as to his or her ability to be impartial or independent. • If a reasonable third person, having knowledge of the relevant facts and circumstances, considers the arbitrator may not be impartial or independent. • If any of the circumstances described in the Red Non-Waivable list arise. • If any of the circumstances described in the Red Waivable list arise and the parties cannot reach agreement on the arbitrator acting or continuing to act.
WHEN SHOULD A DISCLOSURE BE MADE?	• If facts or circumstances exist that may give rise to doubts as to an arbitrator's impartiality or independence.

RED NON-WAIVABLE: an arbitrator should not act	RED WAIVABLE: an arbitrator may act if the parties agree	ORANGE: an arbitrator should disclose and may act in the absence of any objections	GREEN: no duty to disclose
Regular advice to appointing party, with a significant financial income	Relationship with the dispute	Current or previous services for a party	Previous services against a party
Arbitrator is the legal representative of, or shares an identity with, a party	Direct or indirect interest in the dispute	Arbitrator holds a position in the appointing arbitral institution	Contracts with another arbitrator or counsel for a party
Arbitrator has a controlling influence over a party	Direct or indirect interest in the dispute	Arbitrator has a controlling influence over a party's affiliate	Previously expressed legal opinion

3.5 The premise of the Red Non-Waivable category, illustrates a weakness of the IBA Guidelines. The list purports to remove control from the parties, by seeking to mandate that any scenario falling within the Red Non-Waivable list cannot be approved of by the parties such that the arbitrator remains on the tribunal. The recent English case of *W Limited v M SDN BHD*[17] illustrates the inherent problem with this approach. Whilst the conflict situation fell squarely within the Red Non-Waivable list,[18] the English Court concluded that there was no apparent bias due to the particular facts of the case. The arbitrator had been unaware of the affiliate company being linked to his firm after it was purchased, and his firm's conflict checker did not pick up the relationship either. Some degree of

flexibility may be needed, and on a straight reading of the IBA Guidelines this is not provided for.

The Halliburton Case

3.6 The IBA Guidelines have recently come under strict scrutiny. The facts of the Halliburton case[19] are simple. The Halliburton Company (Halliburton) provided services to BP in the Gulf of Mexico. Transocean Ltd also provided services to BP, including overlapping services to those provided by Halliburton. Halliburton entered into a liability policy with Chubb Bermuda Insurance Ltd (Chubb), which also insured Transocean Ltd. In 2010, there was an explosion and fire on an oil rig in the Gulf of Mexico, the "Deepwater Horizon" oil spill. Many claims were brought against BP, Halliburton and Transocean. BP also claimed against Halliburton and Transocean.

3.7 Following a trial in the US, Halliburton concluded a settlement on damages and claimed a proportion of this settlement under its insurance policy. Chubb refused to pay. Arbitration was commenced. Both parties selected their own arbitrator, but the parties were unable to agree on the Chairman. This resulted in an application to the High Court following which Chubb's first-choice "M" was selected. In 2016, Halliburton discovered that, after M's appointment and without Halliburton's knowledge, M had accepted appointments as an arbitrator in two other references, both of which arose out of the same Deepwater Horizon incident: (i) Transocean's claim against Chubb; and (ii) a nomination by another insurer to arbitrate another claim by Transocean arising out of the same incident.

3.8 The decision centres on (the absence of) disclosure. The Supreme Court has to decide when an arbitrator must make disclosure of circumstances which may give rise to justifiable doubts as to his or her impartiality.

3.9 Arbitrators have a duty of disclosure but the consequences of non-disclosure are currently unclear. It seems as though non-disclosure may help demonstrate a lack of impartiality and independence, but cannot prove it by itself. There is no practical consequence for non-disclosure. In *Halliburton*, the Court of Appeal ruled that "*something more* [than non-disclosure] *is required*".[20]

4. The data

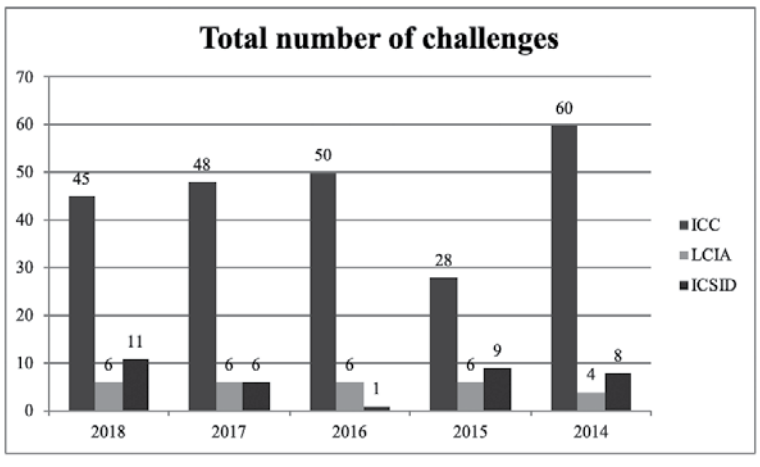
4.1 In the context of the case load statistics we have reviewed, formal challenges against arbitrators are limited, and they rarely succeed.

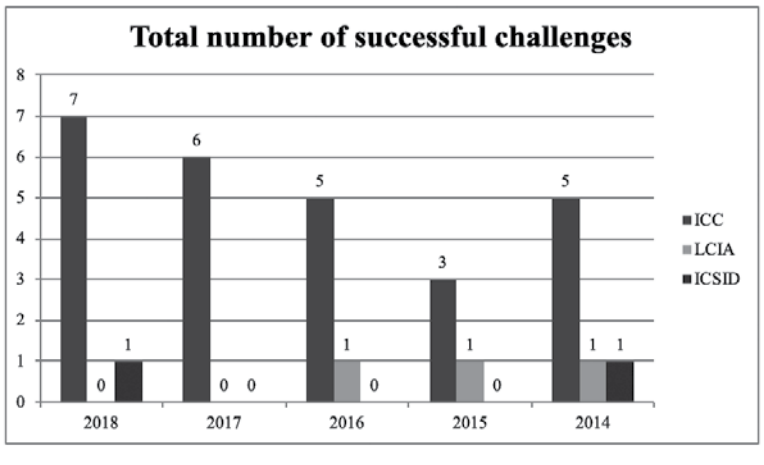
4.2 In the years 2014 to 2018, ICC and LCIA caseloads have increased steadily and the proportion of cases where a challenge against one or more arbitrators was made has remained consistently low. Far fewer challenges are brought under the LCIA Rules, with an average 1.83% of cases compared to the ICC Rules with an average 5.68%[21] - almost triple. A possible reason for this is the short period in which the challenge must be brought under the LCIA Rules (14 days). However, the success rate of these challenges is remarkably similar: challenges under the LCIA Rules have an average success rate of 11.64% and challenges under the ICC Rules have an average success rate of 11.42%.[22]

4.3 With a predictably lower caseload, the data is very different for challenges brought under ICSID. Parties are more comfortable bringing challenges in ICSID proceedings, but these hardly ever succeed. However, this greater number of challenges could be indicative of a greater level of tactical challenges for the purpose of delay.[23] On average, for the period of 2014 to 2018, 14.28% of ICSID cases involved a challenge to one or more arbitrators. Of these, an average of only 4.32% were successful (three in the five years under consideration). There are also likely to be overlapping cases[24] and one or two particularly discontent parties (involving Venezuela) having brought at least 8 of the total 35 challenges.[25]

TABLE 4: A comparative table detailing the number and proportion of challenges in comparison to the total caseload for arbitrations administered under the ICC Rules, the LCIA Rules and ICSID for the period from 2014 to 2018.

		ICC	LCIA	ICSID
2018	Total number of cases[1]	842	317	56
	Total number of challenges	45	6	11
	Rate of new cases: challenges	5.34%	1.89%	19.64%
	Total number of successful challenges	7	0	1
	Rate of successful challenges	15.6%	0%	9.09%
2017	Total number of cases	810	285	53
	Total number of challenges	48	6	6
	Rate of new cases: challenges	5.93%	2.11%	11.32%
	Total number of successful challenges	6	0	0
	Rate of successful challenges	12.50%	0%	0%
2016	Total number of cases	831[2]	303	48
	Total number of challenges	50	6	1
	Rate of new cases: challenges	6.02%	1.98%	2.08%
	Total number of successful challenges	5	1	0
	Rate of successful challenges	10.00%	16.6%	0%
2015	Total number of cases	801	326	52
	Total number of challenges	28	6	9
	Rate of new cases: challenges	3.50%	1.84%	17.30%
	Total number of successful challenges	3	1	0
	Rate of successful challenges	10.71%	16.6%	0%
2014	Total number of cases	791	296	38
	Total number of challenges	60	4	8
	Rate of new cases: challenges	7.59%	1.35%	21.05%
	Total number of successful challenges	5	1	1
	Rate of successful challenges	8.33%	25.0%	12.5%
TOTALS	Total cases	4075	1527	247
	Total challenges	231	28	35
	Rate of cases: challenges	5.68%	1.83%	14.28%
	Rate of successful challenges	11.42%	11.64%	4.32%





5. A case for change?

5.1 The *Halliburton* hearing concluded on 13 November 2019 after one and a half days of oral argument. The Supreme Court's judgment was expected within four to six weeks. Some two and a half months later the outcome is still pending.[26] It is hoped that the Lord and Lady Justices will come to a unanimous and clear decision that will directly grapple with the contrasting positions put by the parties and the five arbitral institutions that intervened in the proceedings.

5.2 One thing is for certain, keen eyes will scour the judgment, once available, to discern all guidance that can be taken from it, in addition to the core message regarding disclosure. A number of questions hang in anticipation. One question is whether the Supreme Court will adopt a strict stance or rely on the flexibility of the arbitral process. Another is to what extent the Supreme Court will consider general international commercial arbitration as compared to that of maritime, insurance and re-insurance, where there is a much smaller pool of possible arbitrator candidates Ultimately, the judgment will come down to a policy decision is favour of disclosure or discretion.

5.3 As noted at the outset of this article, the integrity of the arbitral process is of fundamental importance to its continued success and to the trust placed in it by parties who choose to resolve their dispute by way of arbitration. With that in mind, if the Supreme Court comes down in favour of stricter disclosure, there is a concern that greater disclosure will lead to an influx of arbitrator challenges, or, as is often the case, lead the arbitral institutions not to confirm an arbitrator. Even if the disclosed information appears to be irrelevant to the dispute, an institution may feel compelled to refuse appointment if one of the parties contests the appointment (for genuine or strategic reasons).

5.4 The data described above demonstrates that challenges are fairly rare, and even fewer are successful. The IBA Guidelines are at pains to emphasise that disclosure does not go hand in hand with apparent bias. It does not follow that because a disclosure is made, an arbitrator cannot or should not act. Of course, this fact does not of itself guard against the risk of strategic challenges. In any event, maintaining trust and confidence in arbitration as a balanced and effective method of dispute resolution is likely to take precedence over the possibility of an increase in arbitrator challenges.

5.5 If greater disclosure is the answer, it may be that institutions would choose to be more robust in testing whether the disclosure has any impact on the arbitrator's independence or impartiality at the confirmation stage. Similarly, perhaps the corollary to the perceived threat of an increase in unnecessary challenges will be for institutions to sharpen their teeth into not just providing for, but enforcing, concrete consequences. Many sets of rules allow arbitrators to award costs against a party bringing a frivolous challenge, but anecdotal experience suggests that this is rarely done. If anything, the *Halliburton* case demonstrates that arbitral institutions have their skin in the game.

5.6 With the wait for an answer from England's highest judiciary almost at an end, the global arbitration community counts on a robust decision containing some clear guidance on this difficult issue.

Ekaterina Finkel and Louise Oakley

1 We would like to thank Bradley Mycock for his invaluable assistance in reviewing and analysing the cases, compiling the key statistics and more generally for his help in writing this article during his time in the Dispute Resolution Department at Baker McKenzie in London.

2 See, for example: paragraphs 2 - 4 of the introductory text to the IBA Guidelines (cited below at endnote (v)); section 33(1)(a) of the English Arbitration Act 1996, which states that the tribunal shall "*act fairly and impartially as between the parties*", this mirrors the provisions of Article 18 of the Model Law. Further, Gary Born calls impartiality a "*defining characteristic*" of arbitration (paragraph 8 of Chapter 1 of his 2015 book *International Arbitration: Law and Practice* 2nd edn.), and the enforcement of impartiality and independence of arbitrators "*vital*" (Chapter 7, *Ibid*); and Mustill and Boyd's seminal text refers to the requirement of the impartiality of the tribunal as being "*so obvious as to require no elaboration*" (page 44, sub-paragraph (v), *Commercial Arbitration*, 2nd edn, 1989).

3 The UNCITRAL Model Law and the New York Convention do not allow a review on the merits (assuming that the dispute is arbitrable in scope by reference to that country's law) except for issues of public policy, although some systems allow a review of the law in limited circumstances, e.g. section 69 of the English Arbitration Act 1996 allows an appeal to the court on a question of law arising out of an award (this can, however, be contracted out of by the parties); and Article 52 of the ICSID Convention, which permits an application for annulment, an exceptional recourse to "*safeguard against the violation of fundamental legal principles relating to the process*".

4 See endnote xii below.

5 IBA Guidelines on Conflicts of Interest in International Arbitration, adopted by resolution of the IBA Council on 23 October 2014, and updated on 10 August 2015. Available online at: https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (last accessed on 23 December 2019).

6 The Supreme Court website last accessed on 27 January 2020: https://www.supremecourt.uk/cases/uksc-2018-0100.html

7 See, for example, paragraph 50 of Chapter 7 of G. Born's 2015 book *International Arbitration: Law and Practice* (*Op Cit*), where he confirms, after discussing the UNCITRAL procedure, that the same basic structure of a challenge is followed by other institutional rules.

8 This is consistent with paragraph 6 of the introductory wording to the IBA Guidelines (*Op Cit*), where it is acknowledged that the IBA Guidelines do not override any applicable national law, but it is hoped that they will find broad acceptance in the international arbitration community.

9 Any other approach would arguably allow the final say on this critical matter to persons or organisms that may have an interest in the outcome of the decision. This is the reason for the English Arbitration Act providing for section 24 regarding the removal of arbitrators as a mandatory provision that cannot be derogated by the parties. Before turning to the courts, the parties are required to have exhausted any challenges they can bring under their chosen rules. The final say, however, rests with the courts. This is reflected also in Article 13(3) of the Model Law and parties cannot contract out of this provision for the interlocutory judicial consideration of challenges.

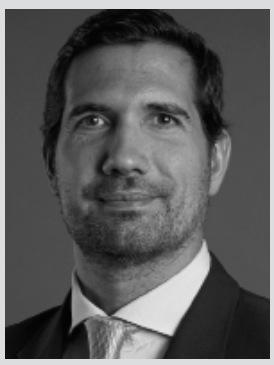
10 See section 24(1) and (2) of the English Arbitration Act 1996, and the cases referred to immediately below.

11 The test for bias was confirmed by the House of Lords (as it then was) in: *Porter v Magill* [2001] 1UKHL 67, namely: whether "*a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*." This is, in effect, a test for apparent bias, as opposed to real or actual bias. The Court of Appel in *Halliburton Company v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817 confirmed that this is an objective test that should not be confused with the approach of the person who brought the complaint (paragraph 40 of the judgment). Furthermore, Mr Justice Hamblen held that whether there is actual or apparent bias is irrelevant, if apparent bias is found that is sufficient to lead to substantial injustice, actual bias does not also need to be proved: *Cofely Limited v Anthony Bingham* [2016] EWHC 240 (Comm) at paragraph 116.

12 Though parties should also bear in mind the possibility of a challenge to an arbitrator being used as a ground to resist enforcement of or set aside any subsequent award (subject to any relevant time limits).
13 See for example, Article 52 of the ICSID Convention and Arbitration Rules 50 and 52-55; and Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).
14 See, for example, paragraph 28 of the decision of *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), where the arbitrators stated that "*The Claimant accepts that our decision "must be made on the basis of an objective review of the established facts.*"
15 See paragraph 3 of the Introduction to the IBA Guidelines.
16 See Explanation to General Standard 2 at sub-paragraph (d).
17 [2016] EWHC 422 (Comm).
18 Paragraph 1.4 of the Non-Waivable Red List.
19 *Halliburton Company v Chubb Bermuda Insurance Ltd* (UKSC 2018/0100).
20 *Halliburton Company v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817, paras. 76, 77.
21 The 2016 statistics include 135 related small claim cases arising from a collective dispute. The numbers here exclude these.
22 LCIA statistics available online here: https://www.lcia.org/News/lcia-releases-challenge-decisions-online.aspx (last accessed on 23 December 2019).
23 See, for example, an article by Y. Kryvoi of BIICL entitled "*ICSID Arbitration Reform: Mapping Concerns of Users and How to Address Them*" available online at: https://ssrn.com/abstract=3280782 (last accessed on 27 January 2020).
24 *Víctor Pey Casado v Chile*, *Fábrica de Vidrios Los Andes v Venezuela*, and *ConocoPhillips v Venezuela*. Full references: *Víctor Pey Casado and President Allende Foundation v Republic of Chile* (ICSID Case No. ARB/98/2); *Fábrica de Vidrios Los Andes, C.A.* and *Owens-Illinois de Venezuela, C.A. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/21); ConocoPhillips Petrozuata B.V., *ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30). These three cases alone account for 10 of the 35 challenged cases.
25 ICSID decisions on disqualification, available online at: https://icsid.worldbank.org/en/Pages/Process/Decisions-on-Disqualification.aspx (last accessed on 23 December 2019).
26 The Supreme Court's vacation period ran from Monday 2 December 2019 to Friday 3 January 2020, which may have impacted this four to six week estimate for delivery of the judgment.

[BIOGRAPHIES]

The Founders



PEDRO SOUSA UVA

Pedro Sousa Uva is an international dispute resolution lawyer focused in international arbitration and cross-border disputes. Based in Munich, he is Of-Counsel at the Lisbon based full service law firm pbbr. Pedro headed the arbitration and litigation department of the firm until October 2018.

As to date, Pedro has gathered over 15 years of work experience in Dispute Resolution. Before joining pbbr, he handled at Miranda law firm international disputes, often based in former Portuguese colonies in Africa or Asia. Seconded to the London office of Wilmer Hale in 2009/2010, Pedro worked on international arbitration matters alongside a worldwide team of lawyers. He started his career at Abreu Advogados, where he represented foreign and national clients in court and arbitral proceedings for nearly a decade.

Pedro holds a LL.M degree in Comparative and International Dispute Resolution from the School of International Arbitration (Queen Mary University of London). Before graduating in Law at the Lisbon Law School of the Portuguese Catholic University (2003), he studied as a scholarship student International Arbitration at the Katolieke Universiteit Leuven in Belgium in 2001/2002. Pedro is a regular speaker on arbitration events and hosts conferences, including São Paulo, Vienna and Lisbon. He was one of the invited lecturers for the 7th Post Graduation Course of Arbitration at the University Nova, in Lisbon (2018).

Pedro co-chaired the Sub40 Committee of the Portuguese Association of Arbitration (APA) from 2013 to 2018, being an active member of the Co-Chairs Circle (CCC). He was a member of APA's Ethics Committee. Pedro co-founded AFSIA Portugal (2010), the national branch of Alumni & Friends of the School of International Arbitration (AFSIA).

During the last years, Pedro authored several articles on international and national arbitration topics, notably "*International Arbitration Shifting East*", published in Iberian Lawyer in December, 2017, "*Getting the Deal Through - Arbitration 2016*" (co-author, Portugal; 11th Edition), "*World Arbitration Reporter -2nd Edition*" (co-author, Jurisnet 2014), "*Interim Measures in International Arbitration* - Chapter 30 (Portugal)" (co-author, Jurisnet 2014) and "*Portugal finally approves its new arbitration law*" (co-author, Revue de Droit Des Affaires Internationales / International Business Law, no. 3, June 2012). His dissertation was published in the American Review of International Arbitration under the title "A *Comparative Reflection on Challenge of Arbitral Awards Through the Lens of the Arbitrator's Duty of Impartiality and Independence*".

Pedro has been recently considered a leading individual in Portugal again by *Who's Who Legal (WWL) – Arbitration Future Leaders 2020*.

Pedro has been selected by his peers for inclusion in the 10th Edition of "The Best Lawyers in Portugal" for his work in Arbitration and Mediation, a recognition which he holds since 2015.

*

The idea for YAR was born in London and put into practice by the co-founders Pedro Sousa Uva and Gonçalo Malheiro in January, 2011. It is a pioneer project as it was the first under40 international arbitration review ever made.

[BIOGRAPHIES]

The Founders

GONÇALO MALHEIRO

Gonçalo Malheiro is an associated partner of Abreu Advogados. He focuses his work on Arbitration and Litigation.

With around 20 years of experience, Gonçalo has a broad expertise in handling arbitration, civil, commercial and criminal litigation. He has represented foreign and national clients before Tribunals and Courts.

He has also handled numerous contract disputes including claims arising out of sales of goods agreements, distribution arrangements, unfair competition matters, banking and insurance, real estate, franchising disputes and corporate matters.

Gonçalo completed his LLM at Queen Mary – University of London (School of International Arbitration) and published his dissertation about interim injunctions in Portuguese Arbitration Law and a compared analysis with different jurisdictions.

Before, he already had attended a Summer Course at Cambridge University.

Between 2012 and 2015 he was Chairman of the Young Member Group of the Chartered Institute of Arbitrators and is currently member of the Chartered Institute of Arbitrators.

Gonçalo attended the 1st Intensive Program for Arbitrators organized by the Portuguese Chamber of Commerce and Industry in April 2015.

He has been a speaker in several national and international conferences focused on arbitration.

Besides publishing in English and Portuguese regarding various arbitration matters, Gonçalo is also Co-Founder of *YAR* - Young Arbitration Review,.

Gonçalo also co-founded AFSIA Portugal (2010), the national branch of Alumni & Friends of the School of International Arbitration (AFSIA), of which he is a member.

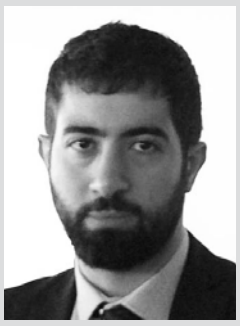
Gonçalo published recently articles about arbitration in Portuguese speaking countries and recently about rules of evidence in arbitration for the book “La prueba en el procedimiento arbitral”.

[BIOGRAPHIES]

STEVEN FINIZIO

Steven P. Finizio is a partner at Wilmer Cutler Pickering Hale and Dorr, LLP. He is a member of the International Arbitration Practice Group. Mr. Finizio's practice focuses on complex commercial and regulatory disputes, and concentrates primarily on international arbitration. Mr. Finizio also serves as an arbitrator in international commercial arbitrations and is recognized as a leading practitioner in guides such as Chambers, Legal 500, Global Arbitration Review's Who's Who in International Arbitration and Euromoney's Guide to the World's Leading Experts in Commercial Arbitration. Mr. Finizio teaches International Commercial Arbitration as an Adjunct Professor at Pepperdine University Law School in London and is on the faculty at the Cologne Academy of Arbitration and for AILA's annual International Treaty Law and Arbitration Programme.

He is co-author of A Practical Guide to International Commercial Arbitration: Assessment, Planning and Strategy (Sweet & Maxwell 2010; new edition forthcoming) and also of "International Commercial Arbitration" in The Law of Transnational Business Transactions (West 2004) and is a contributing editor to the International Comparative Legal Guide to International Arbitration (Global Legal Group).



TARIK SHARIF

Tarik Sharif is an Associate in the International Arbitration & Litigation practice at DWF Law LLP in London. Tarik specialises in complex cross-jurisdictional and domestic litigation and arbitration and has experience acting for clients across a range of sectors such as energy and infrastructure, oil and gas, metals, financial services and real estate. He is admitted to practice as a solicitor in England and Wales.

GUSTAV FLECKE-GIAMMARCO

Gustav regularly acts as counsel and arbitrator in multifaceted domestic and international arbitrations. He has extensive experience with institutional arbitrations (including ICC, DIS, VIAC, SCC, FAI and SCAI) and ad hoc arbitrations (domestic and UNCITRAL Rules), and has served as chairman, co-arbitrator and sole arbitrator at various seats throughout Europe. Who's Who Legal: Arbitration—Future Leaders praises him "as one of the brightest people I've ever worked with". Before co-founding 7SA, Gustav practiced with Heuking Kühn Lüer Wojtek in Düsseldorf and headed the case management team responsible for arbitrations seated in Germany, Switzerland, Austria, Benelux, and the Nordic countries at the International Court of Arbitration in Paris. Gustav is a member of the ICC Commission on Arbitration and ADR and the editorial board of the Journal of International Arbitration. He also served on the drafting committee for the 2018 DIS Arbitration Rules.

MARTINA MAGNARELLI

Martina is an associate at Seven Summits Arbitration (7SA). Before joining 7SA, Martina worked as legal counsel for Siemens in Paris. Martina has gained experience in international arbitration at the ICC International Court of Arbitration in Paris and the international arbitration group of Freshfields Bruckhaus Deringer LLP in Vienna. During her studies and bar qualification, Martina has also worked for the International Bar Association in London and at the legal department of Siemens in Switzerland. Martina is an Italian-qualified lawyer and a member of the Munich bar. Martina graduated from LUISS Guido Carli University, Rome, and holds an LL.M. in international and European economic and commercial law from the University of Lausanne. She has successfully defended her PhD on "Privity of Contract in International Investment Arbitration" at the University of Lausanne in March 2019. Martina's PhD thesis will be published by Kluwer Law International in due course.

DANIELE VERZA MARCON

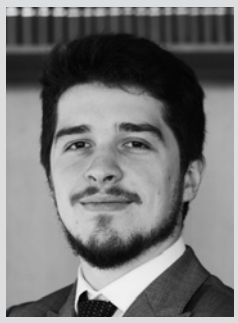
Daniele is concluding her bachelor's degree in Law at the Federal University of Rio Grande do Sul (Brazil). As a member of the study group at UFRGS named "Private Law and Civil Liberties", Daniele has been developing researches related to artificial intelligence and private law.

ISABELA LUCIANA COLETO

Isabela Luciana Coleto is a Brazilian lawyer and accountant and recent graduate from Advanced Studies in Public International Law with specialization in International Dispute Settlement and Arbitration from Leiden University, in the Netherlands.

ERIKA DONIN DUTRA

Erika holds a Master of Law degree from the Federal University of Rio Grande do Sul (Brazil), where she also obtained her bachelor's degree magna cum laude. As a lawyer, she works with both consultant matters, advising clients in the contractual field, especially contracts involving technology, construction and infrastructure, distribution and commercial representation; and dispute resolution matters, acting in arbitration and judicial proceedings involving mainly construction and infrastructure.



LUKAS DA COSTA IRION

Lukas is concluding his bachelor's degree in Law at the Federal University of Rio Grande do Sul (Brazil). Since he developed an interest in arbitration, Lukas has been studying it and conducting researches on the field. He was also a member of UFRGS's team in the 2019 Foreign Direct Investment Moot, receiving an honourable mention for being among the top 10 advocates of the competition.

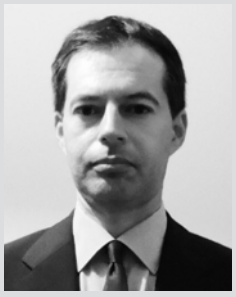
JOANA GRANADEIRO

Joana Granadeiro is an Associate at Morais Leitão, Galvão Teles, Soares da Silva & Associados, SP, RL since 2017. She is a member of the firm's dispute resolution group, having previously worked for a year at the firm's M&A practice group. Prior to joining Morais Leitão, Joana Granadeiro worked for a year at Three Crowns LLP, in Paris. She obtained her law degree from Universidade Católica Portuguesa and subsequently obtained her LL.M. from New York University. More recently, she obtained a Post-Graduate Degree in Energy Law from Universidade Católica Portuguesa. She is admitted to the New York and Portuguese Bar Associations and is fluent in English and French.

RUBANYA NANDA

Rubanya is a LLM graduate in Investment Treaty Arbitration from Uppsala University, Sweden and is a Research Associate at Jindal Global Law School. She cleared the foundational level of the Company Secretary Exam conducted by ICSI (The Institute of Company Secretaries of India) and is a Student member of the Chartered Institute of Arbitrators (CIArb).

Rubanya participated and presented a Paper on "Arbitration vis-à-vis Cross Border Mergers Acquisition" at the 2nd NLIU Trilegal Summit on Mergers & Acquisition, held on 26th February 2017, National Law Institute University, Bhopal.



NUNO CRUZ

Born in Cascais in 1977, graduated in Law in 2002, from the Modern University of Lisbon. In 2005 was admitted as an Advocate to the Portuguese Lawyers Bar Association. He later postgraduated in Labour Law, and in Consumer Law, at the Faculty of Law of the University of Lisbon. In 2013 completed the master's degree in International Law, in the University of Lisbon, and currently is a PhD Scholarship Student, also in the University of Lisbon, concerning investment arbitration.

Nuno also had a brief experience as a legal consultant for the Portuguese Army (Conscription), and as a court clerk in the Justice Department of the Portuguese Republic. Is also a certified legal trainer, and published "The Relationship Between Justice and Law - Objection of Conscience and Civil Disobedience", in the Luso-Brazilian Juridical Magazine (RJLB), Year 3, No. 5, 2017.

EKATERINA FINKEL

Ekaterina (Katia) is a Senior Associate in the Baker McKenzie Dispute Resolution team based in London. Her practice focus is international arbitration in the energy sector, where she advises clients in commercial and investment disputes under ICSID, LCIA, ICC and UNCITRAL arbitration rules. She taught international commercial and investment arbitration at King's College London for several years and regularly publishes in the field of international arbitration.

LOUISE OAKLEY

Louise is a Knowledge Lawyer for Baker McKenzie's International Arbitration Group, having previously been a Senior Associate and then a Knowledge Lawyer in the London Dispute Resolution team. As a fee-earner, Louise worked on several international arbitration disputes, predominantly those under LCIA, DIFC-LCIA and ICC Rules, in addition to her broader Commercial Litigation practice.

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