PhD. 34281

**THE CULTURE OF INTERNATIONAL ARBITRATION AND
THE EVOLUTION OF CONTRACT LAW**

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DECLARATION

This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration except where specifically indicated in the text.

This dissertation, including footnotes, does not exceed the permitted length.

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Carol Liebman and George Bermann gave me years of mentorship and education—when I was their student at Columbia Law School, when I applied for the PhD programme at Cambridge and when I embarked upon an academic job search. Without their advice and confidence in me, I would not have reached this point. Thanks also to Daniel Kalderimis for selecting me for the Vis Moot team at Columbia in 2003; without you, I might never have heard of international arbitration.

My parents, Michael Karton and Barbara Heller, have become accustomed to my world travels but I know that doesn't make it any easier for them. Thank you for letting me go and helping me get to all the places my wanderings have taken me. This thesis is dedicated to my father, who was my first and is still my best teacher. Who else ever worked so hard to lose a bet?

Finally, more than just thanks are due to my partner in every way that counts, Dr. Ann Shih-yi Chen. Baby, thank you for dragging me to Cambridge, showing me that I could do a PhD, taking care of me, loving me, reading my drafts, and teaching me everything I know about grounded theory.

TABLE OF ABBREVIATIONS

AAA	American Arbitration Association
ACICA	Australian Centre for International Commercial Arbitration
AED	United Arab Emirates Dirhams
aff'd	Affirmed
AJIL	American Journal of International Law
Am	American
Arb	Arbitration
art	Article
ASA	Swiss Arbitration Association
Ass	Association
AUD	Australian Dollars
BGB	Bundesgesetzbuch [German Civil Code]
Bull	Bulletin
Bus	Business
Cal	California
Can	Canada / Canadian
Cf	Compare Favourably
CIETAC	Chinese International Economic and Trade Arbitration Commission
CISG	U.N. Convention on Contracts for the International Sale of Goods (1980)
CLJ	Cambridge Law Journal
CUP	Cambridge University Press
cmt	Comment
Co	Company
Comm	Commerce / Commercial
Comp	Comparative
Corp	Corporation / Corporate
Ct	Court
DIAC	Dubai International Arbitration Centre
Disp	Dispute
Doc	Document
ECJ	European Court of Justice

Econ	Economics
ed	Editor
edn	Edition
EJIL	European Journal of International Law
Eur	European
Fla	Florida
fn	Footnote
Harv	Harvard
HK	Hong Kong
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ICA	International Commercial Arbitration
ICC	International Chamber of Commerce
ICC Rules	Rules of Arbitration of the ICC (1998)
ICDR	International Center for Dispute Resolution (a division of the AAA)
ICDR Rules	ICDR International Dispute Resolution Procedures (2009)
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICSID	International Centre for the Settlement of Investment Disputes
ILSA	International Law Students Association
Int'l	International
Invs	Investment
J	Journal
JDI	Journal de droit international
L	Law
La	Louisiana
Lab	Labour
LCIA	London Court of International Arbitration
LCIA Rules	LCIA Arbitration Rules (1998)
Leg	Legal
Mich	Michigan
Minn	Minnesota
MLR	Modern Law Review

NC	North Carolina
New York Convention	U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
No.	Number
Nw	Northwestern
NY	New York
NZ	New Zealand
obs	Observations
OJLS	Oxford Journal of Legal Studies
OR	<i>Obligationenrecht</i> (Swiss Code of Obligations)
OUP	Oxford University Press
P	Press
para	Paragraph
PECL	Principles of European Contract Law
Penn	Pennsylvania
PCIJ	Permanent Court of International Justice
Pol	Politics / Political
Pol'y	Policy
Prob	Problems
Proc	Proceedings
Pub	Public
Q	Quarterly
R	Review
Reh'g	Rehearing
Rep	Report
Resol	Resolution
rev'd	Reversed
Rev arb	<i>Revue de l'arbitrage</i>
s	Section
Sci	Science
SIAC	Singapore International Arbitration Centre
So	South/Southern
Soc	Social

NC	North Carolina
New York Convention	U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
No.	Number
Nw	Northwestern
NY	New York
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obs	Observations
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OUP	Oxford University Press
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para	Paragraph
PECL	Principles of European Contract Law
Penn	Pennsylvania
PCIJ	Permanent Court of International Justice
Pol	Politics / Political
Pol'y	Policy
Prob	Problems
Proc	Proceedings
Pub	Public
Q	Quarterly
R	Review
Reh'g	Rehearing
Rep	Report
Resol	Resolution
rev'd	Reversed
Rev arb	<i>Revue de l'arbitrage</i>
s	Section
Sci	Science
SIAC	Singapore International Arbitration Centre
So	South/Southern
Soc	Social

Soc'y	Society
St	State
Stud	Studies
Tex	Texas
Tr	Translator/Translation
Transnat'l	Transnational
Trav	Travaux
U	University
UCC	Uniform Commercial Code (US)
UK	United Kingdom
UN	United Nations
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (2006)
UNCITRAL	UN Commission on International Trade Law
UNCITRAL Model Law	The UNCITRAL Model Law on International Commercial Arbitration (1985, with amendments adopted in 2006)
UNCITRAL Rules	UNCITRAL Rules of Arbitration (1976)
US	United States
Va	Virginia
Ybk	Yearbook
Vol	Volume
VCLT	Vienna Convention on the Law of Treaties
Wash	Washington (state)

Soc'y	Society
St	State
Stud	Studies
Tex	Texas
Tr	Translator/Translation
Transnat'l	Transnational
Trav	Travaux
U	University
UCC	Uniform Commercial Code (US)
UK	United Kingdom
UN	United Nations
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Va	Virginia
Ybk	Yearbook
Vol	Volume
VCLT	Vienna Convention on the Law of Treaties
Wash	Washington (state)

ABSTRACT

International commercial arbitration ('ICA') is typically characterised as a procedural alternative to litigation in national courts. The great majority of scholarly literature on ICA relates to its procedure, as opposed to substance. This is not surprising since, in ICA, the governing substantive law is usually the national law of some state. One might therefore expect that there would be no difference between the decisions of arbitrators and judges on matters governed by substantive law. However, this intuition remains untested.

ICA exists outside the legal system of any state and is specifically adapted for the resolution of international commercial disputes. The decisions of international arbitrators are fertile ground for the growth of international (*i.e.*, transnational) commercial law. A better understanding of arbitrators' decision making will therefore shed light on how international commercial law is likely to evolve. Such understanding would also enable both consumers and providers of arbitration services to make better-informed decisions.

International arbitrators' decisions are not susceptible to traditional legal analysis because only a tiny, non-representative sample of arbitral awards is published. The researcher simply lacks access to the necessary data. For the same reason, quantitative statistical studies of arbitrators' decisions are unlikely to yield useful insights. This thesis adopts a sociological approach. It identifies social norms that constitute an incipient culture of ICA and assesses the effects of these norms on arbitrators' decisions on the merits.

Part I consists of two case studies that focus on specific areas of contract law. These case studies, which employ standard comparative law methodologies, provide evidence that the outcomes reached in ICA do diverge from those reached in national court litigation, even when arbitrators and judges purport to apply the same substantive laws. Part II employs the sociological methodology of 'grounded theory' to explain this divergence. It analyses the writings of arbitrators, counsel and commentators in order to describe two classes of social norms: those arising from the institutional structure of ICA and those arising from the values shared by international commercial arbitrators.

The thesis concludes by predicting, in general terms, the effects of these social norms on arbitrators' decisions on the merits. It also suggests the specific contract law doctrines that international arbitrators will tend to prefer. These doctrines represent a likely future of international commercial law.

CHAPTER ONE: INTRODUCTION

International law ... clearly manifests a desire for unity and universality, based on the common needs and interests of the international economic community. As such, it does not accord with a fragmentation of the international legal framework and encourages the use of unifying legal notions, such as *lex mercatoria*, general principles of law, or truly international public policy.¹

Harmonisation or unification of commercial law always has been a goal of the international commercial community. A well-functioning commercial system requires a high degree of legal certainty, and doubts about the applicability and interpretation of laws that may apply to a given international dispute detract from that certainty. The various uniform law projects, going back at least to the drafting of the Franco-Italian Code of Obligations in 1913, 'provide ample evidence for the fact that there has always been a substantial need for the transnationalisation of the legal relationships of international commerce'.²

And yet, despite a century of effort during which international commerce has expanded exponentially, commercial law remains stubbornly ununified. The only supranational instrument of substantive commercial law that has enjoyed any real measure of international acceptance is the UN Convention on Contracts for the International Sale of Goods ('CISG').³ The CISG deals only with contracts for the sale of goods between nationals of the contracting states,⁴ and deals with even this subset of international transactions in an incomplete way.⁵ While the CISG has been a dramatic success when

¹ B Oppetit, *Philosophie du droit* (Dalloz, Paris 1999) 119, quoted and translated in Gaillard 2010, 42. All footnotes citing secondary sources give the name of the author, the year of publication and, if appropriate, the relevant page or paragraph number in the cited source. For complete citations, see the list of Works Cited.

² Berger 1999, 34.

³ United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3.

⁴ Art 1(1)(a). Under art 1(1)(b), the CISG may also apply when 'the rules of private international law lead to the application of the law of a Contracting State'.

⁵ By its own terms, the CISG applies only to 'the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract'. Art 4. Accordingly, it provides no rules on such core issues as contractual validity (including incapacity, lack of agency authority, misrepresentation, duress, mistake, unconscionability and illegality), the rights of third parties and the effects of the contract on title to the goods. On the issues not resolved by the CISG, see Mather 2001.

compared with earlier efforts at drafting an international sales code,⁶ its ratification rate surely does not demonstrate a global commitment to unify sales law: only seventy-six states are signatories, and the abstainers include such economically important polities as the UK and Brazil.⁷ The CISG took years to negotiate and has not been amended since its drafting was completed in 1980.

'Soft law' attempts at harmonisation—those not adopted into national laws, the way treaties and model laws are—have fared no better. The best-known examples of such instruments are compilations drafted by academics and international civil servants, such as the UNIDROIT Principles of International Commercial Contracts ('UNIDROIT Principles')⁸ and the Principles of European Contract Law ('PECL').⁹ These have received a great deal of academic attention,¹⁰ and have influenced revisions to the contract codes of a few countries,¹¹ but have not had a broad impact on the harmonisation of law.¹²

Thus, if harmonisation of commercial law on a global scale is to be achieved, it seems that it will have to develop organically, and not through negotiations at international conferences or scholarly drafting committees.¹³ Economic globalisation may already be engendering just such a legal globalisation. Scholars now regularly speak of declining legal

⁶ The CISG's immediate predecessor, the 1964 Convention Relating to a Uniform Law on the International Sale of Goods (ULIS), was only ever ratified by nine countries. See Stoffel 2001, 1201 (calling the CISG the first 'lasting effort[] to bridge the common law-civil law divide').

⁷ <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html> accessed 28 November 2010.

⁸ <<http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004-english.pdf>> accessed 28 November 2010. The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental organisation headquartered in Rome. It is charged, *inter alia*, with developing uniform private law instruments. <<http://www.unidroit.org/dynasite.cfm?dsid=103284>> accessed 28 November 2010.

⁹ The PECL were drafted by the Commission on European Contract Law, sometimes called the Lando Commission after its Chair, Dutch professor Ole Lando. The Commission is a private initiative but has been supported by the European Parliament. <http://webh01.ua.ac.be/storme/CECL_Resolution.html> accessed 28 November 2010.

¹⁰ For example, searches on the Westlaw and Kluwer Online databases turned up more than 120 articles published in English with 'UNIDROIT Principles' in the title and over 300 articles published in English in the last three years alone that mention the Principles.

¹¹ For example, the 2001 civil code of Lithuania contains 'many clauses [that] repeat almost word for word sections of the [PECL] or UNIDROIT Principles'. Klimas 2006, xxvi. This phenomenon is not limited to small, newly-independent states like Lithuania; the 2002 amendments to the German Obligations Law included provisions translated from or inspired by the UNIDROIT Principles and PECL. Reimann 2009, 884 (characterising the publication of the PECL and UNIDROIT Principles as among the important developments that had occurred since the publication of a 1992 report on reform of the German Obligations Law).

¹² By contrast, some sets of internationally standardised contract terms, like the INCOTERMS and the Uniform Customs and Practices for Documentary Credits, both drafted by the ICC, have attained wide acceptance in their respective commercial sectors. To the extent that parties refer to these standardised terms in their contracts, they too promote harmonisation.

¹³ The process by which transnational law is developing 'matches the one experienced in the first stages of judicial development described by legal historians and anthropologists.... law percolates up from the bottom.' Grizel 2006, 168.

nationalism and greater acceptance of supranational and transnational decision-making bodies.¹⁴ The result of this phenomenon is 'a kind of internationalized law, or globalized law, which exists side by side of, or on top of, the national or local sector. It may well represent a minority, even a small minority, of lawyers' work, but its importance is clearly on the rise.'¹⁵

The most fertile ground for the growth of an internationalised commercial law is international commercial arbitration (ICA), a system of dispute resolution that exists outside the legal system of any state and is structured for the resolution of international commercial disputes. It is often described as the primary means for resolving such disputes.¹⁶ The extent to which arbitration does in fact dominate international commercial dispute resolution is contested, but it is undeniable that arbitration now accounts for a significant share of international commercial disputes and that it has increased greatly in importance since the beginnings of the modern commercial arbitration era in mid-20th century. Caseloads for the major arbitral institutions have increased dramatically, new institutions have been founded that now attract their own significant clienteles, more lawyers now work in ICA than ever before and multinational firms increasingly tout their expertise in the field.¹⁷

Despite its increasing importance, international arbitration continues to be seen by both participants and commentators as merely an alternative to the default option of litigation in national courts. In other words, parties choose arbitration because they do not (or at the time they concluded their contract did not) want their dispute decided by a court: 'Arbitration is, more or less, liberation from ... court jurisdiction.'¹⁸ Parties' specific reasons for choosing arbitration are generally procedural: matters such as the enforceability of arbitral awards, the neutrality of the forum, the speed and cost of the proceedings, confidentiality, the ability to choose one's arbitrator, and the flexibility of evidentiary rules.¹⁹ As Ogus observes, 'Procedural reasons, rather than substantive reasons, seem to predominate when parties to international contracts choose between arbitration and litigation.'²⁰

¹⁴ See, e.g., Andersen 2009; Michaels 2006; Adieh 2004; Koch 2003; Menyhart 2003; Ramos 2002; Havel 2000; McGinnis & Movsesian 2000; Slaughter 2000; Sweet & Brunell 1998; Koopmans 1991.

¹⁵ Friedman 2001, 355.

¹⁶ See below, fns 993-995 and accompanying text.

¹⁷ This trend is described in detail in Born 2009, 67-70.

¹⁸ Kitagawa 1967, 135.

¹⁹ A number of surveys have been conducted on the reasons why parties might choose arbitration over litigation.

See, e.g., Drahozal & Ware 2010; Naimark & Keer 2002; Bühring-Uhle 1996, 129-134.

²⁰ Ogus 2002, 430. Drahozal's meta-study of party preferences supports the proposition that parties choose arbitration predominantly for procedural reasons. Drahozal 2011.

Indeed, arbitration is seen primarily as a procedural—and not a substantive—alternative to litigation. The US Supreme Court has described the difference between litigation and arbitration as purely ‘procedural’²¹ and arbitration agreements as simply ‘a specialized kind of forum-selection clause’.²² Ridgway writes that users of international arbitration are seeking only ‘a ... degree of detachment from local procedural law’—not local substantive law.²³ In the vast majority of cases—97.7 percent, according to one study²⁴—international disputes resolved by arbitration are governed by the substantive law of a state.²⁵ In such cases, one would expect the tribunal to decide issues of substantive law in the same way that a court from the country whose law governs the dispute would decide them.

To the extent that parties think about the dispute resolution clause when they negotiate a contract (as opposed to relying on a standard form),²⁶ they probably believe that providing for arbitration of any eventual disputes is purely a procedural choice. In theory, it ought to make no difference on the merits (in terms of both factual and legal determinations) whether a dispute is resolved by litigation or arbitration.²⁷ Yet the procedure adopted by a tribunal necessarily affects the tribunal’s determinations on the merits, and having arbitrators as opposed to judges decide the merits may also affect the outcome. As Park puts it, ‘Since contracts do not enforce themselves, but need flesh-and-blood adjudicators, who interprets an international agreement has often been more significant than what the applicable law says about its construction.’²⁸

The academic literature does recognise that arbitrators might choose different substantive law or interpret that law differently from national court judges. For example, Craig, Park and Paulsson note that, when the parties select an arbitrator, they do so in part

²¹ *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987) (reasoning that ‘the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights’).

²² *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). See also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (‘By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.’).

²³ Ridgway 1999, 52.

²⁴ Dasser 2008, 140.

²⁵ This figure includes cases where the choice of law rules of the state whose law governs the dispute lead to the application of a treaty as the governing law of the contract, as in jurisdiction under art 1(1)(b) of the CISG.

²⁶ It is often observed that ‘Parties negotiating a contract usually deal with the dispute resolution clause as a type of necessary evil that serves only to dampen an otherwise optimistic atmosphere of cooperation.’ Webster 2003, 120. Corporate counsel interviewed for a study of corporations’ dispute resolution policies reported that they are ‘often ... brought into negotiations late and expected to conclude dispute resolution clauses with minimal negotiation because the commercial terms are settled’. W&C/QMUL 2010, 10.

²⁷ Except to the extent that procedural decisions, such as on the scope of document production, are determinative of outcomes on the merits.

²⁸ Park 2003, 1257-1258.

based on 'the normative standards' they want to be applied to the dispute.²⁹ More comprehensively, Brower and Sharpe give three reasons why arbitrators and national court judges might reach divergent outcomes: where the governing substantive law is unclear or incomplete, where arbitrators seek to reach a compromise award (the purported tendency of arbitrators to 'split the baby'³⁰) or where a 'rogue tribunal' issues an award in disregard of the governing law.³¹ Most important—in the literature, if not in practice—is the so-called *lex mercatoria*, the autonomous global law of international commerce that has been developed by international arbitrators and academics associated with international arbitration.³²

However, no general or overarching theory of arbitral decision-making has been proposed that might explain whether or in what ways arbitrators decide substantive law issues differently from the way national courts do. This thesis proposes such a theory. It argues that there exist legal and social norms in international commercial arbitration, norms that are distinct from those prevailing in any national legal system, and that collectively constitute an incipient legal culture specific to ICA. Moreover, it proposes that these norms affect the way that arbitrators approach matters of substantive law, which in turn may affect the outcomes reached in arbitration. In other words, this thesis proposes that the norms specific to ICA lead arbitrators to reach different outcomes from national court judges on the merits of disputes, even when they are applying the same laws.

The term 'norm' is used in this thesis in a broad and non-technical sense, to describe any standard that does or is supposed to guide conduct and may serve as a basis for the assessment of conduct.³³ Rules, presumptions, principles, guidelines, maxims, perspectives, and customs may all be described as norms. They are 'normative', as opposed to 'descriptive', in that they do not determine what the people influenced by them are able or unable to do, but rather what such people feel they are entitled or ought to do. Norms may be categorised according to their source: legal norms are those engendered by legal rules; religious norms are those engendered by theological precepts; institutional norms are those generated by and within a given institution; social norms are those that shape conduct within an identifiable social group or community.

²⁹ Craig, Park & Paulsson 2001, 296.

³⁰ See below, fn 601 and accompanying text.

³¹ Brower & Sharpe 2004, 200 (citations omitted).

³² The *lex mercatoria* is discussed in more detail in Chapter Two.

³³ This definition of 'norm' is derived from the definition set forth in S Shapiro 2010, 42.

It may be difficult to see why the decisions of international commercial arbitrators would be of interest to anyone beyond the parties to those disputes. After all, except where states or state agencies are themselves parties to commercial contracts (which is a well-recognised exception to state immunity³⁴), the protection of vital national interests has little relevance in ICA. The morality of crime and punishment is not implicated. Inequalities among social classes, races or religious groups are seldom germane. National mores do not have as great an impact as in other areas of law. ICA does not involve fraught issues of regulation; workplace safety, environmental and consumer protection, labour relations and corporate governance are rarely relevant to international commercial disputes. Questions of social justice and the greater good are seldom directly implicated in disputes between commercial entities, still less in cross-border commercial disputes. ICA deals only with *ad hoc* transactions between (contractual, not necessarily economic) equals entering into voluntary arrangements limited in time, scope, and duties. In short, except in limited ways, issues of concern to political leaders or the general public rarely arise in ICA.

Moreover, most international commercial contracts of the type that contain arbitration clauses are entered into by parties of relatively equal bargaining power. As a result, international arbitral tribunals are unlikely to concern themselves with contractual interpretations intended to protect the interests of weaker parties.³⁵ Each international arbitration is also self-contained. Since there is no system of binding precedent within arbitration, and arbitral awards do not establish new legal rules outside the ICA system, arbitral tribunals need not consider the effects of their rulings beyond the parties.

Nevertheless, understanding the way that international arbitrators decide substantive law issues matters because ICA has become a significant generator of law. Despite the lack of a formal system of precedent, arbitrators do tend to cite each other. This is hampered (as is research on ICA) by a lack of systematic publication of commercial arbitration awards;

³⁴ See, e.g., Dicey & Morris 2000, 246-248 (Rule 19, Exception 2).

³⁵ In domestic arbitrations, it is common for arbitration clauses to be included in employment and consumer contracts, which are often adhesive. Various consumer protection statutes restrict or prohibit pre-dispute arbitration agreements in consumer contracts. See, e.g., in the US, the proposed Arbitration Fairness Act, H.R. 1020, 111th Cong. (2009) (introduced on February 12, 2009, by Representative Henry Johnson with 108 co-sponsors and referred to the Subcommittee on Commercial and Administrative Law on March 16, 2009); in the UK, the Unfair Terms in Consumer Contracts Regulations 1999, S.I. 1999 No. 2083; in France, *Code de la consommation* art 132-1; in Germany, BGB ss 305-310. The British, French and German rules were laid down in compliance with an EU Directive, Council Directive 93/10/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] O.J. L 95/29, which in effect sets up a rebuttable presumption that mandatory arbitration clauses in consumer contracts constitute unfair terms. Courts remain divided on the circumstances in which they will invalidate mandatory arbitration clauses in consumer contracts. See generally Rutledge & Howard 2010; McGill 2010.

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Nevertheless, understanding the way that international arbitrators decide substantive law issues matters because ICA has become a significant generator of law. Despite the lack of a formal system of precedent, arbitrators do tend to cite each other. This is hampered (as is research on ICA) by a lack of systematic publication of commercial arbitration awards;

³⁴ See, e.g., Dicey & Morris 2000, 246-248 (Rule 19, Exception 2).

³⁵ In domestic arbitrations, it is common for arbitration clauses to be included in employment and consumer contracts, which are often adhesive. Various consumer protection statutes restrict or prohibit pre-dispute arbitration agreements in consumer contracts. See, e.g., in the US, the proposed Arbitration Fairness Act, H.R. 1020, 111th Cong. (2009) (introduced on February 12, 2009, by Representative Henry Johnson with 108 co-sponsors and referred to the Subcommittee on Commercial and Administrative Law on March 16, 2009); in the UK, the Unfair Terms in Consumer Contracts Regulations 1999, S.I. 1999 No. 2083; in France, *Code de la consommation* art 132-1; in Germany, BGB ss 305-310. The British, French and German rules were laid down in compliance with an EU Directive, Council Directive 93/10/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] O.J. L 95/29, which in effect sets up a rebuttable presumption that mandatory arbitration clauses in consumer contracts constitute unfair terms. Courts remain divided on the circumstances in which they will invalidate mandatory arbitration clauses in consumer contracts. See generally Rutledge & Howard 2010; McGill 2010.

however, the awards that are published are regularly cited by subsequent tribunals, even on points of national law.³⁶ Perhaps more importantly, international commercial arbitrators are few in number and tend to be closely-knit, both professionally and personally. The same arbitrators are appointed repeatedly in the most important cases, and may also appear as counsel or expert witnesses in front of each other. There are frequent academic- and practitioner-focused conferences and many of the top arbitrators and arbitration counsel publish in scholarly journals. There thus are a number of informal means by which principles and perspectives diffuse between arbitrators.

Accordingly, what arbitrators do when making decisions on issues of substantive law is of both practical and academic interest. At minimum, a theory of arbitral decision-making that can be tested against the available awards is needed. Such a theory would help parties to make more informed decisions regarding arbitration: whether to arbitrate, which arbitral institution or procedural rules to select, which arbitrators to select, whether to conclude a choice of law agreement (and, if so, which law to choose) and whether to include in their arbitration agreements provisions that alter or restrict the scope of arbitrators' authority.

Parties and their counsel would be the primary beneficiaries of an improved understanding of arbitral decision-making, but providers of arbitration services—arbitrators, arbitral institutions, and counsel—would also benefit. Predictability of outcomes is regularly cited as one of the most important interests of the business community, yet predictability has long been described as the 'principal challenge' facing ICA.³⁷ The close professional relationships between arbitrators and counsel, the informality of arbitration proceedings, the confidentiality of both the proceedings and the ensuing awards, and the lack of an appeals process to overturn erroneous decisions all conspire to make arbitration a gamble. Arbitrators and arbitral institutions should want greater elucidation of the likely results in arbitration. After all, parties must actively choose to have their disputes resolved by arbitration and 'unrealistic expectations are resentments waiting to happen'.³⁸

More generally, a better understanding of arbitral decision-making will yield insights into the ways that international commercial law will evolve through the jurisprudence of arbitration. In particular, it will help to explain how principles of law develop outside of

³⁶ Primarily for this reason, Carbonneau refers to international arbitrators as 'law-makers'. Carbonneau 2004. On whether arbitral awards create 'precedents', see generally Waidemeier 2010 (arguing that international arbitral awards are capable of constituting precedents, but that ICA has not yet evolved a true system of precedent).

³⁷ Domke 1965, 14.

³⁸ Park 2002, 283.

national legal systems. Transnational contract law (also characterised as a-national law, non-national law, the *lex mercatoria*, or general principles of international private law) is a controversial subject.³⁹ Disagreements remain over whether a body of transnational laws does in fact exist or is developing and, if so, what rules compose it and in what directions it is likely to evolve. Since most national choice of law regimes prevent national court judges from applying transnational rules, ICA is the most important forum in which transnational and/or uniform rules are generated and applied. Arbitrators are closely associated with the development and promotion of transnational rules of law, both in using those rules to decide disputes and in developing codified sets of rules such as the UNIDROIT Principles.

This thesis does not attempt to identify specific general principles of contract law, as has been done by a variety of scholars. The UNIDROIT Principles, which attempt to codify general principles of international commercial law, are a prime example, as are non-codified compilations of principles such as that maintained by the Center for Transnational Law (CENTRAL) at the University of Cologne.⁴⁰ Instead, this thesis seeks to identify the social norms that inform arbitral decision-making, and thus explain why the transnational principles that have so far been identified and applied came to be recognised and to predict the kinds of principles that are likely to develop in the future.

These are empirical questions; the aims of this thesis are descriptive, rather than normative. The most straightforward way to answer such empirical questions about arbitrators' decision-making would simply be to read a sufficient number of arbitral awards, then catalogue and characterise the decisions. This is how traditional common law legal scholarship proceeds. However, it is impossible in international arbitration because only a tiny percentage of arbitral awards is published. Access to the raw data necessary to implement this 'brute force' approach does not exist.

Accordingly, a researcher attempting to describe international arbitral decision-making must resort to some kind of heuristic. In traditional legal scholarship, this would involve an investigation of the relevant legal norms, in particular the rules of law applicable to international commercial disputes decided by arbitration. In international arbitration, however, this approach too confronts serious limitations. International arbitration does not

³⁹ Of these terms, this thesis will generally employ 'transnational law'. As Gaillard points out, 'transnational' is preferable to terms like 'a-national' or 'non-national' because the latter do not 'convey the notion that the rules thus identified often find their roots in national laws'. Gaillard 2010.

⁴⁰ <<http://www.trans-lex.org/principles>> accessed 28 November 2010. See also Berger 1999.

have its own, unified substantive law;⁴¹ arbitrators apply different substantive laws in different disputes. Accordingly, there is no substantive law *of* arbitration, no unified, integrated set of substantive law rules that apply in ICA.⁴²

There do exist rules in ICA that pertain to substantive law, in particular to the choice of that law. This thesis begins by reviewing those rules. However, they do not—cannot—tell the entire story of how adjudicators make decisions. Two case studies presented in Chapters Three and Four provide evidence that the outcomes on the merits reached in ICA may differ from those reached in international arbitration, even when the same choice of law rule or the same substantive law is applied. As will be discussed below, the rules specific to ICA that pertain to substantive law do not on their own explain this divergence in outcomes.

To understand the new procedural and substantive forms that are developing in ICA, it is vital to go beyond doctrine. This principle is well-established when it comes to national laws. As Legrand writes, ‘...the notion of “French law” can not be reduced to that of “binding law in France”. French law is much more than a compendium of rules and precepts. Accordingly, to assert that the study of French law consists in the study of French legislative texts and judicial decisions is plainly inadequate.’⁴³ Comparativists similarly agree that ‘one must take account not only of legislative rules, judicial decisions, the “law in the books”, and also of general conditions of business, customs, and practices, but in fact of everything whatever which helps to mould human conduct in the situation under consideration.’⁴⁴

However, the same insight has not been so readily applied in the international sphere.

Notes Hirsch:

The idea that international law and other societal processes are profoundly interlinked is not new, but sociological theories are seldom employed in mainstream international law scholarship.... Only recently, [have] international law scholars ... turned their attention to modern sociology and employed its tools to study international legal concepts and problems.⁴⁵

⁴¹ ICA also does not have a single, unified procedural law. However, there is a far greater degree of convergence in procedure than in substance. See Newman 2009; Del Duca 2007; Kaufman-Kohler 2003; Elsing & Townsend 2002.

⁴² Such substantive law rules as do exist specific to ICA are discussed in Chapter Two, section B.

⁴³ Legrand 1999, 5.

⁴⁴ Zweigert & Kötz 1998, 11.

⁴⁵ Hirsch 2005, 891 (noting that ‘the sociological perspective was not included in the seven major methods of international legal scholarship that were presented in the 1999 Symposium on Methods in International Law published as a special issue of the American Journal of International Law’).

Research on ICA has been primarily doctrinal, focused on explicating the multiple and overlapping sets of rules that govern the field of arbitration. The empirical research that exists in the literature similarly does not focus on arbitrators themselves, but on the attitudes of the consumers of arbitration services: parties engaged in international commerce and their counsel.⁴⁶ However, as Friedman argues, transnational law 'is as much a product of its times and its social context as national or local law'.⁴⁷ There is no reason in principle why the ICA field could not possess its own, distinct legal culture. Indeed, there is reason to believe that such a culture is already developing. Globalisation places pressure on national legal cultures; where once these were autonomous, now they must interact (and, at times, compete) with other national legal cultures. This same cross-cultural interaction may be leading to the generation of a coherent set of norms outside of any national legal culture, in the discrete, international space inhabited by ICA.

As will be discussed below, commentators have begun to identify a culture of international arbitration; however, thus far, such commentaries have focused on the generation of a common set of standardised procedures within ICA.⁴⁸ These procedures are a hybrid; they borrow from both common law and civil law and are specifically adapted to the needs of commercial parties. More importantly, the harmonised procedures developed 'less through formal exchange of published opinions than through the cross-pollination that comes with the overlapping experiences of those in the international arbitration community'.⁴⁹ Such procedural convergence is outside the scope of this thesis, but it does demonstrate that ICA is sufficiently coherent as a field to develop shared norms that organically generate legal rules.

To study extra-legal features of international arbitrators' decision-making, this thesis adopts the vocabulary and methods of sociology, a field of inquiry intimately connected with questions of culture. In particular, the method adopted here is that of grounded theory, an inductive method popular in socio-legal research, according to which a broad theory is allowed to emerge from repeated comparisons between individual items of data. The theory is grounded in the data, rather than being posited *a priori* and verified by the data, as in traditional sociological research.

⁴⁶ For a summary of the empirical research that has been performed on ICA, see below, fns 591-603 and accompanying text.

⁴⁷ Friedman 1996, 90.

⁴⁸ Ginsburg 2003, 1337-1338.

⁴⁹ Rogers 2005, 1001.

The data analysed here consist of the writings of international arbitrators and other participants in ICA, expressed in published arbitral awards, in academic writings and conference presentations, and in surveys. Consideration of these data led to the identification of a set of social norms specific to ICA that collectively constitute an incipient culture of international arbitration. The social norms that compose this incipient culture may explain the divergence in outcomes between arbitration and litigation that is depicted in the two case studies.

While this thesis focuses on arbitration and arbitrators, it is ultimately concerned with the evolution of contract law. As such, it deals only with international commercial arbitration narrowly defined. That is, it considers only arbitrations of disputes arising from contractual relationships between commercial entities (including state entities engaged in commerce). It excludes from consideration arbitrations of disputes between employers and employees or between commercial entities and consumers, which implicate public policy considerations that vary widely from state to state and are quite different from those implicated by relationships between commercial entities.

In addition, this thesis excludes from consideration a class of arbitrations that is often joined with contractual disputes under the umbrella of 'international arbitration'—those arising out of investment treaties. Investment arbitrations directly implicate public interests and state actors, and therefore are governed in part by public international law, which possesses doctrines and mores distinct from (although related to) those involved in international commercial relationships. Accordingly, investment arbitrations will not be discussed here, except to the extent that a given arbitration also involves the interpretation of private contracts or matters of arbitral practice common to both investment and commercial arbitrations.

One must also distinguish the international commercial arbitrations studied in this thesis from trade association arbitrations (usually involving disputes over the characteristics or qualities of commodities), where merchants entirely contract out of any national or transnational legal system. In trade association arbitrations, the arbitrators are usually industry experts (as opposed to lawyers); they are expected to apply industry usages and impose extra-legal sanctions. A significant body of empirical literature exists analysing trade association arbitrations, some of which assesses the social context of these arbitrations.⁵⁰

⁵⁰ See, e.g., four articles by Lisa Bernstein: 'Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms and Institutions' (2004) 99 Mich L R 1724; 'The Questionable Empirical

However, while such specialised arbitrations may be international and commercial, they 'are commonly not covered by the general literature on international commercial arbitration'.⁵¹ Accordingly, they are excluded from the analysis presented here.

It is also important to note that, for the purposes of identifying the substantive law principles preferred by international commercial arbitrators, this thesis will not consider submission agreements (contracts to submit a pre-existing dispute to arbitration), nor will it consider the interpretation of arbitration clauses within contracts. Agreements to arbitrate are often treated in a unique manner by arbitral tribunals and by the courts of different countries with respect to the applicable law. Different law may apply to them than to the underlying contracts, and they may be interpreted according to different principles. This thesis restricts its analysis and predictions to the law that governs commercial relationships, excluding arbitration agreements and forum selection agreements.

This thesis proceeds in three parts; the first lays out the legal norms that apply to substantive law in arbitration and shows, by means of case study, that these norms are insufficient to explain the outcomes reached in international arbitrations; the second proposes a grounded theory of arbitral decision-making that does provide an explanation for the outcomes reached; and the third (the conclusion) discusses the theory's implications.

Part I considers international arbitral decision-making in action. It begins by setting out the legal rules specific to ICA that are relevant to substantive law determinations. Next, it provides evidence that arbitrators do in fact reach different outcomes from national court judges on issues of substantive contract law. Since the field of contract law is too broad to conduct a full comparison between the approach of international arbitrators and the approach of national court judges from every jurisdiction, a case study method has been adopted.

Two case studies are conducted, each of which considers a discrete area of contract law: first, in Chapter Three, suspension of performance in response to non-performance; and second, in Chapter Four, the admissibility and use of extrinsic evidence to interpret contracts. These topics were selected based on two characteristics that they share: both arise with enough frequency in international disputes to provide a number of published awards sufficient to discern trends in arbitral decision-making and both display a clear divergence in

Basis of Article 2's Incorporation Strategy: A Preliminary Study' (1999) 66 U Chicago L R 710; 'Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms' (1996) 144 U Penn L R 1765; 'Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' (1992) 21 J Leg Stud 115.

⁵¹ Bühring-Uhle 1996, 45.

the prevailing doctrines between civil law and common law systems. The latter is important because there would be little point in considering how arbitrators approach contract issues on which there is a broad international consensus. It would be of little use to conduct a detailed study in order to demonstrate that international arbitrators believe that those who breach contracts should generally be sanctioned, but that certain exceptions exist. Such a conclusion is neither of intrinsic interest nor is it likely to lead to a change in the law. In those areas where there is no international consensus—that are still ‘up for grabs’—the particular influence of ICA on contract law’s evolution can best be seen.

Each of the case studies explains and compares the prevailing doctrines in a representative sample of common law and civil law states, in order to set out the way judges decide disputes involving these two issues. Next, the case studies examine the available arbitral awards and compare the results reached by arbitrators with the various national approaches. In the process, the case studies demonstrate that the applicable substantive law norms set out in Chapter Two do not adequately explain the outcomes reached.

Part II seeks to provide an adequate explanation. It proposes a theory of arbitral decision-making grounded in the writings of international arbitrators and arbitration scholars. Chapter Five introduces this theory and the methodology adopted to develop it: a sociological approach based on the grounded theory method introduced by Glaser and Strauss.⁵² The theory proposes that a unified culture of international arbitration is in the process of coalescing, a culture that affects the way international commercial arbitrators decide substantive law issues. This culture is defined by various social norms, which can be identified from the writings of international arbitrators.

The remainder of Part II deals with social norms that exist in ICA and their effects. These norms may lead arbitrators both to choose different laws than national court judges would (to the extent that the relevant rules give them discretion) and also to apply any given law differently than would national court judges. These norms may also influence the content of transnational substantive law principles recognised by international arbitrators.

These social norms are divided for analytical purposes into those arising from the structure of the ICA system and those arising from arbitrators’ values, which are considered in Chapters Six and Seven, respectively. Chapter Six describes the sources of arbitral authority, arbitrators’ relationships with the disputing parties, and the role of competitive

⁵² The foundational text of grounded theory is Glaser & Strauss 1967.

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⁵² The foundational text of grounded theory is Glaser & Strauss 1967.

forces in ICA. Chapter Seven considers the ideological values prevalent among international commercial arbitrators. In particular, it describes arbitrators' dedication to the values of party autonomy, the service of business, neutrality and internationalism.

Chapter Eight concludes that the divergences between arbitral and judicial decision-making described in Part I can be explained by the emergent ICA culture described in Part II. It discusses the implications of ICA culture for the future of contract law, identifies the substantive law doctrines that arbitrators are likely to prefer and predicts the directions in which international commercial law is likely to evolve. Without a sufficient sample of arbitrators' decisions on substantive law matters, definitive predictions of how arbitrators will decide such issues are impossible. However, a sociological analysis of ICA culture makes possible more accurate predictions than could otherwise be made.

PART I: SUBSTANTIVE CONTRACT LAW IN INTERNATIONAL COMMERCIAL ARBITRATION

Part I challenges the intuition that international commercial arbitrators and national court judges ought to reach the same determinations on substantive contract law issues. By means of case studies, it provides evidence that the outcomes reached in ICA do in fact differ from those reached in national court litigation and demonstrates that a strictly legal analysis—a comparison of the rules related to the choice and application of substantive law in arbitration and in litigation—is insufficient to explain the divergence in outcomes. This evidence supports the proposition that ICA arbitrators approach substantive law from a different perspective than that of national court judges.

Part I is composed of three chapters. Chapter Two lays out the rules of law that pertain to substantive determinations in ICA. Chapters Three and Four each present a case study; Chapter Three considers the circumstances in which aggrieved parties may suspend performance in the face of non-performance without terminating the contract, while Chapter Four considers the rules applicable to contractual interpretation.

Since arbitration remains fundamentally an alternative to litigation in national courts, the way that arbitrators apply doctrines of suspension of performance or interpret contracts can only be understood in comparison with the way that courts act in similar situations. Consequently, each of the case studies presented in this Part considers the global legal context of the issue under examination by considering the different applicable rules and approaches in common law and civil law jurisdictions. These are represented by five exemplars: the United States and England⁵³ representing common law jurisdictions, and France, Germany and Switzerland representing the civil law. These countries were chosen because they exemplify some of the variety that exists within the common law and civil law, respectively, and also because they constitute the home nations of a significant portion of active international commercial arbitrators. One would expect arbitrators to be influenced by the legal systems in which they were trained; therefore, if results reached in ICA differ from those that would occur in the courts of England, the US, France, Germany and Switzerland, this would constitute evidence that arbitral decision-making is influenced by forces distinct from the legal systems and cultures of the arbitrators' home countries.

⁵³ Throughout this thesis, 'England' and 'English law' should be taken to encompass England and Wales.

After placing the relevant legal issues in comparative context, each of the case studies examines the available arbitral awards in which each issue arose. As will be seen, with both suspension of performance and the use of extrinsic evidence in contractual interpretation, arbitrators are reaching results that are consistent with each other but distinct from the results reached under any one national legal system.

Some background on the applicable legal rules is necessary for the case studies. Accordingly, Part I begins with a discussion of the rules pertaining to substantive law that are applicable in ICA (Chapter Two). Three areas of rules pertaining to substantive law in ICA differ from those in litigation: the choice of law process, the acceptance of transnational rules of substantive law and the possibility of amiable composition. Since these issues are comprehensively addressed by the existing literature, only a brief overview is given here.

CHAPTER TWO: LEGAL RULES PERTAINING SUBSTANTIVE LAW IN INTERNATIONAL ARBITRATION

A significant body of literature exists that explores the development of common sets of *procedural* rules and standard practices in ICA. This chapter concerns the legal rules and practices of ICA that pertain to *substantive* law. It might seem that there could be no substantive law norms common to the entirety of international arbitration; after all, arbitral institutions do not draft codes of substantive law rules, only procedural rules. Moreover, there is no unified substantive law of ICA; different tribunals apply different substantive laws to the individual disputes brought before them. Nevertheless, there do exist rules of substantive law specific to ICA. To the extent that these rules differ from those that obtain in national legal systems, they help to explain why arbitrators and national court judges might reach a different result on the merits of a given dispute, *i.e.*, if they apply different substantive laws.⁵⁴ The substantive legal rules of ICA might be characterised as international private international law: they relate both to the choice of the substantive law that will govern the dispute and to the range of substantive rules that are available in arbitrations.

Choice of law is a complex topic, and no attempt will be made here to survey the full range of choice of law rules applicable in different states. This chapter will describe three sets of rules that make choice of law in ICA distinct from choice of law in any national jurisdiction: the choice of law process in international arbitration and how it differs from that in national courts; the bodies of substantive law that are available in ICA but are either unavailable or unlikely to be applied in national court proceedings; and the power of arbitral tribunals, when acting (expressly or even implicitly) under amiable composition, to apply no legal rules whatsoever.

⁵⁴ This discussion leaves aside the question of the substantive law applicable to the arbitration agreement, which may or may not be the same as the law applicable to the remainder of the contract. See, *e.g.*, Redfern & Hunter 2004, 147-153. It also leaves aside the status of the substantive law in arbitration—whether the content of the substantive law must be proved in the same manner as the facts, or whether the arbitral tribunal can itself establish what is required by the applicable law. This is currently an open question. See Kaufmann-Kohler 2003, 1331.

A. THE CHOICE OF LAW PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION

In international arbitration, party autonomy in choice of law is nearly absolute. International arbitral tribunals have no *lex fori*, and therefore no nationally-generated choice of law regime and no inbuilt predisposition in favour of their national law. They begin the choice of law process not from the point of view of any national system of law, but from the expectations of the parties. This was alluded to by the tribunal in International Chamber of Commerce (ICC) Case No. 12073 of 2003, where the respondent argued that its representative did not have legal capacity to enter into the contract, and the result would be different depending on which law applied. The tribunal found, 'While national civil procedure laws and conflict rules applied by national judges typically follow substantive law on capacity (if any), international arbitrators do not have a *lex fori* and must also consider the contractual dimension of arbitral jurisdiction.'⁵⁵

Thus, if the contract contains a clear choice of law clause, tribunals are generally bound to respect that choice.⁵⁶ Deference to a choice of law by the parties is, as one tribunal put it, 'standing practice' in ICA.⁵⁷ Such deference extends to permitting parties to choose to be governed by specific provisions or specific rules of law, and to derogate from aspects of the otherwise-applicable law. As another tribunal wrote, 'the principle of party autonomy is not only understood as one of localization of a contract within the sphere of a given law but also as one allowing the parties to depart from the otherwise applicable law.'⁵⁸ However, the tribunal also noted that the autonomy principle is not unlimited; mandatory rules relating to fundamental public policies cannot be overridden by the parties' agreement:

Even in international arbitration, the parties' agreement should not be allowed to prevail over *all* mandatory rules of national laws ... some rules are so important to the economic or social welfare of the country whose legislature enacted them that international arbitrators must be prepared to enforce them irrespective of the contrary intent of private parties.⁵⁹

⁵⁵ (2008) XXXIII Ybk Comm Arb 63 [19]. See also Craig, Park & Paulsson 2001, 322.

⁵⁶ The rules of procedure of most arbitral institutions require the tribunal to apply any laws or rules of law chosen by the parties. ICC Rules art 17(1); LCIA Rules art 22.3; ICDR Rules art 28(1); UNCITRAL Rules art 33(1).

⁵⁷ ICC Case No. 7047 of 1994 (1996) XXI Ybk Comm Arb 70 [14]. The tribunal also stated that the parties' choice of law can be overridden only by principles of international public policy, such as 'provisions to fight corruption and bribery'. Ibid [16].

⁵⁸ ICC Case No. 7528 of 1993 (1997) XXII Ybk Comm Arb 125 [10].

⁵⁹ Ibid [12].

Aside from limitations imposed by obedience to mandatory provisions of the national law of the seat of arbitration, there are only two generally-applicable exceptions to the rule that tribunals must respect parties' choice of law. First, choices *in fraudem legis*, that is, made only to circumvent an undesired law, will not necessarily be enforced; second, tribunals sometimes apply, in addition to the law chosen by the parties, mandatory laws of states other than the *situs* that claim extraterritorial effect.⁶⁰

Party autonomy in choice of law does not enjoy such a wide scope in litigation. For example, national courts may not enforce a choice of law agreement if the law chosen has no connection to the state in which the court sits⁶¹ (although in recent years courts have moved toward greater enforcement of contractual choices of law⁶²).

As will be discussed in Chapter Six, arbitral decision-making is affected by competition between arbitrators for appointment by the parties. This competition 'gives arbitrators a stronger incentive than public court judges to enforce the provisions of the parties' contract, including the parties' contractual choice of law'.⁶³ This difference is seen as a motivating factor for parties choosing to resolve their disputes by arbitration. Thus, Benson acknowledges that parties' primary motivations for choosing arbitration are procedural, but argues that, in addition, 'arbitration may also provide a mechanism for assuring that the contracting parties' preferred substantive law is applied'.⁶⁴

If the contract does not designate the governing substantive law, most arbitral rules empower the tribunal to select the choice of law rule it considers most appropriate, and then to apply that choice of law rule to determine the governing law.⁶⁵ Moreover, the tribunal need not choose a choice of law rule taken from a nation's private international law regime, and need not even apply a choice of law rule at all. Instead, the rules of most arbitral institutions permit the tribunal to designate an applicable law directly (*voie directe*); for example, the ICC rules simply permit the tribunal, in the absence of a choice by the parties, to 'apply the rules of law which it determines to be appropriate'.⁶⁶ In short, arbitral tribunals are

⁶⁰ Blessing 1997, 39-40.

⁶¹ Dicey & Morris 2000, 1196-1198.

⁶² This trend is exemplified by the Rome I Regulation. See below, fn 74 and accompanying text. See also Briggs 2008, 381 (concluding that, 'As far as the common law is concerned, the right of parties to choose the law to govern their contract is practically unrestricted.').

⁶³ Drahozal 2005, 524.

⁶⁴ Benson 1999, 92.

⁶⁵ See, e.g., LCIA Rules art 22.3; UNCITRAL Rules art 33(1).

⁶⁶ Art 17(1); See also ICDR Rules art 28(1).

more likely to enforce a contractual choice of substantive law and, absent such a choice, often avoid the complex and uncertain choice of law process by making a *voie directe*.

B. AVAILABILITY OF TRANSNATIONAL RULES OF SUBSTANTIVE LAW

Choice of law in ICA may lead to the application of the law of a different state than would be applied by a national court. In addition, rules of law are frequently applied in arbitration which are either unavailable or unlikely to be applied in national courts. In the context of international private law, 'rules of law' must be distinguished from 'laws'. The latter means the laws applicable in a state, whatever their source. Rules of law, on the other hand, are any statements of principle which have the characteristics of legal provisions but which are not law obtaining in any state. The two most prominent examples of rules of law are international contract law instruments and general principles of international private law.

1. International contract law instruments

The major international contract law instruments were all drafted by representatives of both common and civil law jurisdictions. These instruments take one of two forms: conventions that mimic domestic statutes or compilations of principles in the manner of the American Restatements.

As to the conventions, parties may choose to apply them directly to their contracts. More commonly, however, they apply when the parties have made no choice of law, but are domiciled in different states and choice of law analysis leads to the application of the law of a state party to the convention.⁶⁷ Generally, the domestic choice of law rules of contracting states provide that the convention will apply to contracts between parties from that state and another contracting state. These types of international contract law instruments are equally applicable in state courts and in ICA.

The two most prominent examples of these conventions are the United Nations Convention on Contracts for the International Sale of Goods (CISG) and its predecessor, the Uniform Law for International Sales (ULIS). These two instruments apply only to contracts for the sale of goods for commercial use. The CISG applies to contracts that have both sales and non-sales aspects, so long as the sales aspects form the 'preponderant part' of the parties' obligations.⁶⁸ If parties conclude two or more separate contracts, not all of which are

⁶⁷ CISG art 1(1).

⁶⁸ CISG art 3(2). See generally CISG-AC Opinion No. 4.

contracts of sale, then the CISG applies to the contracts of sale and the otherwise-applicable domestic law applies to the other contracts.

These instruments are applicable to a huge number of contracts. In practice, however, most lawyers and judges in many jurisdictions are not aware of the applicability of these conventions, so they seldom appear in the decisions of national courts.⁶⁹ Arbitrators, on the other hand, tend to be aware of them, to be receptive when the parties submit that they are applicable and even to determine that they are applicable when the parties make no such submission. This can be seen in the case studies that follow in the next two chapters.

The second type of international contract law instrument—the compilations of principles—are usually drafted by representatives of states but are not conventions to be ratified. The two best known are the UNIDROIT Principles and the PECL. These instruments most commonly apply when tribunals invoke them as embodiments of general principles of international private law.⁷⁰ The UNIDROIT Principles and PECL may also apply directly as rules of law governing a contract if the parties so designate or, absent such a choice, if the tribunal chooses them. However, this is rare in practice.⁷¹ Usually, they are applied to interpret or supplement the CISG or to fill gaps in applicable domestic laws.⁷²

These instruments cannot have the status of governing law in national court proceedings even if the contract contains a clause choosing them as the governing law. For example, under the 1980 EC Convention on the Law Applicable to Contractual Obligations ('Rome Convention')⁷³ and under the Rome I Regulation (applicable to contracts concluded

⁶⁹ See Ziegel 2005. In the United States, Canada, Australia and New Zealand combined, there were only 79 published decisions under the CISG in the 17 years from the date the CISG entered into force until 2005. In the same period, seven Western European civil law countries surveyed by Ziegel published decisions under the CISG in 765 cases. Ibid, 68. The only states in which the CISG is frequently applied by the courts are Germany and China.

⁷⁰ Farnsworth 1997, 3. Indicative is PECL art 1:101(3), which states that the PECL may be applied when the parties 'have agreed that their contract is to be governed by "general principles of law", the "lex mercatoria" or the like; or have not chosen any system or rules of law to govern their contract'.

⁷¹ Empirical studies indicate that parties rarely choose transnational rules of law to govern their contracts. See, e.g., Dasser 2008, 140. For awards where the UNIDROIT Principles were applied directly as the law governing the contract, see, e.g., ICC Case No. 7710 of 1995 [2001] JDI 1148; ICC Case No. 8501 [year unknown] [2001] JDI 1164. In both cases, the parties did not make a choice of law and the tribunal chose the UNIDROIT Principles via *voie directe*. No awards could be found where the PECL were applied as the governing law.

⁷² Berger 1998, 133. Examples of awards where tribunals have employed the UNIDROIT Principles in this manner include: ICC Case No. 8547 of 1999 (2003) XXVIII Ybk Comm Arb 27 (to supplement the ULIS); ICC Case No. 9333 of 1998 [2002] JDI 1094 (along with the CISG, to supplement Swiss law); ICC Case No. 8486 of 1996 (1999) XXIVa Ybk Comm Arb 162 (to supplement Dutch law); ICC Case No. 8817 of 1997 (2000) XXV Ybk Comm Arb 355 (to supplement the CISG); ICC Case No. 8128 of 1995 [1996] JDI 1024 (to supplement the CISG).

⁷³ Convention on the Law Applicable to Contractual Obligations, 19 June 1980 (80/934/EEC) art 4.

after 17 December 2009),⁷⁴ courts of EU member states cannot apply rules of law, such as the UNIDROIT Principles or PECL. Under the Rome Convention, a contract may be governed by 'the law chosen by the parties', or, in the absence of such choice, by 'the law of the country with which [the contract] is most closely connected'. Similar rules apply under the Rome I Regulation.⁷⁵ Because international instruments are considered 'rules of law', not 'laws', state courts have interpreted these words to require application of a national law, even if the parties explicitly choose rules of law.⁷⁶ Thus, if a contract contains an express choice of 'rules of law' in a proceeding before an EU state court, the court will disregard that choice and apply the national law designated by the Rome I Regulation.⁷⁷ In ICA proceedings, on the other hand, contractual disputes may be determined under rules of law.

2. General principles of international private law

Some states have considered permitting their courts to apply international contract law instruments like the UNIDROIT Principles and PECL.⁷⁸ However, another category of rules of law remains the exclusive province of arbitration: general principles of international private law. Also called *lex mercatoria* or 'transnational commercial law', these are the putative laws of global commerce.⁷⁹ They are closely tied to ICA and have generally been identified and promoted by arbitrators and—in particular—by certain influential academics involved in arbitration.⁸⁰

⁷⁴ Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ No. L 177, p. 6 ff.) ('Rome I Regulation')

⁷⁵ Ibid, art 4.

⁷⁶ See, e.g., *Shamil Bank of Bahrain v Beximco Pharm Ltd* [2004] EWCA Civ 19 (holding that under art 3(1) of the Rome Convention, only choice of law clauses selecting national laws are valid, and therefore that a choice of law clause selecting Shari'a law was invalid). See Bantekas 2010, 1 fn 4 (noting that 'In this case it was held that the choice of Islamic law as the proper law of the contract was inoperable, given that Islamic law is not a quantifiable legal system which the courts can ascertain for the purposes of choice of law. In the field of arbitration, on the other hand, this does not constitute a problem at all.')

⁷⁷ But see recitals 13 and 14 to the Rome I Regulation, which state that the Regulation 'does not preclude parties from incorporating ... into their contract a non-State body of law' and that 'Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules.'

⁷⁸ The European Commission proposed that the Rome I Regulation permit the application of non-state bodies of law, i.e., 'rules of law'. See European Commission 2005. However, this proposal was not accepted.

⁷⁹ 'General principles', '*lex mercatoria*' and 'transnational commercial law' are not identical concepts, but they are used here interchangeably, as they all refer to principles of contract law that are detached from the law of any nation and that purport to represent truly international principles of substantive law applicable to all international commercial relationships.

⁸⁰ See, e.g., Drahozal 'Private Ordering' 2009, 1036 (referring to ICA as the 'source' of the *lex mercatoria*); Rogers 2002, 351-52 (describing the *lex mercatoria* as 'developed by academics, who were also actively involved in arbitrations, as a means to permit arbitrators to tailor decisions to customary trade usages'); Benson 1999, (calling *lex mercatoria* '[t]he law that dominates international trade through the use of arbitration').

The very existence of such principles, let alone their applicability to the resolution of actual disputes, is controversial. They remain entirely unavailable in national court litigation,⁸¹ and prior to the 1970s, arbitration awards based on general principles of law were considered unenforceable.⁸² Now, however, both arbitral rules of procedure and recently-adopted national arbitration laws permit the parties to choose to be governed by 'rules of law', not just 'laws'.⁸³ For example, under article 187(1) of the Swiss Private International Law Statute (adopted 1987), arbitral tribunals may apply the 'rules of law with which the case has the closest connection,' a provision drafted specifically to permit application of *lex mercatoria* in arbitrations.⁸⁴ Similarly, article 1496 of the French National Code of Civil Procedure (adopted 1975) provides for the application of the 'rules of law' considered 'appropriate' by a tribunal.⁸⁵ As a result of the spread of such provisions, arbitration awards applying general principles as the substantive law governing the contract will now be enforced by the majority of national courts.⁸⁶ In effect, national courts now uphold the freedom of parties to arbitration to choose to be governed by general principles, even though they continue to prevent parties to litigation from making the same choice.

The importance of general principles of law is often overstated. Only a small percentage of international contracts provide for the application of general principles.⁸⁷ As the ICC reported: 'In 79.8% of the contracts giving rise to disputes referred to ICC arbitration in 2007, the parties had specified the law applicable to the merits. They opted for State laws in all but three contracts.'⁸⁸ The three exceptions called, respectively, for the application of the UNIDROIT Principles, the CISG, and the rules of the Organization for the Harmonization of Business Law in Africa (OHADA).⁸⁹ Thus, in no dispute filed with the ICC in 2007 did

⁸¹ Briggs 2002, 159 (noting that under the Rome Convention, '... a choice of the *lex mercatoria*, or of the law of Mars, not being the law of a country, cannot be upheld, because the Convention sanctions only the choice of the law of a country'). The only real exception is France, where *lex mercatoria* concepts have generally received a friendly reception from both commentators and courts. Sandrock 2001, 303.

⁸² Rivkin 1993, 72.

⁸³ All major rules of procedure except the UNCITRAL Rules permit the parties or the tribunal to choose to apply 'rules of law'. In the drafting of UNCITRAL Rules art 33(1), 'law' was specifically chosen, as opposed to 'rules of law,' in order to preclude the application of non-state rules. Van Hof 1991, 226-227. By contrast, the ICC Rules exemplify the majority position. ICC Rules art 17(1) was drafted utilising the term 'rules of law' specifically to permit the parties to choose to be governed by non-state rules. Craig, Park & Paulsson 2001, 320.

⁸⁴ Ibid. An unofficial translation of the statute is available online: <<http://www.umbricht.ch/pdf/SwissPIL.pdf>> accessed 28 November 2010.

⁸⁵ When it was adopted, the *Code de procédure civile* was unusual for permitting the application of 'rules of law' in arbitration. Official translation available online: <<http://www.legifrance.gouv.fr/home.jsp>> accessed 28 November 2010.

⁸⁶ Rivkin 1993, 73-74; see also Lew 1978, 123.

⁸⁷ The available empirical evidence is discussed in Drahozal 2005, 536-544.

⁸⁸ ICC Statistical Report 2007, 12.

⁸⁹ Ibid.

the parties call for the direct application of 'general principles' or '*lex mercatoria*'.⁹⁰ In a study of the arbitration clauses of disputes filed with the ICC over roughly the second half of the twentieth century, Dasser found that only 0.3% referred to '*lex mercatoria*' or 'general principles'.⁹¹

When parties do choose to be governed by general principles, this is often because 'there was no published and publicly available national law on point. In other words, the new Law Merchant applied only in the absence of national law, not in lieu of national law.'⁹² Finally, there is some evidence that both parties and tribunals are calling for the application of general principles less frequently than in the past; from 2003 to 2007, the percentage of arbitration clauses in ICC disputes that called for the application of transnational rules of law declined from 1.2% to 0.5%.⁹³

Nevertheless, it is useful to study general principles of international private law in arbitration. They constitute a potentially important body of law to which many arbitrators are dedicated but which is almost entirely absent from national courts. The dedication of arbitrators and arbitral institutions to promoting general principles is evident in the publication policies of the major institutions. For example, as will be discussed below, the ICC has prioritised the publication of arbitral awards where the tribunal does not apply national laws.⁹⁴ The only reason for such a policy is to promote the legitimacy of general principles as a basis for the resolution of international commercial disputes.

In addition, clauses providing for some manner of general principles remain common in contracts involving governments or government enterprises. Typically, 'The government does not wish to submit to the laws of a foreign state. A private party will not wish to have the contract governed by the laws of the foreign government since they may be changed to his disadvantage after the contract is made.'⁹⁵ Of course, private parties need not resort to general principles to protect themselves from their sovereign contractual partners; other means exist, such as expropriation insurance, stabilisation or renegotiation clauses in the contract and choice of the law of a 'third state'.

⁹⁰ Ibid.

⁹¹ Dasser 2008, 140.

⁹² Drahozal 2005, 526.

⁹³ Drahozal 'Private Ordering' 2009, 1039; see also Dezalay & Garth 1996, 63.

⁹⁴ See below, Chapter Five, Section A.3.

⁹⁵ Lando 1989, 143-144.

Finally, general principles are notoriously indistinct. The flexibility of general principles of international law means that decisions applying them provide some of the most direct evidence of the actual preferences of arbitrators. However, the 'standard explanation' for why parties would not contract for the application of general principles is that they are 'too vague and uncertain to serve as a useful substitute for national law'.⁹⁶ Indeed, the primary criticism of general principles is that they are so vague as to constitute a mere façade for the preferences of the arbitrator: 'While not completely standardless, [general principles] and *lex mercatoria* tend to be very elastic concepts whose content changes as much with the arbitrator as with the industry.'⁹⁷ Thus, the way arbitrators select and apply general principles of international private law tells us a great deal about what arbitrators think the law ought to be.

C. ARBITRATION WITHOUT LAW: AMIABLE COMPOSITION

An important difference between courts and arbitral tribunals is that tribunals, if the parties so empower them, decide disputes under amiable composition. Tribunals so empowered are often referred to in French as '*amiables compositeurs*' or are said to decide '*ex aequo et bono*'. (These terms are synonymous as generally construed.⁹⁸) In such cases, the tribunal may decide according to its own sense of justice without reference to any particular law: 'Amiable composition and *ex aequo et bono* make no pretence of standards: [they] generally are considered as an authorization to act *contra legem*, to depart from the law, to change the law or to reject a claim based on the law.'⁹⁹ Amiable composition clauses give tribunals much latitude—even more than when deciding under equitable principles¹⁰⁰ or general principles.

For a tribunal to possess the power of amiable composition, the parties must confer this power in express terms.¹⁰¹ Many tribunals take this restriction seriously.¹⁰² For example, in ICC Case No. 13278 of 2003, Spanish law governed the contract and the respondent proffered an argument based on general principles of *force majeure*. The sole arbitrator

⁹⁶ Drahozal 2005, 546.

⁹⁷ McConnaughay 1999, 471.

⁹⁸ ICC Case No. 11663 of 2003 (2007) XXXII Ybk Comm Arb 60 [17].

⁹⁹ McConnaughay 1999, 471-72 (quoting Sohn 1967, 332-333).

¹⁰⁰ Scheuner 1967, 282 (noting that 'The judge who refers to equity stays within the borders of existing law.').

¹⁰¹ ICDR Rules art 28(3); ICC Rules art 17(3); LCIA Rules art 22.4; UNCITRAL Rules art 33(2).

¹⁰² ICC Case No. 11663 of 2003 (2007) XXXII Ybk Comm Arb 60 [17]; ICC Case No. 9771 of 2001 (2004) XXIX Ybk Comm Arb 46 [60].

rejected this argument as unsupported by Spanish law and improperly intended to entice her into exercising powers of amiable composition, which had not been conferred upon her.¹⁰³

However, some tribunals have taken on amiable-composition type powers without an express conferral of those powers. For example, in ICC Case No. 7369 of 1994, neither the Qatari respondent nor the Italian claimant raised any arguments regarding amiable composition or equitable principles. The tribunal conceded that it was 'bound to decide all issues by relying on the proper law of the Contract between the parties, as a result of the clear wording of the Applicable law Clause of the Agreement, which is also expressly reflected in the Terms of Reference adopted by the parties.'¹⁰⁴ However, the tribunal nevertheless relied in its decision on general principles of equity: '... the Tribunal has decided to consider these principles as part of its terms of Reference, in its genuine and serious desire to be fair to both parties, by among other things, considering the general principles of equity'.¹⁰⁵

Amiable composition clauses do not appear ever to have been common in international commercial contracts,¹⁰⁶ and are less popular than they used to be. As an indication of this trend, of fifteen published ICC awards involving contracts that conferred amiable composition powers upon the tribunal, only two were issued in the 1990s and none since 2000.¹⁰⁷ However, they are worthy of mention for three reasons: first, at least fifteen published awards have been decided under amiable composition and must be understood in that context. Second, all the major arbitral rules continue to permit parties to choose amiable composition, so the possibility, though diminished, is not dead.¹⁰⁸ Third, amiable composition is both historically and theoretically tied to the *lex mercatoria* doctrine. When tribunals are empowered to act as *amiables compositeurs*, they frequently take this as evidence that the parties intended to apply general principles.¹⁰⁹ Goldman goes so far as to

¹⁰³ ICC Case No. 13278 of 2003 (2008) XXXIII Ybk Comm Arb 118 [9].

¹⁰⁴ ICC Case No. 7639 of 1994 (1998) XXIII Ybk Comm Arb 66 [31].

¹⁰⁵ Ibid. See also ICC Case No. 7181 of 1992 (1996) XXI Ybk Comm Arb 99 [60].

¹⁰⁶ 81% of corporations surveyed in 2010 reported that they never use *ex aequo et bono* or amiable composition adjudication. Only 2% often concluded contracts that contain *ex aequo et bono* or amiable composition clauses. W&C/QMUL 2010, 15.

¹⁰⁷ ICC Case No. 1677 of 1975 (1978) III Ybk Comm Arb 217; ICC Case No. 2216 of 1974 [1975] JDI 917; ICC Case No. 2694 of 1977 [1978] JDI 985; ICC Case No. 2879 of 1978 [1979] JDI 989; ICC Case No. 3267 of 1979 (1982) VII Ybk Comm Arb 96; ICC Case No. 3380 of 1980 (1982) VII Ybk Comm Arb 116; ICC Case No. 3540 of 1980 (1982) VII Ybk Comm Arb 124; ICC Case No. 3938 of 1982 [1984] JDI 926; ICC Case No. 4265 of 1984 [1984] JDI 922; ICC Case No. 4467 of 1984 [1984] JDI 924; ICC Case No. 4972 of 1989 [1989] JDI 1101; ICC Case No. 5103 of 1988 [1988] JDI 1207; ICC Case No. 5118 of 1986 [1987] JDI 1027; ICC Case No. 6503 of 1990 [1995] JDI 1022; ICC Case No. 7986 of 1999 [2002] JDI 1071. Some of the contracts at issue in these cases were concluded several years before the arbitration was initiated. See also Rogers 2002, 353.

¹⁰⁸ Redfern & Hunter 2004, 54.

¹⁰⁹ See, e.g., ICC Case No. 3292 of 1980 [1981] JDI 924.

assert that inclusion of an amiable composition term in a contract constitutes a designation of general principles as the applicable law.¹¹⁰ Most arbitrators and commentators do not subscribe to Goldman's wholesale identification between amiable composition and general principles; however, tribunals acting as *amiable compositeurs* may refer to general principles to give their decisions analytical structure and consistency.

¹¹⁰ Goldman 1979, 927.

CHAPTER THREE: CASE STUDY 1: SUSPENSION OF PERFORMANCE

Consider the following ethical proposition: If you do not fulfil your promise, I shall not fulfil mine. Although this proposition is intuitively supported by simplicity and fairness, the question remains: When will it be warranted in law?¹¹¹

When confronted with a breach of contract, a lawyer's first reaction may be to file a suit. A businessman's instinct would probably be simply to refuse to perform his own obligations. Withholding performance first and litigating later (if necessary) has advantages over performing and later seeking to recover losses due to the other party's breach. It requires no advance planning and is simple and intuitive; parties who embark on it may not even be contemplating the use of a legal remedy. Also, common sense dictates that it is better to hold on to one's money and later possibly have to pay than to pay now and later try to recoup the loss. Such action may reduce one's losses and impel the nonperforming party to perform. The world's legal systems recognise 'the principle that performance of an obligation may be withheld if the other party has itself failed to perform', even if they differ as to the scope or basis of that principle.¹¹²

On the other hand, excessive withholding of performance can create a windfall for the withholding party or work an injustice on the party in breach:

It is in society's interest to accord each party to a contract reasonable security for the protection of that party's justified expectations. But it is not in society's interest to permit a party to abuse this protection by using an insignificant breach as a pretext for evading its contractual obligations.¹¹³

Consequently, the right to withhold performance has been limited in a variety of ways. Civil law jurisdictions accomplish this by operation of the *exceptio non adimpleti contractus* ('the *exceptio*'), which is a specific doctrine only pleaded in cases of suspended performance. Under the common law, on the other hand, the availability of suspension of performance is regulated according to generally-applicable rules pertaining to contractual conditions. Despite diversity of doctrine, different legal systems all seek to balance the interests of an

¹¹¹ Nyer 2006, 30.

¹¹² Crawford & Olleson 2001, 55.

¹¹³ Farnsworth 1999, 580.

aggrieved party to suspend performance against the right of a breaching party not to be forced to compensate the creditor for more than the consequences of its own breach.

Doctrines governing suspension of performance are well-developed in most national legal systems. However, it remains to be seen how international arbitrators approach the same issues. This chapter examines the decisions of international commercial arbitrators in cases where a party has suspended performance. Because of the small number published awards, the conclusions drawn here are necessarily tentative.¹¹⁴ Nevertheless, the available data suggest that, when it comes to deciding cases of suspension of performance, arbitrators tend to make decisions in a different way than the courts of any country, and to reach results that are more consistent with each other than with the provisions of any national law. In other words, in this relatively discrete and well-settled area of contract law, the outcomes reached in arbitration and in national court litigation diverge.

This chapter begins with an overview of the remedy of suspension of performance, considers whether it constitutes a general principle of private international law and suggests a scheme for comparing the different approaches to this remedy. Next, it places the remedy in context by comparing the law on suspension of performance in three civil law jurisdictions (Germany, Switzerland, and France), two common law jurisdictions (England and the United States) and under the major international contract law instruments. Finally, it assesses the published arbitral awards that consider suspended performance.

A. THE REMEDY OF SUSPENSION OF PERFORMANCE

The central question is this: when will one party to a contract (the creditor), faced with non-performance by the other party (the debtor), be justified in temporarily withholding its own performance without ending the contractual relationship or otherwise discharging either party's obligations? For the sake of clarity, and because different countries use the same terms differently and different terms to refer to the same thing, this procedure will be referred to here only as 'suspension of performance'.

This chapter adopts the civil law terminology of 'creditors' and 'debtors'. These are clearer and more precise than the traditional common law labels of 'breaching' and 'aggrieved' or 'injured' parties and are more elegant than 'obligor' and 'obligee'. Here, the

¹¹⁴ These limitations are discussed below. See fns 580-590 and accompanying text.

debtor will always be the party who first breached the contract and the creditor will be the party who seeks to suspend its own performance in response to the debtor's breach.

Suspension of performance is often defined in opposition to remedies that bring an end to the contractual relationship, all of which are labelled here as 'termination'. The distinct characteristic of suspension of performance is that it paralyses the contract but does not kill it. Suspension is 'a dilatory plea which ... entitles the injured party *for the time being* to refuse to perform his part'.¹¹⁵ The party suspending performance need not immediately decide whether to terminate the contract; instead, suspension forces the debtor to choose whether to cure its breach or face termination. Conversely, termination brings an end to both parties' obligations; it may give the creditor a right to damages and to the return of such performance as it has already rendered, but will never obligate the debtor to complete performance. A claim by the creditor for specific performance, therefore, is compatible with suspension but not with termination.

Suspension of performance has 'been recognised to some extent as an operative principle in international judicial and arbitral decisions'.¹¹⁶ Consequently, some arbitrators have pronounced the right to suspend performance to be a general principle of international private law. If suspension does constitute a general principle, then arbitral tribunals may be justified in applying it as a part of the *lex mercatoria*. Indeed, several commentators claim that suspension constitutes a general principle.¹¹⁷ Such a position is supported by suspension's association with the *exceptio*, a maxim of long standing and general acceptance in the civil law world. A good example is this unequivocal statement:

With respect to contracts for sale ... it is clear that the right of a party not to perform in the face of non-performance by the other party to an international contract is a part of the *lex mercatoria*. With respect to construction, distribution, or technical assistance contracts ... there is little doubt about the adoption of the *exceptio* by the international trade practice.¹¹⁸

However, claims of the universality of the principle embodied by the *exceptio* are overblown. No common law legal system states a general right of creditors to suspend performance. Even within the civil law world, the doctrines operate inconsistently. The codes of the Germanic legal systems explicitly enshrine the *exceptio* as a broadly-applicable

¹¹⁵ Treitel 1988, 310-11 (emphasis in original).

¹¹⁶ Crawford & Olleson 2001, 56.

¹¹⁷ Debate also exists as to whether the *exceptio* forms a general principle of *public* international law. On this, see generally Crawford & Olleson 2001.

¹¹⁸ Draetta et al 1992, 163. See also O'Neill & Salam 1993.

principle of contract law, while the codes of the Romanistic legal systems, exemplified by France, tend to employ the *exceptio* but not to enshrine it as a general principle.

The French *Code civil* does not contain one all-encompassing provision for cases where the *exception* might be invoked, but rather includes it in provisions dealing with the obligations of seller and buyer in certain nominate contracts. Nevertheless, in a variety of cases spanning more than a century, the Cour de cassation has declared the *exceptio* to be a general principle applicable in all bilateral contracts,¹¹⁹ a position that has been supported by commentators.¹²⁰

International contract law instruments promulgated by various nongovernmental and intergovernmental organisations provide a mixed picture. The UNIDROIT Principles, which are frequently invoked as a 'codification' or 'expression' of the general principles of international law,¹²¹ state a general right to suspend performance,¹²² as do the PECL.¹²³ However, the CISG, which is the premier uniform contract law instrument and is frequently applied in international contracts of sale, does not espouse suspension of performance as a general principle. Indeed, there is reason to doubt that the CISG ever permits a creditor to suspend performance.¹²⁴

An international consensus that creditors have a right to suspend performance therefore cannot be said to exist. However, even if it did, suspension still would not constitute a general principle of international law because there is no consensus on the contours of this putative right—different jurisdictions employ different terminology and reasoning. Despite this variation, however, the doctrines applicable to suspension of performance in different jurisdictions all consider the same set of factors when determining whether a suspension of performance is justifiable.

B. SUSPENSION OF PERFORMANCE IN COMPARATIVE CONTEXT

In civil law countries, suspension of performance is governed by the *exceptio*, which is found in some form in the laws of every civil law jurisdiction, either explicitly named (as

¹¹⁹ See, e.g., Req., 28 April 1862, D. 1863.I.250; Req., 17 May 1938, D.H. 1938.419; Civ. 1^{re}, 20 June 1995 [1995] 1361 Revue de Jurisprudence de Droit des Affaires.

¹²⁰ Most notably Cassin, Pillebout and Raynaud.

¹²¹ See, e.g., Marella 2003, 1142; Farnsworth 1997, 2; Berger 1997, 945; ICC Case No. 10422 of 2001 [2003] JDI 1142; ICC Case No. 8365 of 1996 [1997] JDI 1078 (obs J-J Arnaldez); ICC Case No. 8873 of 1997 [1998] JDI 1017.

¹²² Art 7.1.3. See below, Chapter Three, Section B.3(ii).

¹²³ Art 9:201. See below, Chapter Three, Section B.3(i).

¹²⁴ See below, Chapter Three, Section B.3(ii).

in Germany and Switzerland) or as a rule or set of rules pertaining to particular nominate contracts (as in France). The *exceptio* is unknown in the common law world, except for those jurisdictions (e.g., South Africa and Scotland) that are part of the English legal family but have a civil law heritage. In common law jurisdictions, 'analogies can be drawn [to the *exceptio*], though they are far from precise'.¹²⁵ While the same result will frequently be reached in similar cases before common law and civil law courts, the reasoning and terminology used to justify non-performance is often entirely different.

Treitel suggests two explanations for the absence of the *exceptio* as a singular legal convention in common law countries.¹²⁶ First, there is not as elaborate a taxonomy of bilateral contracts as in the civil law systems, where such contracts are divided into nominate sub-groups. Second, civil law systems tend to conceive of suspension (under the *exceptio*) and termination as separate remedies, while common law systems lump the two together, applying the same rules for their invocation and in some cases using the same term, 'rescission', for both (although this term is falling into disfavour).¹²⁷

In England and the US, the rights to suspension of performance and termination are both determined according to the rules on 'conditions'. This term is used in a variety of senses in Anglo-American contract law, but in this context, conditions can be defined as events upon which the parties' obligations are conditioned. This meaning of condition is further subdivided into promissory and contingent conditions.¹²⁸ If one or both parties are not bound to perform unless an external event not under either party's control occurs, then that event is a contingent condition.¹²⁹ If, on the other hand, the contract is immediately binding on both parties, but party A is not obliged to perform or to tender performance until party B has performed certain of its obligations, then party B's performance is a promissory condition of party A's performance.¹³⁰ Promissory conditions (which are the type of interest here) are subdivided into precedent, concurrent, and subsequent promissory conditions, depending upon whether the condition arises before, simultaneously with, or after the obligation to which it pertains.¹³¹ The classic example of a contract containing concurrent

¹²⁵ Treitel 1988, 306.

¹²⁶ Ibid.

¹²⁷ Cheshire, Fifoot & Furmston 2001, 604

¹²⁸ Treitel 2003, 62.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ibid, 762-764.

conditions is the contract of sale, in which the obligations of delivery and payment are contingent upon each other and (unless otherwise agreed) owed simultaneously.¹³²

The importance of concurrent conditions to suspension of performance is that non-performance by the debtor does not lead to the creditor's performance being excused; rather, the creditor's obligation never becomes due without the performance (or at least tender of performance) of the debtor.¹³³ This characterisation of conditions in the common law systems provides the conceptual link to the *exceptio* as an 'exception' in the civil law sense. Under such a theory, just as the *exceptio metus* might be pleaded to assert that a contractual obligation agreed to under duress never actually existed as a binding obligation, the *exceptio non adimpleti contractus* is pleaded to assert that the creditor's obligation never came into existence because of non-performance by the debtor.

Strictly construed, the *exceptio* is a defence: the creditor suspends its performance, the debtor sues, contending that the suspension constituted a breach of contract, and the creditor defends, citing the *exceptio*. In practice, though, suspension of performance is used most frequently as a form of self-help, deployed to coerce the debtor to complete performance rather than as a defence to a suit by the debtor.¹³⁴

The common law is comfortable with the idea of self-help. For example, the American UCC expressly recognises 'self-help' as a 'remedy' available to an aggrieved party.¹³⁵ In contrast, civil law countries are loath to acknowledge the coercive use of suspension, especially France, where the maxim '*nul ne peut se faire justice à soi-même*' (equivalent to the English expression that no one may take the law into his own hands) remains 'exceedingly influential'.¹³⁶ Nevertheless, the value of permitting self-help in some circumstances is undeniable and civil law commentators acknowledge it; Draetta describes the *exceptio* as 'the most notable' permissible form of self-help in the civil law.¹³⁷ In addition, permitting suspension of performance conforms to the civil law's preference for solutions that preserve the contractual relationship.¹³⁸

¹³² The presumption of concurrent conditions in sales contracts has been codified. In England, Sale of Goods Act 1979 s 28; in the US, Uniform Commercial Code ('UCC'), ss 2-507(1), 2-511(1).

¹³³ Crawford & Olleson 2001, 67.

¹³⁴ Nicholas 1992, 213-214.

¹³⁵ UCC, ss 2-706, 2-712.

¹³⁶ Treitel 1988, 2.

¹³⁷ Draetta et al 1992, 160.

¹³⁸ Jukier 2005, 807-808.

The different rules relating to suspension of performance, regardless of the jurisdiction that promulgated them, all consider four essential factors. Therefore, the laws of states and the decisions of arbitrators can be compared according to the ways that they address those factors. First, the contracts in question must make the obligations of the creditor contingent in some manner. Second, the contract must provide that the parties perform simultaneously or that the debtor perform before the creditor. Third, breaches must meet some minimum standard of severity to justify suspension. Fourth, recognising that 'the wider the gap between the withdrawn performance and the defective one, the more effective a weapon the [*exceptio*] will prove',¹³⁹ courts typically examine the creditor's response. (The neutral term 'quality' will be used to describe the different ways in which the creditor's conduct in suspending performance may be evaluated.)

1. Civil law jurisdictions

Throughout the civil law world, suspension of performance is governed by operation of the *exceptio*. This principle is relatively modern, in that it has no roots in Roman law. The *exceptio* and the wider maxim *inadimplenti non est adimplendum* were extrapolated by the medieval glossators from a variety of Roman law principles applicable to specific instances, such as the *exceptio mercis non traditae*, and from the general principle of good faith.¹⁴⁰

The *exceptio* must be understood within the range of remedies available to a creditor. Of these, three are worth mentioning. The first is retention, which is roughly comparable to a vendor's lien in the common law and permits a seller or deposittee who receives insufficient payment to hold back the goods or thing deposited. Retention overlaps the *exceptio* in that both put pressure on a debtor by withholding performance.¹⁴¹ However, retention applies only to tangible things (not money)¹⁴² and thus is generally available only to sellers and deposittees of goods. In addition, retention is available in unilateral contracts, where one party's promise is exchanged for the other party's performance.¹⁴³

The *exceptio* also works alongside the remedy of price reduction. It allows a buyer faced with incomplete delivery or defective goods to reduce the price unilaterally. In common law jurisdictions, a buyer would have to pay the full price then later sue for damages

¹³⁹ Legrand 1988, 1028 (citing Cassin 1914, 633).

¹⁴⁰ Zimmerman 1996, 801.

¹⁴¹ Nyer 2006, 46 fn 42.

¹⁴² In the Franco-Roman systems. German law recognizes a wide right of retention, which also includes retention of all types of rights under bilateral contracts. Treitel 1988, 249.

¹⁴³ Ibid.

or under a theory of unjust enrichment.¹⁴⁴ Price reduction is distinguished from suspension of performance in two ways. First, there is no equivalent remedy for the seller (e.g., 'goods reduction' or 'services reduction'), while suspension is available to all contracting parties. Second, price reduction amounts to a unilateral amendment to the contract, while suspension insists on performance of the contract without amendment.

Most importantly, suspension must be examined together with termination. Unlike common law jurisdictions, civil law countries distinguish sharply between suspension of performance and termination of a contract. In all of the civil law nations discussed here, termination requires a more serious breach than does suspension of performance. In addition, in some civil law countries, most notably France, court intervention is required to terminate a contract. Pleading the *exceptio*, on the other hand, is a wholly private action; the court's only role is to decide after the fact whether the creditor's suspension was justified.

Given this, it is perhaps curious that the severity of breach required for suspension is closer to that for termination in France than in Germany and Switzerland. The latter two nations demand only that the breach be nontrivial and regulate use of the *exceptio* primarily according to the creditor's conduct. In France, on the other hand, to justify suspension of performance, a debtor's breach must be 'sufficiently serious'. Either way, however, the focus is on the creditor's conduct. If the performance suspended is substantially greater than the debtor's non-performance, civil law courts will hold the suspension unjustified.

(i) *Germany*

Suspension doctrine in Germany is characterised by clarity and simplicity. It is expressed in BGB section 320, entitled *Enrede des nicht erfüllten Vertrags* ('defence of failure to perform the contract'). Section 320 states:

(1) Unless the contract requires him to perform first, a person bound by a synallagmatic contract may refuse to perform his part until the other party effects counter-performance....

(2) If one party has partially performed, counter-performance may not be refused if, under the circumstances, in particular on account of the relative insignificance of the part not performed, the refusal would constitute bad faith.¹⁴⁵

¹⁴⁴ Müller-Chen 2005, 596; Lookofsky 1989, 42-43. In England, under regulations introduced in 2002, consumers may require a seller to reduce the purchase price on defective goods. Sale and Supply of Goods to Consumers Regulations 2002, S1 2002/3045.

¹⁴⁵ English translation from the Institute of European and Comparative law at the University of Oxford <<http://www.iuscomp.org/gla/>> accessed 28 November 2010.

BGB section 320(1) restricts the application of the *exceptio* to true synallagmatic contracts, those which are not merely bilateral, but also where each party's promised performance is exchanged for the other's.¹⁴⁶ Moreover, the obligation suspended by the creditor must be related synallagmatically to the obligation breached by the debtor.¹⁴⁷ German law also assumes, absent contrary intent of the parties, that performance in a synallagmatic contract is simultaneous.¹⁴⁸ If the contract specifies a particular order of performance or belongs to a class of nominate contracts in which sequential performance is the rule, then the party who performs first may not suspend its performance under section 320. German law thus resolves the two issues of order and contingency of performance in one step by limiting the *exceptio* to synallagmatic contracts.

Restricting the *exceptio* to cases of true synallagmatic contracts means that suspension of performance is available in a smaller range of contractual disputes than in other countries. However, the *exceptio* must be seen in the context of the range of remedies available to creditors; under German law, the right of retention (*Zurückbehaltungsrecht*) is available in a wider set of circumstances than in other civil law systems, so the difference between Germany and other civil law countries is not as great as it would appear from looking at the *exceptio* alone.¹⁴⁹

With respect to the debtor's breach, the German rule requires merely that the breach be 'not trivial'.¹⁵⁰ Any non-performance may entitle the creditor to raise the *exceptio*, subject only to the principle *de minimis non curat lex*.¹⁵¹ In the Germanic family of legal systems generally, the extent of breach required to justify suspension is largely immaterial. This rule exemplifies the doctrinal simplicity of German law with respect to suspension of performance, as it avoids the problem of defining what constitutes a fundamental breach.¹⁵²

¹⁴⁶ In a synallagmatic contract, such as any contract for the sale of goods, the parties' obligations are exchanged for each other and are contingent upon each other. Delivery of goods is contingent upon payment of the price and *vice versa*. In a bilateral but non-synallagmatic contract, each party takes on obligations but the two performances are not exchanged for each other. The classic example of a bilateral but non-synallagmatic contract is one where an agent has a duty to act and the principal has a duty to reimburse the agent for her expenses. The agent's duty to act is enforced by the contract but is not contingent upon reimbursement of her expenses, while the principal's duty to reimburse is not contingent upon the agent successfully completing her performance. Treitel 1988, 249.

¹⁴⁷ Ibid, 287.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid, 304.

¹⁵¹ Christie 2001, 468.

¹⁵² Coester-Waltjen 2005, 141.

Instead, German law regulates the availability of the *exceptio* depending on the creditor's conduct. Specifically, BGB section 320(2) provides that the creditor may not refuse to perform if 'the refusal would constitute bad faith'. Practically speaking, however, the good faith test involves an assessment of the extent of the debtor's breach. The rule is one of proportionality: if the performance suspended by the creditor is substantially greater than the breach committed by the debtor, courts may give effect to the *exceptio* only to the extent of the debtor's breach. Moreover, if the breach is not *de minimis* but still relatively minor, courts may not permit the creditor to invoke the *exceptio* at all.¹⁵³ German law, therefore, focuses on whether the creditor's suspension of performance was proportionate; the extent of the breach is relevant to this determination but is not decisive.

(ii) *Switzerland*

The Swiss approach to suspension of performance is similar to the German. In fact, article 82 of the Swiss Code of Obligations (CO) was based on BGB section 320. There are only two differences of note. First, Swiss law permits invocation of the *exceptio* in all bilateral contracts, not just synallagmatic ones. Second, CO article 82 states no requirement of good faith or proportionality with regard to the conduct of the suspending party. However, Swiss courts and commentators agree that the creditor's conduct is bound by the general good faith provision in Swiss law, article 2 of the Swiss Civil Code. Thus, Switzerland, like Germany, requires suspension of performance to have been undertaken in good faith and may limit the protections of the *exceptio* to the extent of the debtor's breach.¹⁵⁴

(iii) *France*

The use of the *exceptio* in French law cannot be understood except in the context of the rules regarding termination of the contract (*résolution*). The right to terminate exists in all bilateral contracts under *Code civil* article 1184, but a party cannot simply give notice that it is terminating a contract, as in other legal systems. Rather, a creditor must first serve upon the debtor a *mise en demeure*, which is a formal notification of the delinquency, then launch an *action en résolution*. Termination of a contract does not occur until a court orders it. There are only two exceptions to this lengthy and occasionally expensive process: the

¹⁵³ Treitel 1988, 303.

¹⁵⁴ Ibid, 304.

inclusion in the contract of a termination clause or conduct by the debtor in such bad faith that continuing the contractual relationship would be impossible or unconscionable.¹⁵⁵

Although the *exceptio* technically may be invoked only as a defence to an action for breach launched by the debtor, it may be relied on without judicial process. If a debtor does sue the creditor for breach of the contract, the court must give effect to the *exceptio* if the circumstances are such as to justify the creditor's refusal to perform. Thus, invocation of the *exceptio* is a particularly attractive option in France; it is frequently relied on even in cases of a breach severe enough that a court would grant *résolution*.¹⁵⁶

The *exceptio* is not expressed in the French *Code civil* as a general principle of contractual relationships. Instead, sections of the *Code civil* that deal with certain nominate contracts contain separate expressions of the *exceptio* applicable to that type of contract only. The *exceptio* appears in provisions relating to sales contracts, (articles 1612 and 1653), *échanges* (article 1704; an *échange* is in essence a barter contract, where one physical thing is exchanged for another) and *dépôts* (article 1948; a *dépôt* is a deposit contract, where the subject matter of the contract is kept by one party and later returned in kind).

Each of these articles states the relevant principle but provides little detail. For example, article 1612, pertaining to sales, reads in full: 'The seller is not obliged to deliver the thing where the buyer does not pay the price of it unless the seller has granted him time for the payment.'¹⁵⁷ As a result, specific rules limiting use of the *exceptio* have been developed by the courts and by commentators.

The contract must be bilateral but need not be synallagmatic: 'While French law requires that the obligations should arise out of the same contractual relationship, this will of itself generally satisfy the requirement for interdependence.'¹⁵⁸ With respect to order of performance, it is presumed that performance in bilateral contracts is simultaneous, although this can be overridden by express contractual terms or standard industry usages.¹⁵⁹ For nominate contracts, order of performance may be determined statutorily. For example, under *Code civil* article 1612, performance in sales contracts is simultaneous unless the goods are

¹⁵⁵ Laithier 2005, 118. The *Cour de cassation* has upheld the right of a creditor to terminate unilaterally if the breaching party's conduct is egregious, but has cautioned that such unilateral action is at the terminating party's risk. Civ. 1^{ère}, 28 octobre 1998, *Bull I*, n° 211.

¹⁵⁶ Treitel 1988, 311.

¹⁵⁷ Official English translation <<http://www.legifrance.gouv.fr>> accessed 28 November 2010.

¹⁵⁸ Marsh 1994, 325.

¹⁵⁹ Treitel 1988, 286-288.

bought on credit or under an arrangement where payment is not due until a later date. In such cases, the seller must perform first.

In France and the jurisdictions influenced by it, the severity ('*gravité*') of the breach is an important factor; the breach must be '*suffisamment grave*'.¹⁶⁰ Under the *Code civil*, whether a breach involves partial or defective performance is less important than the effect of the breach on the creditor. One common formulation is that the breach must be such that, 'if the aggrieved party had known of it, he would not have entered into the contract'.¹⁶¹ A frequently-cited application of this principle is that a tenant cannot refuse to pay rent solely on the grounds that the landlord has failed to maintain the premises unless the want of repair is so great as to make enjoyment of the premises impossible.¹⁶² Opinion is divided on whether the *exceptio* is available to a buyer in case of defects that give rise only to guarantee liability,¹⁶³ but French commentators agree on the whole that the *exceptio* should only be available in cases of severe defects.¹⁶⁴

As in Germany and Switzerland, creditors suspending performance must do so in good faith. However, French courts place greater emphasis on the proportionality of the suspension than do German or Swiss ones.¹⁶⁵ In particular, the majority view is that, 'In a [bilateral] contract, the non-performance by one of the parties of some of his obligations does not necessarily release the other from all of his obligations.'¹⁶⁶

The requirement of proportionality can also subsume the requirement of a sufficiently serious breach. For example, the *Cour de cassation* has held that a lessee of computer disks that turned out to be defective could not suspend performance. Although the disks did not perform as well as advertised, they were viable for the lessee's purposes. Where the debtor's breach results in no real harm to the creditor, suspension of *any* performance by the creditor is unjustifiably disproportionate.¹⁶⁷ Indeed, some commentators describe the requirement of

¹⁶⁰ Cass. 1^e civ., Oct. 19, 1999, R.J.D.A. N° 1290; see also Ghestin et al 2001, 441.

¹⁶¹ Nyer 2006, 51.

¹⁶² Treitel 1988, 302-303.

¹⁶³ There is no direct equivalent to guarantee liability in the common law. It is similar to strict products liability in American law or, more generally, to liability arising from breach of an implied warranty of merchantability.

¹⁶⁴ Treitel 1988, 302.

¹⁶⁵ Marsh 1994, 324.

¹⁶⁶ Cass. soc., Oct. 21, 1954, J.C.P. 1955, II, 8563, obs P Ourliac & M de Juglart (cited and translated in Legrand 1988, 1029). Some cases do go the other way. See, e.g., Cass. req., Apr. 20, 1921, D.P. 1922, I, 181. (Tenant was justified in withholding rent in its entirety after owner refused to make repairs.)

¹⁶⁷ Cass. com., Jan. 30, 1979, D.S. 1979, Inf. rap. 317.

a serious breach to be an aspect of the general rule of good faith: it would be in bad faith for a creditor to suspend performance in response to a relatively minor breach.¹⁶⁸

Finally, French law includes a public policy exception to the applicability of the *exceptio*. Under French administrative law doctrine, the *exceptio* is unavailable to parties involved in government contracts, a result justified by the overriding state interest in uninterrupted provision of public services.¹⁶⁹

2. Common law jurisdictions

At about the same time that the doctrine of the *exceptio* was developing among the canonists of continental Europe, actions for assumpsit and wholly executory bilateral contracts came to be recognised in England.¹⁷⁰ (Previously, the only action available was for debt.¹⁷¹) It came to be understood that contracts could involve an exchange of one promise for another, but the promises were held to be independent. Thus, if one party failed to perform, the other had no choice but to perform and later sue for damages.¹⁷²

It was not until *Kingston v Preston* in 1773 that there arose the notion that promises in a bilateral contract may be conditional upon one another. In *Kingston*, a silk mercer had promised to sell his business to his apprentice. The price was to be paid in monthly instalments over several years, the apprentice to provide 'good and sufficient security' for the payments before the business was conveyed to him. When the apprentice failed to arrange security, the Court of King's Bench excused the seller, holding that requiring performance would be the 'greatest injustice'.¹⁷³ Although Lord Mansfield allowed that promises in bilateral contracts could be independent of one another, here the master's promise to convey the business depended on the apprentice's promise to provide security; the buyer's obligation was a 'precedent condition' of the seller's.

The common law rules on suspension of performance continue to be expressed in terms of conditions. Indeed, in both the US and England, suspension of performance as a remedy can only be understood in the context of conditions. Whether expressly stated in a contract or implied by law, conditions 'may determine not only the *content* of a party's

¹⁶⁸ Marsh 1994, 324.

¹⁶⁹ Cons. d'Etat, 28 Nov. 1890, Rec. Lebon 1890, 881; Cons. d'Etat, 19 Mar. 1930, Rec. Lebon 1930, 311.

¹⁷⁰ Baker 2002, 333-334.

¹⁷¹ Ibid, 329.

¹⁷² Farnsworth 1999, 553-554.

¹⁷³ (1773), 99 Eng Rep 437 (KB).

obligations but also the *consequences of their non-performance*'.¹⁷⁴ Here, the existence of a condition means that a party's obligation is contingent on the occurrence of a particular event, in this case the other party's performance. The primary difference between the US and England is that American courts presume that obligations in bilateral contracts are mutual conditions, while in England, a party seeking to justify suspension of performance has the onus to prove the existence of mutual conditions.

Order of performance is generally considered to be as important in common law systems as under the civil law; a party who must perform first cannot suspend performance. However, in both England and the US, there is a trend towards recognition of concurrent conditions as the default position. The *Restatement (Second) of Contracts* embodies this trend: where the parties' performances 'can be rendered simultaneously, they are to that extent due simultaneously, unless the language or the circumstances indicate the contrary'.¹⁷⁵

An important aspect of the holding in *Kingston v Preston*—one that continues to influence common law doctrines of non-performance—is that Lord Mansfield made no distinction between a non-occurrence of a condition precedent that would justify suspension of performance and one that would justify termination of the contract. To this day, no common law legal system distinguishes explicitly between termination and suspension, lumping them both under the heading of 'rescission'.

A consequence of this conflation of the standards applicable to termination and suspension is that, under the common law, a creditor may not suspend performance unless the debtor's breach is serious. Although neither England nor the US recognises a distinct remedy of suspension, both limit the ability of creditors to suspend performance primarily according to the extent of the breach; the conduct of the creditor is irrelevant. In particular, 'no requirement of proportionality between the breach and the suspension of performance has been advocated in common law jurisdictions'.¹⁷⁶ Instead, the creditor's conduct is regulated by the doctrine of unjust enrichment; courts will award damages in equity to a debtor if the suspension of performance unjustly enriched the creditor.¹⁷⁷

¹⁷⁴ Treitel 1988, 257.

¹⁷⁵ Restatement (2d) of Contracts, s 234. This section also provides that, where one party's performance requires a period of time to complete, that party must perform first.

¹⁷⁶ Nyer 2006, 61.

¹⁷⁷ Treitel 1988, 291.

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¹⁷⁴ Treitel 1988, 257.

¹⁷⁵ Restatement (2d) of Contracts, s 234. This section also provides that, where one party's performance requires a period of time to complete, that party must perform first.

¹⁷⁶ Nyer 2006, 61.

¹⁷⁷ Treitel 1988, 291.

(i) *England*

Mustill cites a 1976 ICC arbitration award to the effect that, under English law, an aggrieved party faced with a serious breach may terminate the contract but that it may not suspend performance.¹⁷⁸ Such a position may still be operative under English law. In 1992, the Court of Appeal stated, 'there is not yet any established doctrine of English law that [a creditor] may suspend performance, keeping the contract alive'.¹⁷⁹ Nevertheless, English courts do permit suspension of performance in certain circumstances.

England provides the counterpoint to Germany's doctrinal simplicity; the legal issues are clouded by overlapping terms and a lack of consensus on the tests to be applied. Treitel writes, 'discussions of this problem are often widely scattered in the books, with the result that very different solutions are proposed for problems which appear to be basically similar'.¹⁸⁰ Despite the confusion, English doctrine on suspension of performance is streamlined in one sense: issues of order of performance, conditionality of performance, and extent of breach are essentially coterminous. To understand the current state of affairs, a historical perspective is required.

In the landmark case of *Boone v Eyre*,¹⁸¹ Lord Mansfield elaborated on the doctrine he laid down in *Kingston v Preston*. *Boone* involved a contract for the sale of a plantation, including the slaves who lived and worked on it. The buyer refused to pay, justifying his refusal on the basis that the seller did not own all of the slaves and consequently could not transfer title to them. The court held that the obligation at issue—to deliver title to the slaves—did not go to the heart of the bargain and therefore that the buyer could not avoid his obligation to pay the purchase price. Setting out the rule, Lord Mansfield wrote that, 'where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent'.¹⁸²

Later cases extended this concept to recognise the existence of concurrent conditions (also called interdependent conditions), which exist when the parties are to perform

¹⁷⁸ Mustill 1988, 112 fn 96 (citing ICC Case No. 2583 of 1976 [1977] JDI 950).

¹⁷⁹ *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1992] 749 QB 656.

¹⁸⁰ Treitel 1967, 139.

¹⁸¹ (1777), 126 Eng Rep 160 (KB).

¹⁸² *Ibid.*

simultaneously.¹⁸³ Thus, with respect to order of performance, 'Where the obligations are concurrent or the breached obligation is a condition precedent of the other party's obligation', the breach may justify suspension of performance.¹⁸⁴

In the Victorian era, courts came to categorise contractual obligations as either 'conditions' or 'warranties'. The breach of a 'condition' would allow the aggrieved party to terminate the contract, while the breach of a 'warranty' would give rise only to a claim for damages. This terminology was codified in the Sale of Goods Act 1893.

Whether English courts spoke of conditions versus warranties or (following the terminology in *Kingston*) dependent versus independent obligations, the main factor by which suspension was regulated was the importance of the contractual term breached by the debtor. The conditionality of the parties' obligations was typically reasoned backward from this point, so that an obligation would be characterised as a warranty if it was collateral or relatively unimportant, while obligations that went to the heart of the benefit the creditor expected to receive were characterised as conditions.¹⁸⁵

In determining whether an obligation constitutes a condition, English courts look first for evidence of the parties' intent, in particular for any terms designated 'of the essence'. Absent such evidence, English courts have tended to rely on characterisations adopted by previous case law in relation to specific types of contracts. In this manner, English law has come to resemble the civil law distinctions between different nominate contracts. Thus, for example, 'under a contract of employment or a building contract, the carrying out of work by the employee and the builder respectively is regarded as a condition precedent for payment'.¹⁸⁶

The focus on the importance of the term breached persisted until the 1962 Court of Appeals judgment in *Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha*.¹⁸⁷ This case involved a charterparty in which the ship's owner covenanted to maintain the ship in 'seaworthy' condition. The charterer withheld payment, alleging breach of the seaworthiness term for missing equipment and lack of a competent crew. Lord Diplock swept away the distinction between conditions and warranties, observing that complex obligations such as

¹⁸³ Treitel 1988, 281.

¹⁸⁴ Marsh 1994, 325.

¹⁸⁵ Treitel 1988, 283.

¹⁸⁶ Ogus 1989, 244-245, citing *Sumpter v Hedges* [1898] 1 QB 673. However, for a contractor to have the right to suspend work for missed payments, this must be provided in the contract.

¹⁸⁷ [1962] 2 QB 26 (CA).

ensuring seaworthiness, which are endemic in modern contracts, cannot be cleanly divided into the two categories. Instead, he set out a standard that focuses on the effect of the breach on the creditor, not the centrality of the term breached:

...the judge had to ... look at the events which had occurred as a result of the breach ... and to decide whether the occurrence of those events deprived the charterers of substantially the whole benefit which it was the intention of the parties as expressed in the charterparty that the charterers should obtain.¹⁸⁸

Since *Hong Kong Fir Shipping*, contractual terms have been considered innominate, *i.e.*, neither conditions nor warranties, unless the contract says differently. Whether performance may be suspended depends on the seriousness of the breach and its consequences for the creditor. Indeed, where terms can be innominate, it makes no sense to insist upon the condition/warranty dichotomy. Instead, *Hong Kong Fir Shipping* places English law on a course familiar to civil lawyers, where the consequences of the breach for the creditor is a key factor.

Despite this holding, the law remains unsettled. The test set forth by Lord Diplock in *Hong Kong Fir Shipping* is cited as the controlling one under British law by the official comment to article 9:201 of the PECL. However, some English courts and commentators continue to look to the importance of the term breached or continue to use the terminology of independent versus dependent conditions or of conditions *vs.* warranties. For example, the Sale of Goods Act 1979 contains a section entitled 'when condition to be treated as warranty',¹⁸⁹ and specifically designates as conditions certain implied terms, such as those describing the goods¹⁹⁰ or requiring them to be of a particular quality.¹⁹¹

Since English courts do not generally recognise a right to suspend performance and keep the contract alive, no distinction is made in England between breaches that justify termination of a contract and those that only justify suspension. This fact, combined with the absence of a general duty of good faith in English law, means that little attention is paid to the quality of the suspending party's conduct. Proportionality only enters into the question in one sense: if the obligation breached by the debtor is severable, its breach justifies suspension

¹⁸⁸ Ibid, 72.

¹⁸⁹ Sale of Goods Act 1979 s 11.

¹⁹⁰ Ibid s 12.

¹⁹¹ Ibid s 14.

of only the equivalent aspects of the creditor's obligations that remain unperformed.¹⁹² This is most likely in long-term relationships like distributorships or construction contracts where performance is in stages or instalments.

(ii) *The United States*

In the United States, there is less linguistic confusion than in England—on this subject at least. The non-occurrence of any precedent or concurrent condition will entitle a party to withhold performance, regardless of whether that condition is contingent or promissory. In addition, performance is presumed to be conditional and simultaneous in all bilateral contracts, under the doctrine of 'constructive conditions of exchange'.¹⁹³ Unlike in England, therefore, the bar is low as to a finding that an obligation is conditional on the other party's performance. Thus, the Restatement (Second) provides:

Performances are to be exchanged under an exchange of promises if each promise is at least part of the consideration for the other and the performance of each promise is to be exchanged at least in part for the performance of the other....¹⁹⁴

It is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time.¹⁹⁵

Summing up the jurisprudence, Farnsworth states: 'only by the clearest language can the parties make a promise to which the concept of constructive conditions does not apply ... the judicial preference for constructive conditions of exchange and the self-help remedies that they afford the injured party is overwhelming.'¹⁹⁶

Thus, proving the conditionality of its obligations is seldom problematic for an American creditor seeking to justify suspension of performance. Furthermore, absent circumstances that indicate a particular order of performance, US courts will generally construe all bilateral contracts to require simultaneous performance.¹⁹⁷ In keeping with its more permissive attitude towards self-help, American law applies the doctrines relating to suspension of performance in every type of bilateral contract.

¹⁹² See Treitel 1988, 596-601.

¹⁹³ Restatement (2d) of Contracts s 259; see also Farnsworth 1999, 561-565.

¹⁹⁴ Restatement (2d) of Contracts s 231.

¹⁹⁵ Ibid s 237.

¹⁹⁶ Farnsworth 1999, 556.

¹⁹⁷ Ibid, 565.

Balancing these presumptions, which favour creditors, are strict rules relating to the severity of the breach required to justify suspension, namely the doctrine of material breach.¹⁹⁸ Only a material breach by the debtor justifies suspension or termination. Under the Restatement, five factors 'are significant' in a determination of material breach:

- (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected
- (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
- (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.¹⁹⁹

Note that, in contrast to the traditional approach in English law, the first four factors relate to the effects of the breach upon the creditor, rather than to the importance of the term breached.

As with English law, US law does not distinguish between different levels of breach to justify suspension and termination. Instead, a material breach 'triggers several possible legal responses. They include the power to suspend performance, the power to abandon a contract and find substitute performance, and the power to rescind a contract and recover in restitution for performance already rendered.'²⁰⁰

Despite this, US courts may in fact set different standards for suspension and termination. The Restatement indirectly promotes a differential standard by focusing on what happens after the breach. Factor (d) of the five factors set out above in section 241 for determining whether a breach is material is 'the likelihood that the party failing to perform ... will cure his failure'. Section 237 states that it is a condition of a party's remaining performance that there be no '*uncured* material failure' of the other party's performance (emphasis added). Finally, section 242 states that, when determining how long a creditor must wait before its obligations are discharged, the factors in section 241 are relevant, as well

¹⁹⁸ Gergen 2005, 76.

¹⁹⁹ Restatement (2d) of Contracts s 241.

²⁰⁰ Gergen 2005, 76.

as 'the extent to which it reasonably appears to the injured party that delay may prevent or hinder him in making reasonable substitute arrangements'.

It thus appears that, if a material breach is incurable or if a delay in performance would prevent the creditor from concluding a substitute transaction, the creditor may treat the material breach as 'total' and terminate the contract immediately.²⁰¹ In other words, in cases where a material breach may be cured within a reasonable period of time, 'such a breach would justify only *suspension* of performance by the injured party: he is only discharged if the breach is not cured within the time allowed by law'.²⁰²

This doctrine performs the same dilatory function as the *exceptio*.²⁰³ It is also sensible: suspension cannot last indefinitely. American courts share continental European courts' preference for 'keeping the deal together' to some degree, but will do only so long as it does not 'seriously disappoint' the justifiable expectations of the parties.²⁰⁴ The means by which American courts achieve this balance is the delay factor, permitting suspension of performance for material breaches, but termination only after an appropriate length of time has passed.

US law dwells little on the creditor's conduct. Despite some notable exceptions, American courts will permit a party 'to refuse nonconforming performance to avoid suffering an uncompensated loss even though the refusal imposes a disproportionate loss on the defaulter'.²⁰⁵ As in England, the relevant jurisprudence deals primarily with contracts that involve severable obligations. Thus, a breach with respect to one instalment will justify suspension only of the creditor's performance relating to that instalment. Only if a breach 'with respect to one or more instalments substantially impairs the value of the whole contract' will a creditor's suspension of its entire performance be upheld.²⁰⁶

3. International contract law instruments

With respect to termination, the four international contract law instruments considered here all contain similar provisions, to the point of using the same terminology. They all distinguish between ordinary and fundamental breaches of contract and limit termination to

²⁰¹ The UCC also contemplates a period between suspension and termination, during which the debtor may cure its breach and thus prevent termination. See UCC s 2-508.

²⁰² Treitel 1988, 313 (emphasis in original).

²⁰³ Farnsworth 1999, 525.

²⁰⁴ Ibid, 580.

²⁰⁵ Gergen 2005, 84. The two well-known exceptions are *Jacob and Youngs v Kent*, 230 N.Y. 239, 129 N.E. 889 (1921) and *Plante v Jacobs*, 10 Wis. 2d 567, 103 N.W. 2d 296 (1960).

²⁰⁶ UCC s 2-612(3). The English Sale of Goods Act 1979 s 31(2) contains a similar rule.

cases of fundamental breach, differing only in whether they define fundamental breach according to 'general interpretive guidelines' (the CISG and ULIS) or lists of factors relevant to such a determination (the UNIDROIT Principles and PECL).²⁰⁷ They also all contain provisions governing instalment contracts, which state that a fundamental breach of one instalment can only lead to termination with respect to that instalment, unless the breach gives rise to a legitimate concern that fundamental breach will recur in future instalments.²⁰⁸

On the matter of suspending performance, however, they differ. Most importantly, the UNIDROIT Principles and PECL state a general right to suspend performance, while the CISG and ULIS permit suspension only in limited circumstances, if at all.

(i) *The UNIDROIT Principles and PECL*

In both the UNIDROIT Principles and the PECL, suspension of performance is governed primarily by a single provision. UNIDROIT Principles article 7.1.3 states:

(1) Where the parties are to perform simultaneously, either party may withhold performance until the other party tenders its performance.

(2) Where the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed.

Art 7.1.3 deals with suspension in a single step. Order of performance is determined expressly. Article 6.1.4 sets up a presumption of simultaneous performance where simultaneity is possible; if one party's performance is to be rendered over time, that party must perform first. The conditionality of the creditor's obligations is regulated implicitly, in that contracts are presumed to be bilateral and no requirement of synallagma is expressed. In addition, the UNIDROIT Principles follow the Germanic position in that no minimum severity of breach is required. Finally, while the quality of the creditor's conduct is not addressed in the text of article 7.1.3, the official comment makes clear that the creditor must conform to the overriding requirement of good faith and fair dealing stated in article 1.7.

The PECL's suspension of performance regime is similar. Article 9:201(1) states:

A party who is to perform simultaneously with or after the other party may withhold performance until the other has tendered performance or has performed. The first party may withhold the whole of its performance or a part of it as may be reasonable in the circumstances.

²⁰⁷ Liu 2005, 124.

²⁰⁸ See, e.g., CISG art 73(2); UNIDROIT Principles art 7.3.1(2)(d).

Performance is presumed to be simultaneous unless 'circumstances indicate otherwise'.²⁰⁹ Thus, the only significant difference from the UNIDROIT Principles is that the requirement of reasonableness on the part of the creditor is express. The official comment to article 9:201 makes the matter even clearer: the debtor's breach need not be 'fundamental', but the performance suspended must not be 'wholly disproportionate' to the obligation breached.

(ii) *The CISG and ULIS*

The CISG and ULIS deal only with contracts for the sale of goods, which are by nature bilateral and synallagmatic. They both presume that performance is to be simultaneous, and permit the parties to agree otherwise. For example, CISG article 58(1) provides that, by default, the buyer must pay the price when the seller places the goods or documents of title at the buyer's disposal. In other words, 'the goods are exchanged for the price'.²¹⁰ Similarly, ULIS article 71 states that 'delivery of the goods and payment of the price shall be concurrent conditions'. However, the ULIS does not spell out the consequences if a concurrent condition is not fulfilled.

Whether, under the CISG, a creditor may suspend performance for non-performance by the debtor is a matter of debate. The only CISG provision that has ever been held to permit suspension is article 71, which is entitled 'suspension of performance':

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

(a) a serious deficiency in his ability to perform or in his creditworthiness; or

(b) his conduct in preparing to perform or in performing the contract.

Notwithstanding its title, article 71 does not create a right to suspend performance. It may only be invoked before performance is due and thus before any breach could possibly occur.²¹¹ In other words, article 71 is available only for cases of 'prospective failure of performance'.²¹² As suspension is to termination, article 71 is to anticipatory repudiation. The difference between suspension of performance and the remedy described in article 71 is

²⁰⁹ PECL art 7:104.

²¹⁰ Honnold 1999, 364.

²¹¹ CISG Explanatory Note [33].

²¹² Honnold 1999, 428.

underlined by legislative history; it was designed to address such situations as when goods are purchased on credit, but the buyer becomes insolvent prior to delivery.²¹³

Nevertheless, at least two courts have applied article 71 to find a right of suspension in cases where breach has already occurred.²¹⁴ Therefore, some discussion of the circumstances under which article 71 would permit suspension is warranted. Here, too, there is disagreement. Article 71 states that the prospective non-performance must constitute a 'substantial part' of the debtor's obligations, a standard that is not defined and appears only in one other article of the CISG.²¹⁵ On the other hand, fundamental breach is explicitly defined in article 25 and appears in several articles. The legislative history of article 71 provides no guidance; debate on its wording focused on the degree of certainty with which the prospective non-performance must be foreseeable.²¹⁶

Heuzé argues that, to define 'substantial' in article 71, we should analogise to CISG article 46, which permits a buyer to demand cure only if the seller's breach is fundamental; therefore, a requirement of prospective fundamental breach is implied by article 71.²¹⁷ However, one could as reasonably analogise to the remedy of price reduction under CISG article 50, which does not require fundamental breach.²¹⁸ More importantly, article 71 does not use the term 'fundamental', while article 72, which deals with anticipatory repudiation, refers specifically to prospective fundamental breaches. Thus, whatever 'substantial' means, it must be something less than 'fundamental'.²¹⁹

When it comes to regulating the creditor's conduct, nothing in the text of article 71 states the extent to which performance may be suspended; there is no mention of proportionality. The CISG does not even contain a general provision requiring the parties to act in good faith.²²⁰ Schlechtriem maintains, in line with CISG article 50, that prospective suspension of performance under article 71 must 'correspond with the disadvantage caused by the nonconformity'.²²¹

²¹³ Ibid, 426. Cf Hornung 2005.

²¹⁴ The Austrian Supreme Court, OGH Feb. 12, 1998, 2 Ob 328/97t, and a district commercial court in Hasselt, Belgium, *J.P.S. BVBA v Kabri Mode BV*, AR 3641/94, Rechtbank van Koophandel Mar 1 1995.

²¹⁵ Art 3(1), which deals with the CISG's applicability to mixed manufacturing and sales contracts.

²¹⁶ Honnold 1999, 428-430.

²¹⁷ Heuzé 1992, 158.

²¹⁸ Schlechtriem 2004 s II, 5(c)(aa). Art 50 should not be taken as granting a specific right of suspension; the *travaux* make clear that art 50 is derived from the remedy of price reduction, not from the *exceptio*.

²¹⁹ Bennett 1987, 518.

²²⁰ Art 7(1) CISG states merely that good faith is to be regarded in the interpretation of the convention.

²²¹ Schlechtriem 2004 s II, 5(c)(aa).

The relevant rules under the ULIS are essentially identical to the CISG. The ULIS does not create a general right of suspension of performance but does include, in article 73, an analogue of CISG article 71. Also like the CISG, the ULIS contains a buyer's right to reduce the purchase price; however, as noted above, this should not be construed as a specific instance of suspension of performance.

C. SUSPENSION OF PERFORMANCE IN INTERNATIONAL COMMERCIAL ARBITRATION

When ICA tribunals are convened, the international nature of the proceedings means that choice of law is always an issue. Thus, in contrasting the approaches of ICA tribunals and courts on cases of suspended performance, one must consider not only to how ICA tribunals apply the law, but also to how they determine which substantive law applies.

As discussed in Chapter Two, when a tribunal does not sit as *amiable compositeur*, it must determine the applicable law. If the parties' contract selects a particular law, the tribunal will respect that choice. If the contract does not designate a substantive law, most institutional arbitral rules permit the tribunal either to select the choice of law rule it considers appropriate or to designate an applicable law directly. National courts, on the other hand, must generally follow the choice of law rules prescribed by their states' private international laws. National choice of law regimes may also prohibit courts from applying transnational rules of law, even if the parties invoke such rules in their contracts. As noted in Chapter Two, arbitral rules give arbitrators greater power to determine the applicable law than national court judges possess, but they do not direct the exercise of that power. Accordingly, the laws that arbitrators choose when the contract does not contain a choice of law provide insight into arbitrators' mindset and priorities.

Once the applicable law is determined, state courts can be expected to take the approach associated with their national legal traditions, and will rely on domestic statutes and precedents as sources of law. Thus, for example, a French judge confronted with a case of suspended performance can be expected to determine first whether a breach is sufficiently serious to permit suspension by the creditor and then to examine whether the creditor's response was proportionate. A German judge might focus first on whether the contract was synallagmatic and then go directly to a determination of whether the suspension was in good faith. Only occasionally will courts reach outside their domestic law, such as when the parties specifically contract for the application of general principles of law to supplement

their choice of national law, or when a judge seeks to reinforce an interpretation by noting that courts of other states have reached the same conclusion.

By contrast, after determining that a particular law applies, ICA tribunals frequently refer to general principles of law and employ patterns of reasoning and terminology associated with other jurisdictions. This is so regardless of the country of origin of the arbitrators and regardless of whether any given national law or international contract law instrument is applied. Thus, for example, we might see an arbitrator considering a contract under American law make reference to the *exceptio*, or an arbitrator applying German law consider whether the debtor breached an important term of the contract.

1. Analysis of published awards

In any award that reaches a decision on the merits, ICA tribunals can take one of four courses of action:

- state that a particular national law or international instrument governs, then apply that law closely, using terminology and reasoning particular to the state or instrument and turning to authorities associated with the state or instrument;
- state that a particular law governs, but also appeal to general principles or utilise terminology or reasoning particular to a different jurisdiction;
- apply general principles directly, either because the contract calls for their application or because the tribunal, acting as *amiable compositeur*, declines to make a choice of law; or
- apply no legal principles whatsoever, when acting as *amiable compositeur*.

The following are examinations of the publicly available arbitral awards that deal with cases of suspension of performance. Where the nationality of the parties or of the arbitrators is stated in the published version of the award, these are supplied. Cases that deal with termination of contracts are more numerous, but they are included here only insofar as they also consider suspension. Although the number of awards is small, each of the four possible outcomes occurs at least once.

(i) ICC Case No. 4629 of 1999²²²

The tribunal considered a construction contract containing an express choice of Swiss law. The tribunal did as a court would and applied Swiss law; where a contract contains a clear and valid choice of law clause invoking a particular national law, there is little leeway for a court or an ICA tribunal to apply a different law.

²²² (1993) XVIII Ybk Comm Arb 11.

This case is also paradigmatic of an arbitration tribunal following the approach of a national court in applying the law to the facts: the tribunal decided the suspension of performance issue in accordance with article 82 of the Swiss *Obligationenrecht* (OR), which it specifically cited, and referred only to Swiss authorities to interpret article 82.

The contract called for the claimants to construct a hotel for the respondent, a Middle Eastern hotel developer. The claimants were to supply all materials and equipment and to complete work before a deadline. The respondent was, among other things, to obtain import licenses and regulatory authorisations and to fulfil various credit conditions set by the claimants' bank. The claimants began work, but soon suspended performance on the grounds that the respondent had failed to fulfil its obligations. When the respondent later drew down the performance bond that the claimants had issued, the claimants initiated arbitration.

The tribunal held that the respondent had breached its obligations, so it 'could not reasonably insist' that the contractors finish by the deadline. It analysed the propriety of the claimants' suspension under OR article 82, which it characterised as embodying the *exceptio*, and which it found to apply when the parties are to perform simultaneously. The tribunal further cited the Swiss Federal Court to the effect that article 82 is inapplicable to breaches of collateral obligations, but found that the obligations breached by the respondent were not collateral. Finally, the tribunal held that, under OR article 108(1), the claimants would have been entitled to terminate the contract as soon as the respondent refused to remedy its non-performance, so the claimants 'were *a fortiori* justified in suspending their work'. Such a ruling is consistent with the Swiss approach, which requires a more severe breach to justify termination than suspension of performance.

(ii) *Klöckner Industrie-Anlagen GmbH (FR Germany) v United Republic of Cameroon*²²³

Klöckner entered into several contracts in the 1970s with the government of Cameroon to supply and construct a fertilizer plant, then provide technical and commercial management for the plant. The contracts contained no choice of law clause.

The arbitration was conducted by a tribunal of the International Center for the Settlement of Investment Disputes (ICSID). Under the ICSID Convention, absent a choice of law by the parties, the law of the party to a dispute which is a contracting state to the ICSID

²²³ ICSID Case No. ARB/81/2, Award (Oct. 21, 1983) 2 ICSID Rep 95 (1994) (original decision, English tr); ICSID Case No. ARB/81/2, Decision on Annulment (May 3, 1985) (1986) XI Ybk Comm Arb 162 (annulment decision, English tr).

Convention will apply. Klöckner did not contest the application of Cameroonian law. However, Cameroon has a dual judicial heritage, different parts of the country having been colonies of France and the UK. The two systems of law remain; disputes between parties from the same region are decided under the law historically in force in that region. Since the fertilizer plant was located and the contracts negotiated in eastern Cameroon, where the law is French, the tribunal applied French-derived Cameroonian law. This appears to be the approach that a Cameroonian court would have taken.

After nineteen months of 'unprofitable and technically inadequate operation', the plant shut down. Klöckner instituted arbitration for the outstanding balance of the price for supplying and constructing the plant. Cameroon defended on several grounds under French-derived law, including the *exceptio*. It claimed that its refusal to pay the entire price was justified by Klöckner's various breaches. Although the tribunal's analysis of the *exceptio* issue referred to French law, it did note, 'in view of the parties' divergence as to applicable law ... that English law and international law reach similar conclusions'.

The tribunal (composed of Uruguayan, American and French arbitrators), found the *exceptio* to embody a general principle of 'French, English and international law'. To find the *exceptio* in French law, it cited various French commentators and court decisions. Its characterisation of the *exceptio* under French law will be discussed below.

As to English law, the tribunal cited a single ICC arbitration award,²²⁴ in which the sole (English) arbitrator wrote that, given the 'mutuality' inherent in all contracts, 'if the seller does not [perform], the buyer may release himself from his obligation to pay'. The tribunal cited no English statute or case law to the effect that the *exceptio* constitutes a general principle under English law. Had an English court decided the issue, it is unlikely to have made such a statement, since the necessary 'mutuality' is not presumed under English law. Instead, an English court would likely have inquired first (following *Hong Kong Fir Shipping*) whether the debtor's breach substantially deprived the creditor of the benefit it expected to receive under the contract or (according to the older formulation) whether the obligation breached constituted a condition of the creditor's performance.

The tribunal cited an opinion of the PCIJ in the *Diversion of Water from the Meuse* case,²²⁵ which stated that the general principle of *inadimplenti non est adimplendum* constitutes a general principle of international law. This citation is dubious. First, the

²²⁴ The *Fertilizer Corporation of India* case, published as an annex to Paulsson 1987.

²²⁵ [1937] PCIJ (ser A/B), No. 70, 4, 50.

tribunal did not address the distinction between general principles of public and of private international law; the *Meuse* case dealt with the treaty obligations of states, not the contractual obligations of private parties. Second, it failed to note that the opinion cited, that of Judge Anzilotti, was a dissent. Third, it did not distinguish between the wider maxim of *inadimplenti non est adimplendum* and the more specific *exceptio non adimpleti contractus*.

Satisfied that it could recognise the *exceptio* in principle, the tribunal turned to the circumstances in which it might apply. Citing French commentaries and judgments, the tribunal held that the debtor's breach must be of more than 'slight importance', that partial non-performance by the debtor does not justify suspension of the entirety of the creditor's performance and that the tribunal must 'measure the relative effect of the refusal to perform against the seriousness of the faulty performance'. This approach corresponds to what a French (or Cameroonian) court would likely do.

However, the tribunal also found that, given Klöckner's defective performance, it was not entitled to any more payment than it had already received; that is, Klöckner's breaches partially discharged Cameroon's obligations. The tribunal cited no authority for this proposition, and indeed a French court is unlikely to have reached the same conclusion. As discussed above, the *exceptio* is a dilatory plea. It permits a creditor temporarily to withhold payment but cannot by itself lead to the discharge of any party's obligations.

Klöckner applied for annulment of the award. The *ad hoc* annulment committee (composed of Swiss, Egyptian and Austrian arbitrators), annulled the award in its entirety on several grounds, including its treatment of the *exceptio*. It declined to consider whether the award correctly construed the requirements for invocation of the *exceptio*, so it is unclear whether the annulment committee agreed that the *exceptio* constitutes a general principle of French, English or international law. However, the annulment committee did find that the tribunal failed adequately to support its holding as to the effects of the *exceptio*:

It looks as if the Arbitral Tribunal considered the *exceptio non adimpleti contractus* as giving rise to the *extinction* of obligations under French law, a conclusion which, on any reading of the citations used in the Award itself, does not necessarily follow and, moreover, does not appear consistent with what the *ad hoc* Committee knows about this area of law.

The annulment committee's conclusions on matters of French substantive law are undoubtedly correct and appear not to have been second-guessed. However, the committee was criticised for re-examining the merits of the original tribunal's decision and thereby

‘improperly crossing the line between annulment and appeal.’²²⁶ There was also a second annulment application, and a second, different annulment committee was formed (*Klöckner II*). The application was rejected but the opinion has not been published, so little of the substance of the application or the reasons for its rejection are publicly known. However, Schreuer comments that the decision in *Klöckner II* helped to ‘alleviate concerns’ generated by the first annulment decision,²²⁷ so the second annulment committee presumably declined to consider the merits of the original tribunal’s substantive legal determinations.

(iii) *Zurich Chamber of Commerce Case No. 273/95 of 31 May 1996*²²⁸

Pursuant to a series of contracts involving multiple parties, the Russian respondent was to supply materials to Claimant 1, a Hungarian enterprise, and Claimant 2, an Argentine conglomerate. The respondent also took a 15% ownership in Claimant 1 and a 20% share in Claimant 2. At the time of contracting, the respondent was a government entity, but was privatised in December 1994. After the respondent’s new owners took control in early 1995, it ceased delivery. The claimants initiated arbitration, seeking specific performance. The respondent argued that its cessation of delivery was justified by prior fundamental breaches of the claimants; it alleged that the claimants had not paid for certain instalments and that they had fraudulently induced the respondent to purchase an ownership interest in them.

The dispute was decided by an arbitral tribunal convened by the Zurich Chamber of Commerce, which was composed of three Swiss lawyers. The ‘main thrust’ of the contracts was held to be the supply of the raw materials, but an ‘ancillary aspect’ was the sale of interests in the claimants to the respondent. Instead of operating a *dépeçage*, the tribunal applied the choice of law rule contained in Switzerland’s Private International Law statute (which was required by the Zurich Chamber of Commerce Rules). The statute provides that, if the parties do not make a choice of law, the law of the seller’s domicile governs. The seller’s domicile was Russia, so the tribunal applied Russian law to the entirety of the group of contracts. Since Russia had ratified the CISG, and the parties all came from countries signatory to the CISG, application of Russian law led to application of the CISG to the sale of goods aspects of the contracts. Relevant Russian domestic laws would apply to the remainder of the contractual relationship.

²²⁶ Schreuer 2004, 18. Schreuer characterises the annulment decision in *Klöckner* as having aroused ‘much concern’. Ibid, 17.

²²⁷ Ibid, 18.

²²⁸ (1998) XXIII Ybk Comm Arb 128.

The tribunal's approach to the choice of law is similar to one a court would have taken. It began by applying the Swiss choice of law rules. These called for the seller's law, which the tribunal then assessed to determine which Russian law would apply to which aspects of the relationship. Even if a court could not apply the CISG directly (for example, if, as under the EC's Rome Convention, it could not apply transnational rules), then the CISG's application would still be warranted because of its incorporation into Russian law. Finally, the tribunal did not apply the CISG beyond its area of applicability—the sales aspects of the contracts—which is the narrow approach that a national court would likely take.

The tribunal found that the CISG does not permit suspension of performance. The respondent asserted that the claimants' failure to pay for certain previous instalments amounted to fundamental breach. The tribunal analysed the respondent's actions according to the CISG's provisions regarding termination, in particular article 73. This article permits termination of an entire instalment contract only if the a breach as to one instalment gives the creditor 'good grounds to believe' that a fundamental breach will occur with respect to future instalments as well. However, the tribunal found that no such grounds existed. In sum, the tribunal found that the CISG—an international instrument—governed, and interpreted it without reference to general principles or exogenous terminology.

(iv) *ICC Case No. 9448 of 1999*²²⁹

The claimant, a Swiss manufacturer of roller bearings, and the respondent, an American distributor, entered into an exclusive distribution contract. The contract contained a choice of law clause applying Swiss law. Switzerland had ratified the CISG and the tribunal characterised the contract as 'successive sales and deliveries of bearings to be manufactured by Claimants and delivered to Respondent, while granting Respondent exclusive representation in the USA'. Therefore, the contract met the test in CISG article 3, so the CISG applied. The tribunal did not state whether it considered the sales aspects of the contract to be predominant, but did assert that 'all preconditions for the application of the CISG to the [contract] are fulfilled'. A national court is likely to have made the same determination.

After two years, the respondent refused payment for future instalments on the grounds that some prior instalments had arrived late and that there were shortfalls in the number of bearings in other shipments. The claimant initiated arbitration to recover the missing

²²⁹ Available at www.unilex.info.

payments. The respondent claimed the right to suspend performance based on the claimant's alleged breaches, citing CISG article 71.

The tribunal stated that it did not need to determine whether the breaches alleged by the respondent had actually occurred. The respondent's allegations, even if true, could not justify suspension of performance under article 71, since that provision gives a party the right only 'to withhold its performance corresponding to a future anticipated breach'. Thus, since the respondent had already received the allegedly late and incomplete deliveries, it had to pay for the amount received and could assert separate claims relating to the allegedly late and incomplete deliveries. Moreover, if the late or incomplete deliveries had constituted a fundamental breach of contract, the Respondent could have terminated the contract with respect to those deliveries under article 73(1) of the CISG. However, the respondent did not allege fundamental breach or attempt to terminate the contract.

The tribunal's analysis of the relevant CISG provisions stays close to the wording of the those articles. For interpretive guidance, the tribunal cited two well-known treatises on the CISG (those edited by Schlechtriem and by Bianca and Bonell). As to the interest rate (which, under the CISG, is governed by domestic law), the tribunal cited a decision of the Swiss federal court. A national court would likely have followed the same approach and reached the same conclusions.

(v) *ICC Case No. 11849 of 2003*²³⁰

This case involved an exclusive distributorship agreement between the respondent, an Italian fashion house, and the claimant, an American retailer. The agreement provided that the goods were to be delivered in seasonal instalments; payment was also be in instalments, by way of periodic draw-downs from a letter of credit opened in favour of the respondent.

The agreement contained a choice of law clause directing the sole arbitrator to 'apply the [CISG] for what is not expressly or implicitly provided for under the contract. Letters of credit shall be governed by the [ICC] Uniform Customs and Practices for Documentary Credits.' However, the claimant took the position that the CISG cannot apply to long-term relationships like distributorships, and that therefore it should apply only to individual sales between the parties, not the general framework of their relationship.

The sole arbitrator rejected this argument and applied the CISG to the entirety of the contractual relationship. However, he did not do so on the basis of the CISG's own provision

²³⁰ (2006) XXXI Ybk Comm Arb 148.

governing its applicability, article 3. Instead, the decisive issue was the arbitrator's view of the parties' motivation for selecting the CISG: 'the parties have clearly indicated their intention to avoid their respective internal law rules, and to resort to neutral solutions'. A court is unlikely to have cited as decisive an apparent preference of the parties for non-national rules. Instead, a court would likely have cited the text of CISG article 3 and commentary or case law interpreting article 3's requirement that, for the CISG to apply, sales aspects of a contract must predominate.

After a few deliveries, the respondent demanded higher prices for future instalments. The claimant refused to open a new letter of credit reflecting the increases. After unsuccessful negotiations, the respondent set a deadline for the claimant to open a letter of credit, after which the respondent would consider the agreement terminated. When this deadline passed, the respondent terminated the contract.

The claimant initiated arbitration, claiming that the respondent's attempt to terminate the contract was unjustified. The respondent defended on the grounds that the claimant's failure to open the letter of credit before the deadline it set justified termination. In turn, the claimant asserted that the respondent's attempt unilaterally to increase the price justified the claimant's having suspended payment. It is this action—the claimant's refusal to open the letter of credit at the higher price—that the claimant characterised as suspension.

The claimant invoked the *exceptio*. The arbitrator found that under the CISG, the *exceptio* is expressed in article 71, but held that article 71 permits only prospective suspension of performance. However, the arbitrator did not rule against the claimant on the grounds that the CISG does not permit suspension for prior non-performance. Instead, he ruled that the claimant's suspension of performance was improper because it was 'excessive and disproportionate'. Under CISG article 54, a refusal to open a letter of credit is tantamount to a total refusal to pay the purchase price, while the disagreement related to '10 or 15% only of the prices'. Except for the reference to article 54, there was no analysis of the claimant's actions under the CISG, nor did the arbitrator cite any source for the 'excessive and disproportionate' standard. The tribunal thus applied the CISG according to a theory of party intent that international instruments would prevail, then applied to the CISG principles not found anywhere in its text.

The claimant, a Bulgarian seller of goods, and the respondent, a Greek importer, concluded a contract through a series of telexes for the delivery of goods in a series of instalments. One telex sent by the claimant stated that the contract was to be 'governed by, constructed and interpreted in accordance with the Uniform Law for the international sale of corporal movables'. The tribunal held the entire contract to be governed by the ULIS.

Leaving aside whether the exchange of telexes formed a contract encompassing all of the deliveries, a court would likely have reached the same conclusion. ULIS article 4 provides that it applies where the parties have chosen it as the governing law of a contract, regardless of whether the states in which they are domiciled have ratified it. The tribunal found this rule to be 'in accordance with the principle of party autonomy'. Party autonomy is a cornerstone of arbitration, but emphatically not an important principle in litigation. Indeed, courts have divided on the question of whether the ULIS can apply simply because the parties have chosen it. For example, the German *Bundesgerichtshof* (federal supreme court) applied the ULIS in such a situation²³² but a US District Court in New York refused to do so.²³³

After delivery commenced, the respondent alleged that the goods were of poor quality. The claimant admitted this but took no action to remedy the nonconformity. In response, the respondent suspended payment for subsequent deliveries, specifically citing the *exceptio* in its communications with the claimant. Asserting that the respondent's suspension breached the contract, the claimant initiated arbitration.

The tribunal stated unequivocally that the respondent had the right 'to stop payment because of the nonconformity of the goods'. It noted that the order of performance under the contract was such that the payment was to occur after delivery, then asserted that 'It would amount to a curtailment of the rights of the buyer if he had to continue payment ... without knowing what will happen in regard to the nonconformity.' Finally, 'the degree of nonconformity is ... irrelevant in regard to [the] right to suspend payment', so the respondent was justified in suspending performance.

The tribunal so decided although it acknowledged that a right to suspend performance 'is not expressly stated in ULIS'. The tribunal found that the *exceptio* is a general principle of law, made applicable to the ULIS by its article 17, which states that gaps in the ULIS may

²³¹ (2003) XXVIII Ybk Comm Arb 27.

²³² Bundesgerichtshof, case VIII ZR 185/92 (9 March 1994).

²³³ *Tarbert Trading, Ltd v Cometals, Inc*, 663 F.Supp. 561, 566 fn 9 (S.D.N.Y. 1987).

be filled by reference to general principles. The tribunal cited UNIDROIT Principles article 7.1.3, the relevance of which was reinforced by 'the internationality of the relations between the parties'. The tribunal thus evidenced a clear preference for general principles of international law, even when these conflict with the law chosen by the parties.

If a court had decided this case, it would not likely have found a right to suspension of performance since such a right is not granted by the ULIS. In particular, the mere fact that the parties came from different countries would be an insufficient basis on which apply the UNIDROIT Principles.

(vii) *ICC Case No. 3540 of 3 October 1980*²³⁴

The claimant, a French construction company, contracted with a Yugoslav subcontractor (the respondent) to build a project in the USSR for a Soviet principal. The contract contained no choice of law clause and empowered the tribunal to act as *amiable compositeur*. The tribunal, composed of Swiss, Yugoslav and French arbitrators, was constituted in Switzerland under the ICC rules.

The parties disagreed on the applicable substantive law, the respondent pleading for French law, the claimant for Swiss law. The tribunal determined that ICA tribunals in general, especially when acting as *amiabiles compositeurs*, may avoid the choice of law process by taking the 'direct approach' (*voie directe*) and selecting a substantive law. The tribunal decided it should apply *lex mercatoria* and not any national law.

Under the contract, payment was to be in monthly instalments. A dispute arose and the Claimant refused to pay for some of the instalments. The respondent raised a counter-claim seeking an interim award for the monthly payments that the claimant had withheld. In its defence, the claimant invoked the *exceptio* and, subsidiarily, a set-off to the extent of the breaches that it claimed against the respondent.

The tribunal held that the *exceptio* 'must be considered as belonging to the general principles of law forming the *lex mercatoria* applicable here'. It gave no authority or justification for this conclusion but did note that both Swiss and French law—the laws pleaded by the parties—recognise the *exceptio*. The tribunal went on to state a familiar description of the remedy as 'by nature dilatory ... it momentarily paralyses the action for execution of the creditor's obligations'.

²³⁴ [1981] JDI 914 (in French; translations are the author's own).

In any event, the tribunal decided that it was 'more expedient' to resolve the dispute on the basis of the claimant's alternative argument for a set-off. It therefore made no determination as to whether the claimant's invocation of the *exceptio* was proper, nor did it address the content of the rights granted to a creditor by the *exceptio*. A common lawyer might say that the tribunal's characterisation of suspension of performance as a general principle of international law was a mere dictum.

(viii) *ICC Case No. 3267 of 1979*²³⁵

In this case, too, the contract contained no choice of law clause and the tribunal was empowered to act as *amiable compositeur*. The respondent, a Belgian building contractor, was part of a consortium that was to construct developments in two Saudi Arabian cities. It subcontracted part of this project to the claimant. The tribunal found that, since it was appointed as *amiable compositeur*, it need not 'decide which specific law governs the contractual relationship between the parties'. Instead, it applied 'general principles of international commercial law ... with no specific reference to a particular system of law'.

The contract called for a fixed price, subject only to limited circumstances that could justify modification. The respondent was to pay in instalments, after specified contractual milestones were reached by the claimant. The first five payments were regularly made, but the respondent deducted from the sixth and seventh payments on the basis of alleged failures by the claimant to reach certain milestones. In response, the claimant terminated the contract.

The tribunal characterised the respondent's deductions as suspensions of performance. Since the contract mandated a particular procedure for withholding payments 'specifically devised for this kind of contingency', and the respondent did not follow this procedure, the payment deductions were not justified. Importantly, the tribunal held that the existence of a particular contractual term on-point means that 'The argument that such ... deduction was made in 'accordance with ... international trade usages', does not carry any weight.' In other words, the tribunal declined to state whether suspension of performance constituted a general principle of law consonant with 'international trade usages' because the agreement of the parties supersedes any such principles.

²³⁵ (1982) VII Ybk Comm Arb 96.

2. Trends discernible in the published arbitral awards

Given the small sample, firm conclusions cannot be made about international arbitrators' approaches to suspension of performance. However, based on what evidence is available, certain patterns may be discerned.

Throughout the awards, international arbitrators' preference for international contract law instruments and general principles is evidenced in their choice of law analyses. In six of the eight awards, either an international instrument or general principles of international law was applied, sometimes over the objection of one or both parties. Particularly noteworthy here is ICC Case No. 11849, where the CISG was applied to parts of the contractual relationship that were not sales, on the grounds that the parties' references to the CISG and to the ICC Uniform Customs and Practices for Documentary Credits evinced an intent to avoid their respective national laws and seek 'neutral solutions'. In three awards, general principles of international law were invoked by the tribunal and were decisive in the tribunal's decision on the propriety of a party's suspension of performance. In one award, ICC Case No. 8547, general principles were applied that were contrary to the explicit language of the ULIS, which is itself an international instrument.

Perhaps most striking, arbitrators did not hesitate to declare that suspension of performance is a general principle of international law.²³⁶ As discussed above, such a conclusion is dubious; even if there is general agreement that some right to suspend performance exists, there is no international consensus on when and how such a right may be exercised.²³⁷

Now that these tribunals have made such declarations, their prophecies may become self-fulfilling. While the decision of one ICA tribunal cannot bind another in the sense of *stare decisis*, very few arbitral awards are published and tribunals cite published awards on points of substantive law. This is especially so in cases dealing with transnational law. The awards discussed here are consistent with the propositions that arbitrators promote the application of general principles of international law and that suspension of performance constitutes such a general principle. Moreover, they do so regardless of whether there is an

²³⁶ This occurred in four awards: *Klöckner* and ICC Cases Nos. 8547, 3540 and 3267.

²³⁷ In each of the awards that found that suspension of performance constitutes a general principle, the tribunals were composed of civil lawyers (except for one American arbitrator who signed the *Klöckner* award). This may account for the readiness of the tribunals to invoke the *exceptio* by name and to declare it to be universally accepted.

applicable law, or whether the applicable law is silent on the question, or even whether the applicable law provides no right to suspend performance.

Among the tribunals that discussed the circumstances in which a creditor may suspend performance, there was no disagreement. In all of the cases where the issue was addressed, the contracts were bilateral and no tribunal imposed a requirement that the contract be synallagmatic. Order of performance was discussed only in ICC Cases Nos. 4629 and 8547, and there the creditor was to perform simultaneously with or after the debtor. No standard for the severity for the breach was advanced. The award in ICC Case No. 4629 implicitly addresses the proportionality of the creditor's conduct—since the breach was serious enough to justify termination, the lesser response of suspension was '*a fortiori*' acceptable. In ICC Case No. 11849, decided under the CISG, the tribunal described the creditor's response as unjustifiable because it was 'excessive and disproportionate'; however, no source was cited for this standard.

In sum, the tribunals that address suspension of performance seem to prefer a rule that does not require a serious breach but does contain a requirement of proportionality (good faith) on the part of the creditor. This formula is clearly influenced by the *exceptio non adimpleti contractus*, and in particular the Germanic formulation of the *exceptio*. Taking into account the UNIDROIT Principles and the PECL—the most recently-enacted major international contract law instruments—which also adopt a Germanic approach to suspension of performance, this version of the remedy will likely be the dominant one in future characterisations of the general principles of international law.

CHAPTER FOUR: CASE STUDY 2: THE USE OF EXTRINSIC EVIDENCE TO INTERPRET CONTRACTS

'A horse! a horse! my kingdom for a horse!' Poor King Richard. What did he mean by his famous cry? Was he saying that in his extremity on Bosworth field he was willing to give up his kingdom if only he could have a horse? Or was this a despairing recognition that for loss of a mere horse he was losing his very kingdom? Sir William Catesby may have thought the former. Certainly he urged the king to withdraw, saying he would help him to a horse. But that was not Richard's meaning: 'Slave, I have set my life upon a cast, and I will stand the hazard of the die'.²³⁸

As Lord Nicholls relates, this episode from Shakespeare's *Richard III* illustrates a fundamental truth: language is 'an inherently imperfect means of communication', so 'the law must find some way to ascribe to language when used as the source of legal right or obligation a certainty of meaning it inherently lacks.'²³⁹ The indeterminacy of language, combined with the fact that parties negotiating a contract may not contemplate matters that later prove to be relevant, means that interpretation is necessary whenever the parties disagree as to the obligations a contract creates.²⁴⁰ Disagreements over the content of a contract are frequently characterised as disputes over the 'law of the contract' (obligations created by the terms of the contract) as opposed to 'contract law' (obligations created by the law governing the contract).²⁴¹

Before a court can interpret the applicable contract law, it must find the sources of that law: statute, case law, and perhaps academic commentary. Similarly, before the 'law of the contract' can be interpreted, the adjudicator must first find that law. It is the sources of the law of the contract that form the subject of this case study: how do adjudicators determine what Farnsworth called 'the subject matter to be interpreted'?²⁴² In particular, what evidence extrinsic to the text of the contract itself will an adjudicator consider?

In this area, a gulf separates the common law and civilian models. As a general rule, the common law focuses on the 'plain meaning' of the final agreement between the parties.

²³⁸ Nicholls 2005, 1.

²³⁹ Ibid.

²⁴⁰ Zweigert & Kötz 1998, 400.

²⁴¹ Farnsworth 1999, 426.

²⁴² Ibid, 427.

A set of exclusionary rules work to shut out evidence extrinsic to the contract itself: evidence of the parties' communications and actions before, contemporaneous with, and subsequent to the conclusion of the contract and of their subjective intent or understanding of what the contract meant. Because the exclusionary rules can have unjust or absurd effects in some cases, a number of exceptions have been developed and the result is a complex set of overlapping rules and exceptions. The civil law has no counterpart to these rules. It admits all relevant extrinsic evidence and charges the adjudicator to assign evidence more or less weight, depending on its reliability and relevance.

The exceptions to the common law exclusionary rules narrow the gap somewhat, and in any given case civil law and common law courts may ultimately reach the same interpretation. However, the underlying doctrines remain irreconcilable. After accounting for the various exceptions, there are three classes of evidence that, generally speaking, the civil law admits and the common law excludes: statements of the parties prior to and contemporaneous with the conclusion of the contract (although England is more friendly to the introduction of such evidence than is the US), evidence of one party's subjective intent, and conduct or statements of either party subsequent to the contract's conclusion.

This chapter considers the situations in which international arbitrators admit extrinsic evidence in interpreting a contract. Arbitration is an alternative to litigation in national courts and contractual interpretation is a matter of substantive contract law, so it is necessary first to understand what courts would do in similar situations. As with the previous case study, this one proceeds by putting the issue of extrinsic evidence into comparative context, first considering the opposing perspectives that underlie the different extrinsic evidence doctrines, then comparing the rules governing the admission of extrinsic evidence under the common law (represented by England and the United States), the civil law (represented by France, Germany and Switzerland) and the major international contract law instruments. Next, it assesses published arbitral awards where the admissibility of extrinsic evidence was considered.

In many contractual disputes, the disagreement is over whether a valid, binding agreement ever came into force. Where the existence of a contract itself is disputed, the court has no choice but to consider extrinsic evidence of what the parties agreed to. Such situations include allegations of lack of consideration, failure of a condition precedent, a defect of consent (*e.g.*, fraud, duress, mistake or incapacity), and formal invalidity (*e.g.*, cases under the common law statutes of frauds or similar writing requirements for some types of contracts

in the civil law). All legal systems therefore agree that extrinsic evidence is widely admissible to resolve such differences.

The same principle applies to cases involving alleged amendments to a contract or actions for rectification—all legal systems admit extrinsic evidence to prove or disprove an amendment or to rectify a contract. These types of disputes are therefore not fruitful ground for an investigation such as the present one, and are excluded. In addition, disputes over the existence of an excuse (*e.g.*, *force majeure* or unconscionability) or over the type of remedy or extent of damages available are outside the scope of this case study, which considers only the obligations created by contracts, not the effects of those obligations.

A. EXTRINSIC EVIDENCE IN COMPARATIVE CONTEXT

Both the common and civil law theories of contract analyse contracts in terms of a free agreement of autonomous wills—in common law terms, a ‘meeting of the minds’.²⁴³ However, there are doctrinal differences in addition to the differences in practice. The common law and civil law models begin from two opposed perspectives, neither of which is found in its ‘pure form’ in modern practice:

On one [civilian] view, it is the *intention* of the promisor which counts; this is justified by the principle of private autonomy which treats the free will of legal persons as the source and measure of legal consequences.... On the other [common law] view, priority is given to the external phenomenon of *expression* ... the internal will of the promisor is treated as significant only in so far as it coincides with the normal objective meaning that a reasonable man would attribute to its expression.²⁴⁴

In other words, the common law focuses on the ‘meeting’, while the civil law focuses on the ‘minds’.

The two perspectives have yielded two opposed methods of interpretation. For common law judges, ‘the inquiry is objective: the question is what reasonable persons, circumstanced as the actual parties were, would have had in mind.’²⁴⁵ Or, in Corbin’s phrasing, a contract’s ‘legal operation must ... be in accordance with the meaning that the

²⁴³ Nicholas 1992, 35.

²⁴⁴ Zweigert & Kötz 1998, 401.

²⁴⁵ *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 1 AC 749, 778 (HL).

words convey to the court, not the meaning that the parties intended to convey'.²⁴⁶ The opposing view is exemplified by article 133 of the German BGB: 'the true intention shall be sought without regard to the [contract's] literal meaning.'

Of course, all interpretation is objective in the sense that no person can know with certainty the thoughts of another. Adjudicators can only work on the basis of 'external phenomena'—the parties' written contract, their other communications and their conduct.²⁴⁷ However, from the civil law viewpoint, such external phenomena are used as tools to ascertain what the parties themselves must have intended, and not what a reasonable person in the place of the parties would have intended. According to article 1156 of the French *Code civil*, the primary role of interpretation is to discover the 'common intention of the parties' (*commune intention des parties*).²⁴⁸ Where such cannot be ascertained, 'the judge is supposed to ascertain the "hypothetical" intention of the parties or to adopt the interpretation which in all the circumstances, objective and subjective, must be regarded as the one the parties would reasonably have intended.'²⁴⁹

This contrasts sharply with the objective method, set out by Lord Hoffman in one of the leading cases, *Investors Compensation Scheme v West Bromwich Building Society*: 'Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.'²⁵⁰ The objective method may sacrifice equity in a given case but promotes certainty and predictability:

Commercial stability requires of any developed system of contract that the terms of the agreement should normally be binding in the sense in which they would reasonably be understood, even though one of the parties, Humpty-Dumpty like, was using the language in a private sense of his or her own.²⁵¹

²⁴⁶ Corbin 1964, 161.

²⁴⁷ Zweigert & Kötz 1998, 406.

²⁴⁸ The full article states, 'One must in agreements seek what the common intention of the contracting parties was, rather than pay attention to the literal meaning of the terms.' ('*On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des termes.*'). Official translation available online: <http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm> accessed 28 November 2010.

²⁴⁹ Zweigert & Kötz 1998, 402.

²⁵⁰ [1998] 1 WLR 896 (HL).

²⁵¹ Hoffman 1997, 666.

In practice, the common law approach is distinguished not only by its emphasis on objectivity, but also by 'the intellectual rigour with which the analysis is carried through to detailed consequences'.²⁵² The common law rules governing extrinsic evidence are significantly more complicated than their civil law equivalents, and contractual interpretation in common law courts is also frequently a complex affair. Judges must rule on objections to the introduction of extrinsic evidence as they arise (excusing the jury each time) and separate briefs and argument are usually required. Even documentary evidence must usually be introduced by testimony, so witnesses must be instructed to avoid injecting extrinsic evidence into the record. Civil law procedure is more streamlined, with its emphasis on documentary evidence and the investigatory powers of the judge.

Another difference in perspective, which is not frequently mentioned, is that the civil law sees contracts as the legal expressions of ongoing relationships between parties—the cumulation of a series of individual acts of will—while the common law sees contracts as crystallising at a particular, identifiable moment.²⁵³ This difference in perspective has implications beyond the admissibility of extrinsic evidence. For example, the civil law provides broader scope than does the common law for pre-contractual liability and it prioritises remedies, like specific performance, that keep the contractual relationship alive. Consequently, common law interpretive doctrine asks the adjudicator to focus on the contract itself and the circumstances immediately surrounding its conclusion, while the civil law directs the adjudicator to consider the whole arc of the parties' relationship.

Finally, the common law and civil law also differ on whether the rules which govern the use of extrinsic evidence are substantive or procedural. This issue is of vital importance when considering arbitral awards, because arbitral tribunals perform a choice of law analysis to determine the substantive law that governs the contract but follow the procedural rules determined by or in accordance with the agreement to arbitrate.

Under the common law, the matter is settled: although the exclusionary rules deal with the admissibility of evidence, the rules themselves are substantive law. As Farnsworth notes, evidentiary rules 'bar some methods of proof to show a fact but permit that fact to be shown in a different way', while the rules that exclude extrinsic evidence bar 'a showing of the fact itself—the fact that the terms of the agreement are other than those in the writing'.²⁵⁴

²⁵² Nicholas 1992, 35.

²⁵³ McMeel 2003, 272.

²⁵⁴ Farnsworth 1999, 428.

The substantive nature of the exclusionary rules is borne out in their application. For example, an objection based on the parol evidence rule is not lost by failure to raise it at trial, while an evidentiary objection must be made at trial to preserve the issue for appeal.²⁵⁵ In addition, when US federal courts sit under diversity jurisdiction (in which situation they apply federal procedural law but state substantive law), they apply the rules governing extrinsic evidence of the state whose substantive law governs the dispute.²⁵⁶

Under the civil law, the matter is equally settled: all rules governing the admission of evidence, for whatever purpose, are procedural. Indeed, while there are no direct equivalents in the civil law to the common law exclusionary rules, such guidance on the admission of extrinsic evidence as does exist is found in the codes of procedure and evidence, rather than in the civil codes and codes of obligations.

1. Common law jurisdictions

The common law doctrine is comprised of a series of rules that exclude different types of extrinsic evidence, with exceptions that allow certain types of extrinsic evidence in certain cases. During the 20th century, the strictness of these rules was loosened to a great degree, especially in England, where courts now regularly admit such extrinsic evidence as constitutes the context or surrounding circumstances of the contract.

However, the rules as a whole continue to apply and the rationales behind them continue to be influential. The broadest and most basic exclusionary rule is the one most closely derived from the requirement of objectivity: extrinsic evidence can only be admissible if it is evidence of objective facts common to the parties, not direct evidence of the intentions of either party.²⁵⁷ Summing up the recent jurisprudence, McMeel writes that, although English judges are increasingly willing to admit some extrinsic evidence as part of the circumstances surrounding the conclusion the contract, 'there appears to be little appetite ... for the regular admissibility of the parties' opinions as to what the contract meant.'²⁵⁸ For this reason, admissible extrinsic evidence must concern matters that both parties knew (or

²⁵⁵ Ibid, 429.

²⁵⁶ Restatement (2d) of Conflict of Laws, s 140. See also, e.g., *Betz Laboratories v Hines*, 647 F.2d 402 (3d Cir. 1981) ('The parol evidence rule is substantive rather than evidentiary, so we apply state law.').

²⁵⁷ Lewison 2004, 85, citing *Rabin v Gerson Berger Assoc Ltd* [1986] 1 WLR 526; *Barlee Marine Corp v Mountain* [1987] 1 Lloyd's Rep 471.

²⁵⁸ McMeel 2003, 274; see also McLauchlan 1999, 182.

ought to have known). Evidence of one party's unilateral expectations is not admissible in any form.²⁵⁹

The rules governing extrinsic evidence seem to be thought of as practical, nuts-and-bolts law—matters for students and advocates but not for scholars. The article by Patterson cited below even contains something of a disclaimer: 'Mindful of the beginning law student, to whom much of the writing in law reviews seems esoteric, the Editors are pleased to publish this article on a fundamental aspect of the law of contracts...'.²⁶⁰ All general contract law treatises address the rules governing extrinsic evidence but the only available book-length treatments of these issues under English law are those by Lewison and McMeel, both of which were written by active barristers and aimed primarily at practitioners. Few pertinent academic articles are available, and most of these are jeremiads against the parol evidence rule.²⁶¹ Furthermore, many of the articles that do exist were written by sitting judges, whose daily work involves frequent exercises in contractual interpretation.²⁶²

Interpretation in a common law court traditionally begins by application of the 'plain meaning rule', which requires the judge to read the contract according to the 'natural and ordinary' meaning of the words used.²⁶³ Only if the words of the contract are vague or ambiguous, 'capable in some context of bearing another meaning, perhaps less natural but not so as to amount to a misuse of language' then extrinsic evidence may be introduced to resolve the ambiguity, but not to contradict the contractual terms.²⁶⁴ If, on the other hand,

the utterance could be given a different meaning only on the basis that the parties had made a mistake or adopted an idiosyncratic usage, evidence of background to show that this must have been the case is inadmissible unless the natural meaning, when applied to the real world, would produce an impossibility or absurdity.²⁶⁵

The controversies surrounding the plain meaning rule have focused on the breadth of the context within which the words of the contract must be read. American courts have traditionally adhered to the strictest version of the plain meaning rule, often called the 'four corners rule', which restricts a judge to reading the literal terms of the contract, and only the

²⁵⁹ McMeel 2003, 293.

²⁶⁰ Patterson 1964, 1.

²⁶¹ Such attacks seem to be launched anew by each generation of contract scholars. A classic example is Sweet 1968.

²⁶² For example, those cited herein by Lords Nicholls and Hoffman and by Judge Staughton.

²⁶³ On the plain meaning rule generally, see Farnsworth 1999, §7.12.

²⁶⁴ Hoffman 1997, 670.

²⁶⁵ Ibid.

terms of the contract itself, in order to determine whether an ambiguity existed that might permit the introduction of extrinsic evidence. While the four corners rule has fallen into disfavour in England and among academics generally, many American states maintain it.²⁶⁶ This divergence may be explained by the continued use of juries for civil trials in the United States:

If the jury is directed to bring a general verdict (*i.e.*, for the plaintiff or for the defendant), it may in so doing exercise its views of jury equity and thus impair the reliability of written instruments. This possibility may account for the reluctance of courts to admit parol evidence and other extrinsic aids to interpretation, and for their adherence to the 'plain meaning' of the contract.²⁶⁷

The more common modern practice, sometimes called the 'context rule', admits evidence of the circumstances surrounding the conclusion of the contract 'in all cases to place the contract in its correct setting, even where there is no ambiguity apparent on the face of the document.'²⁶⁸ The cases that set off this round of liberalisation are *Prenn v Simmonds*²⁶⁹ and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen*,²⁷⁰ in particular the speeches by Lord Wilberforce. In the former, Lord Wilberforce introduced an influential concept, the 'matrix of facts' surrounding the conclusion of contracts:

The time has long since passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations.... We must ... inquire beyond the language and see what the circumstances were with reference to which the words were used, and the object appearing from those circumstances, which the person using them had in view.²⁷¹

In *Reardon*, Lord Wilberforce reiterated this point: '...what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were'.²⁷² The

²⁶⁶ Including the commercially important jurisdictions of New York and Delaware. See, *e.g.*, *Treemont, Inc v Hawley*, 886 P.2d 589 (Wyo. 1994) ('[When] the provisions are clear and unambiguous, our examination is confined to the "four corners" of the document.').

²⁶⁷ Patterson 1964, 837. Another aspect of the American adherence to traditionally strict evidentiary rules may be explained also by the role of juries in American trials. England began only recently to admit hearsay evidence, with the proviso that the judge must consider the context in which the statement was made when considering the reliability of the evidence and the weight to give it. Civil Evidence Act 1995 s 4. Largely because jurors are not trusted to weigh the strength of evidence with the same care that judges are presumed to use, the US Federal Rules of Civil Procedure and those of every state maintain the ban on hearsay evidence.

²⁶⁸ Lewison 2004, 82.

²⁶⁹ [1971] 1 WLR 1381.

²⁷⁰ [1976] 1 WLR 989.

²⁷¹ [1971] 1 WLR 1381, 1383-1384.

²⁷² [1976] 1 WLR 989, 997.

effect of these decisions was to set off a series of judgments relaxing the exclusionary rules that had previously bound contractual interpretation in England.

This liberalisation was extended by more recent courts, especially in the speeches of Lord Hoffman in a pair of cases, *Investors Compensation Scheme v West Bromwich Building Society*²⁷³ and *BCCI v Ali*.²⁷⁴ In the former, Lord Hoffman stated:

The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties, for whatever reason, have used the wrong words or syntax.....

The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.²⁷⁵

Despite some resistance from traditionally-minded judges, the modern doctrine in England is characterised by 'a liberal approach to the relevance of surrounding circumstances in favouring one interpretation over another'.²⁷⁶ In the United States, the trend is in the same direction, but adherence to the four corners rule and the plain meaning rule more generally continues in many jurisdictions. Whatever the attitude of the court to the surrounding circumstances, however, evidence of the surrounding circumstances still cannot be used to contradict the 'natural meaning' of the contract's words. If background evidence contradictory to the written contract is admitted, that would amount to a court impermissibly determining that the parties really meant something different from what it objectively interpreted the contract to say.²⁷⁷ As Judge Learned Hand famously wrote, 'there is a critical

²⁷³ [1998] 1 WLR 896.

²⁷⁴ [2002] 1 AC 251.

²⁷⁵ [1998] 1 WLR 896, 897.

²⁷⁶ McMeel 2003, 272.

²⁷⁷ *The Melanesian Mission Trust Board v Australian Mutual Provident Society* [1997] 2 EGLR 128.

breaking point ... beyond which no language can be forced'.²⁷⁸ This breaking point marks the boundary beyond which even admissible extrinsic evidence cannot survive.

The best-known common law exclusionary rule is the parol evidence rule, which, although unloved by many, continues to be in force in all common law jurisdictions. A classic formulation of the parol evidence rule is found in *Goss v Lord Nugent*:

If there be a contract which has been reduced to writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation so as to add or to subtract from, or in any manner to vary or qualify the written contract.²⁷⁹

Although, as this quotation suggests, the rule originally applied only to exclude oral evidence, it has evolved to exclude all prior and contemporaneous extrinsic evidence from cases where the parties have concluded a contract that represents the entirety of their agreement.

The first step in applying the parol evidence rule is to determine whether the written contract constitutes the final agreement of the parties. If so, 'the agreement is said to be "integrated" [but] if the parties had no such intention, the agreement is said to be "unintegrated" and the parol evidence rule does not apply'.²⁸⁰ In the United States, contracts may also be characterised as entirely or partially integrated. In the latter case, the written contract constitutes the final agreement of the parties on all or only some of the obligations to which they intended to bind themselves.²⁸¹ For example, when a written sales contract specifies the price and quantity terms but reserves the date or manner of delivery to be agreed upon at a later time, then the contract is integrated with respect to price and quantity only.

The degree of integration of an agreement is determined according to the actual intent of the parties. Evidence relating to all the circumstances, including statements and conduct that would be inadmissible under the parol evidence rule, is admissible to determine whether

²⁷⁸ *Eustis Mining Co. v Beer*, 239 Fed. 976, 982 (S.D.N.Y. 1917).

²⁷⁹ (1833), 110 Eng Rep 713.

²⁸⁰ Farnsworth 1999, 431. The integrated agreement may also be oral, or contained in an exchange of correspondence; what matters is the intent of the parties that the agreement be integrated. *Patton v Mid-Continent Systems*, 841 F.2d 742 (7th Cir. 1988). See also Restatement (2d) of Contracts s 209 cmt b. An agreement may also be partially integrated, if the parties intended that it be a final expression of only some of the contractual terms. In such cases, the parol evidence rule applies to those aspects of the agreement that are integrated.

²⁸¹ Farnsworth 1999, 432-433.

the parties intended the agreement to be integrated.²⁸² In other words, the applicability of the parol evidence rule is determined by reference to parol evidence. This is an exception that arguably swallows the rule, and led the Law Commission to describe the parol evidence rule as circular.²⁸³ However, as Lewison notes, a presumption applies that written contracts constitute the whole of the parties' agreement; thus, a party seeking to introduce extrinsic evidence of an antecedent non-written agreement has the burden of proving that this agreement was intended to continue in force together with the eventual written contract.²⁸⁴

Frequently, parties will include in their written contracts a term to the effect that the contract constitutes the entire agreement of the parties. In the United States, such terms are often called 'merger clauses' because they are said to merge the parties' negotiations and other prior statements into the final written instrument. Outside the US, such terms are more commonly referred to as 'entire agreement' or 'integration' clauses.²⁸⁵ The presence of an entire agreement clause is not on its own determinative that the parties intended the agreement to be fully integrated,²⁸⁶ but it is strong evidence of such intent and usually precludes admission of parol evidence.²⁸⁷

If an entirely or partially integrated written agreement exists, then the parol evidence rule applies to exclude any evidence of the parties' prior or contemporaneous statements or actions. A typical example of the rule's operation is *Gianni v R Russell & Co*. Gianni held a lease to run a sales kiosk in the lobby of an office building. After the landlord granted a soda concession to another sales kiosk, Gianni sued on the ground that the owner had orally agreed to give Gianni the exclusive right to sell soda in the building. The lease contained no exclusivity provision, and the Pennsylvania Supreme Court held that it was error to admit testimony relating to the oral agreement: 'As the written lease is the complete contract of the parties and since it embraces the field of the alleged oral contract, evidence of the latter is inadmissible under the parol evidence rule.'²⁸⁸

²⁸² Restatement (2d) of Contracts s 209(3). The Restatement sets up a presumption that contracts appearing to be complete are integrated unless evidence establishes the contrary. Ibid.

²⁸³ Law Commission 1986 [2.89].

²⁸⁴ Lewison, 2004 71, citing *Gillespie v Cheney Egar & Co* [1896] 2 QB 59.

²⁸⁵ CISG-AC Opinion No. 3 [4].

²⁸⁶ For example, Restatement (2d) of Contracts s 209 cmt *b* warns that 'such a declaration may not be conclusive'. Courts have tended toward the same view. *Sierra Diesel Injection Service v Burroughs Corp*, 874 F.2d 653 (9th Cir. 1989).

²⁸⁷ Farnsworth 1999, 436, citing *Tapper Chevrolet Co v Hansen*, 510 P.2d 1091 (Idaho 1973). See also *McGrath v Shah* (1987) 57 P. & C.R. 452 (holding that an entire agreement clause constitutes an 'insuperable hurdle').

²⁸⁸ 126 A. 791, 792 (Pa. 1924). See *Mellon Bank Corp v First Union Real Estate Equity & Mortgage Investments*, 951 F.2d 1399 (3d Cir. 1991) (stating that 'Pennsylvania courts still rely upon *Gianni*'s definitive

In the phrasing of the Restatement, the effect of a determination that an agreement is integrated is that 'evidence of prior or contemporaneous agreements or negotiations is not admissible to contradict a term' of the integrated agreement.²⁸⁹ If the agreement is partially integrated, evidence of prior agreements or negotiations is admissible to supplement the agreement, but not to contradict it.²⁹⁰ If, on the other hand, the agreement is completely integrated (for example, if it contains a merger clause), then even 'consistent additional terms' may not be admitted to explain or supplement the final agreement.²⁹¹

In England, the distinction is not generally made between partially and fully integrated agreements. If an agreement is held to be integrated, then extrinsic evidence may not be admitted to contradict any part of it. In *Investors Compensation Scheme*, Lord Hoffman stated simply that, 'The law excludes from the admissible background the previous negotiations of the parties.'²⁹² In 2009, in *Chartbrook v Persimmon Homes*, the House of Lords reaffirmed the ban on consideration of prior negotiations as evidence of what the parties understood the contract to mean, except for purposes of rectification or estoppel by convention.²⁹³ This was so even though the contractual term at issue in *Chartbrook*, if interpreted 'in accordance with ordinary rules of syntax, makes no commercial sense'.²⁹⁴ On the other hand, to the extent that objective facts are communicated in the course of the parties' negotiations, those facts may be admitted as part of the factual matrix forming the necessary background for the parties' agreements.²⁹⁵

A common type of excluded parol evidence is drafts of a contract.²⁹⁶ Parties are particularly apt to introduce such evidence, especially when the contract was concluded by an exchange of drafts. When both parties argue that their own, different, standard conditions of business were incorporated into the contract (a 'battle of the forms'), the accepted approach is

statement of Pennsylvania's parol evidence rule'). Pennsylvania's common law parol evidence rule is typical of those prevailing in most US states. Farnsworth 1999, 427.

²⁸⁹ Restatement (2d) of Contracts s 215. The language in UCC s 2-202 is similar ('may not be contradicted by evidence of any prior agreement').

²⁹⁰ Restatement (2d) of Contracts s 210(2). In this situation, UCC s 2-202 reaches the same result with oppositely-phrased language: 'consistent additional terms ... may be proved unless the court finds that the writing was intended by both parties as a complete and exclusive statement of all the terms'.

²⁹¹ Restatement (2d) of Contracts s 216(1). Once again, the UCC is similar. Fully integrated contracts may not be 'explained or supplemented ... by evidence of conditional additional terms'. s 2-202.

²⁹² [1998] 1 WLR 896. See also Lewison 2004, 59.

²⁹³ See below, fns 322-328 and accompanying text.

²⁹⁴ *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 [16] (speech of Lord Hoffman).

²⁹⁵ This is so even with respect to 'without prejudice' negotiations toward a settlement agreement. *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44 [40].

²⁹⁶ Lewison 2004, 56.

to admit evidence of the negotiations and assess them according to the traditional rules respecting offers, counter-offers, and acceptance.²⁹⁷

As a specific application of this principle, English courts traditionally held that sentences struck by hand from the final version of a contract could not be considered in construing the contract.²⁹⁸ As the rule evolved, the admissibility of deleted words became dependent upon whether the contract was one varied from standard terms (admissible) or was drafted specifically for the agreement at issue (inadmissible).²⁹⁹ Today, however, English courts tend to consider deleted terms as part of the admissible background of a contract, regardless of whether the contract was made from standard terms or was a one-off.³⁰⁰

Like the plain meaning rule, the parol evidence rule has come in for a great deal of criticism, not least for the large number of exceptions to it. Only those exceptions most relevant to international disputes will be detailed here.

The parol evidence rule does not exclude evidence of documents or statements that are referred to in the written contract. Expressly or impliedly incorporated terms cannot truly be said to be extrinsic to the contract and are admissible. The most common example of this 'exception' is terms which expressly incorporate an extrinsic term or document. In international commerce, it is common for contracts to incorporate form contracts or standard terms, such as the INCOTERMS promulgated by the International Chamber of Commerce or the sets of standard terms promulgated by a variety of industry trade groups.

Extrinsic evidence is also admissible to prove industry customs or practices established between the parties by a course of conduct. However, such evidence cannot be introduced if it contradicts the written terms of the contract.³⁰¹ Like incorporated terms, usages, if established, become a part of the contract and must be interpreted in the same way as the rest of the written contract.³⁰² Usages are facts that must be proven, and the required

²⁹⁷ Ibid, 76, citing *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd* [1979] 1 WLR 401 (CA); *Gibson v Manchester City Council* [1979] 1 WLR 294 (HL). But see Lord Denning's dissenting opinion in *Butler Machine Tool*, which argued that both parties' standard conditions are to be construed together, and either reconciled if they are harmonious or ignored if they are mutually contradictory.

²⁹⁸ *Sassoon (MA) & Sons Ltd v International Banking Corp* [1927] AC 711 (HL) (speech of Viscount Sumner) ('Their Lordships take it to be settled ... that the effect is the same as if the deleted words had never formed part of the print at all.'). See also *Inglis v Buttery* (1878), 3 AC 552, 571 (HL).

²⁹⁹ Lewison 2004, 58 (citing *National Bank of Australasia v Falkingham & Sons* [1902] 1 AC 585 (PC)).

³⁰⁰ *Team Services plc v Kier Management and Design Ltd* (1993), 63 BLR 76 (noting that one-off contracts are 'often composed of ready-made clauses taken from one or more sources, together with *ad hoc* clauses drafted afresh for the purpose of the particular contract').

³⁰¹ *Baker v Black Sea & Baltic General Insurance Co Ltd* [1998] 1 WLR 974 (HL).

³⁰² Lewison 2004, 172.

standard is high. 'Custom, or usage, must be notorious, certain and reasonable, and in effect such as is regarded as binding in the trade in question. Mere trade practice is insufficient.'³⁰³

Criticism of the parol evidence rule has been fierce. Sweet called for 'diagnosis and treatment of a sick rule',³⁰⁴ while Honnold went so far as to say that the parol evidence rule 'has been an embarrassment for the administration of modern transactions'.³⁰⁵ The critics' point of view was summed up well by the Law Commission in a 1976 working paper: 'It is a technical rule of uncertain ambit which, at best, adds to the complications of litigation without affecting the outcome and, at worst, prevents the courts getting at the truth'.³⁰⁶

Criticisms generally fall into two categories: that the rule is needlessly complicated and that it often leads to unreasonable or unjust results. The many exceptions to the exclusionary rules are indeed a source of confusion and may detract from the predictability of results in a given case.³⁰⁷ More importantly, the line between inadmissible parol evidence and admissible background is far from clear. Lawyers unsurprisingly will dress one up as the other, according to the interests of their clients, and judges frequently reach the result they think most just and then admit or exclude evidence as consistent with that result. As Sweet observed, 'New and unique methods of avoiding the parol evidence rule continually appear'.³⁰⁸

In addition, because contractual interpretation is considered an issue of law, not of fact, determinations of the admissibility of extrinsic evidence may be appealed and are reviewable *de novo*. Since perceptions of ambiguity and the scope of the surrounding circumstances may differ from one judge to the next, the result is a degree of unpredictability. In fact, statistics bear out the notion that 'there is a substantial chance of a reversal of trial court decisions'.³⁰⁹ On the other hand, in the United States, juries determine the facts in many civil suits, the characterisation of interpretation as an issue of law has been justified by

³⁰³ Staughton 1999, 311. See also *McCutcheon v Macbrayne (David) Ltd* [1964] 1 WLR 125, 138 (HL) ('It is the consistency of a course of conduct which gives rise to the implication that in similar circumstances a similar contractual result will follow. Where the conduct is not consistent, there is no reason why it should still produce an invariable contractual result.').

³⁰⁴ Sweet 1968.

³⁰⁵ Honnold 1999, 121.

³⁰⁶ Law Commission 1976 [43].

³⁰⁷ See *Zell v Am Seating Co*, 138 F.2d 641, 643-44 (2d Cir. 1943), rev'd 322 U.S. 709 (1944) (describing the confusion that results from the rule's many exceptions).

³⁰⁸ Sweet 1968, 1042.

³⁰⁹ *Ibid*, 1047.

'the judge's superior equipment—his education and legal experience—to interpret written instruments and give them reliability'.³¹⁰

With respect to perverse results, Hoffman rightly points out that the exclusionary rules are designed 'to prevent the court from giving effect to the meaning which, as a matter of probability, it thinks the parties actually intended to convey by the words which they used in the instrument'.³¹¹ From the common law's objective point of view, 'the legal certainty produced by the parol evidence rule is more important than the true intention of the parties'.³¹²

Legal certainty is only one of several rationales that have been advanced in defence of the exclusionary rules. Originally, the parol evidence rule was justified on purely evidentiary grounds—oral evidence was seen as less reliable than documents.³¹³ Now, however, this view has fallen from favour.³¹⁴ A variety of rationales are now advanced in support of the exclusionary rules. In a much-quoted passage from his speech in *Prenn v Simmonds*, Lord Wilberforce explained that extrinsic evidence can simply be a distraction:

The reason for not admitting evidence of these exchanges is not a technical one or even mainly of convenience.... It is simply that such evidence is unhelpful. By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter are changing and until the final agreement, though converging, still different. It is only the final document which records a consensus. If the previous documents use different expressions, how does construction of those expressions, itself a doubtful process, help on the construction of the contractual words? If the same expressions are used, nothing is gained by looking back.³¹⁵

³¹⁰ Patterson 1964, 837.

³¹¹ Hoffman 1997, 670.

³¹² Zweigert & Kötz 1998, 407.

³¹³ In the *Countess of Rutland's Case* (1604), 77 Eng Rep 89 (KB), the first recorded judgment to articulate the parol evidence rule, the rationale given was evidentiary: 'It would seem inconvenient, that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory.' For an American case expressing the same rationale, see *GL Webster Co v Trinidad Bean & Elevator Co*, 92 F.2d 177 (4th Cir. 1937).

³¹⁴ Farnsworth 1999, 429.

³¹⁵ *Prenn v Simmonds* [1971] 1 WLR 1381 (HL) (speech of Lord Wilberforce). See also *The Rio Assu* (No. 2) [1999] 1 Lloyd's Rep 115, 124 (CA) (opinion of Waller LJ) ('The negotiations of a contract can often be a compromise. It is dangerous to make the assumption that one party intended to have something else supplied or provided by the contract.')

Lord Hoffman reached a similar conclusion:

[E]xperience shows that such evidence seldom makes any difference. It usually tends most to show that the parties adopted a form of words which, if things went well, might not have to be examined too closely but which each hoped, in the last resort, would be interpreted favourably to him- or herself.³¹⁶

This rationale is similar to the dominant one in American law, that the exclusionary rules, and in particular the parol evidence rule, promote certainty and protect the expectations of parties who intended their written contract to be a final agreement.

Any contract ... can be discharged or modified by subsequent agreement of the parties.... If the foregoing is true of antecedent contracts that were once legally operative and enforceable, it is equally true of preliminary negotiations that were not themselves mutually agreed upon or enforceable at law. The new agreement is not a discharging contract, since there were no legal relations to be discharged; but the legal relations of the parties are now governed by the terms of the new agreement.³¹⁷

Another compelling rationale for the exclusionary rules is that interpretation of a contract can establish a general meaning of the terms used beyond the meaning given to them by the parties. Most directly, this might occur in the case of a contract that affects a large number of people, such as standard form contract or a collective labour agreement. Moreover, in modern commerce, 'many projects, whether construction, trading or banking, involve a network or other complex structure of contractual relations'.³¹⁸ Third parties whose interests are affected by a contract are not likely to have been present for its negotiation, so they are not likely to be familiar with much beyond the text of the contract and its immediate surrounding circumstances. They can only base their decisions on the contract as it is written, according to a reasonable understanding of its terms. It would be unjust to alter the rights of third parties based on factors of which they could have no knowledge.

Many commentators have also remarked upon the efficiency provided by exclusionary rules. When extrinsic evidence is admitted, the work of the court increases, and so does the length of trials and the concomitant costs. As Staughton said of Lord Hoffman's

³¹⁶ Hoffman 1997, 668.

³¹⁷ Corbin 1944, 607-608. This rationale underlies the Restatement's version of the parol evidence rule, which states that a final agreement 'discharges' any previous understandings. Restatement (2d) of Contracts s 213.

See also *United States v Clementon Sewerage Authority*, 365 F.2d 609 (3d Cir. 1966).

³¹⁸ McMeel 2003, 296.

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³¹⁸ McMeel 2003, 296.

speech in *Investors Compensation Scheme*, which increased the range of evidence that may be admitted as part of the surrounding circumstances, 'It is hard to imagine a ruling more calculated to perpetuate the vast cost of commercial litigation.'³¹⁹ Conversely, as Gilmore argues in *The Death of Contract*, if 'we can restrict ourselves to the "externals" [*i.e.*, objective evidence of facts known to both parties] then the factual inquiry will be much simplified'.³²⁰

Finally, there is what McMeel calls the 'disciplinary' rationale for the exclusionary rules.³²¹ Excluding evidence of the true intent of the parties and emphasising the natural meaning of the terms of the contract encourages 'contracting parties to embody their agreement in a clearly written, comprehensive document'.³²² This rationale may make particular sense in the United States, as the exclusionary rules reduce the role of the jury by shifting the trial's centre of gravity from issues of fact to issues of law: 'Parties to contracts may prefer, *ex ante* (that is, when negotiating the contract...), to avoid the expense and uncertainty of having a jury resolve a dispute between them, even at the cost of some inflexibility in interpretation.'³²³ This rationale is borne out by the common law style of drafting. Contracts written by common lawyers are notorious for their tendency to 'provide expressly for the resolution of every dispute that might conceivably arise'.³²⁴

There are a few routes by which direct evidence of a party's subjective intent may enter the record. These involve either allegations of misrepresentation (or another defect of consent) or an action for what is called rectification in England and reformation in the United States. Rectification is called for when the 'erroneous belief' of the parties 'that the writing expresses their agreement can be characterised as a mistake as to expression ... one that goes to the contents or effect of the writing intended to express their agreement.'³²⁵ In such cases, the court may, in its discretion, 'rectify' or 'reform' the contract to express the agreement that was actually reached by the parties. To so do, the court cannot help but examine extrinsic evidence.

³¹⁹ Staughton 1999, 307.

³²⁰ Gilmore 1974, 42.

³²¹ McMeel 2003, 290.

³²² R Posner 1998, 210. See also Sweet 1968, 1036 (citing *Jones v Guilford Mortgage Co*, 120 S.W.2d 1081 (Tex. Civ. App. 1938)).

³²³ *Federal Deposit Insurance Co v WR Grace & Co*, 877 F.2d 614, 621 (7th Cir. 1989).

³²⁴ Farnsworth 1999, 426.

³²⁵ A definitive American formulation of this notion can be found in *Wiener v Eastern Ark. Planting Co*, 975 F.2d 1350 (8th Cir. 1992) (Reformation lies where 'the language used in the contract is not an accurate rendition of what the parties actually meant').

As Lord Hoffman explains, rectification actions are not truly exceptions to the parol evidence rule: 'In the case of rectification, the text of the contract is not being construed; it is being amended by reference to another text, namely the prior agreement or understanding of the parties.'³²⁶ In theory, when direct evidence of party intent is admitted to help settle a question of rectification or misrepresentation, the court must then ignore this evidence when it comes time to construe the agreement itself.³²⁷ In practice, however, such neat intellectual segregation is difficult.

Despite relaxation of the exclusionary rules in common law jurisdictions, evidence of the parties' conduct subsequent to the conclusion of the contract remains broadly inadmissible in both the United States and England.³²⁸ A frequently-cited rationale for excluding evidence of subsequent conduct is similar to that given for the parol evidence rule: the promotion of certainty and reliability. As Lord Reid put it in *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd*, if evidence of subsequent conduct is admitted, 'one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.'³²⁹

The one exception to the exclusion of subsequent conduct evidence applies when a party's subsequent conduct might give rise to an estoppel by convention.³³⁰ It should be noted, though, that, as with rectification, estoppel by convention is not really an exception to the normal rule because it avoids interpretation of the contract. A successful estoppel claim has no effect on the content of the contract in question. Rather, it prevents a party from enforcing rights created by the contract where the party's actions make it inequitable for it to do so.³³¹

2. Civil law jurisdictions

In comparison with the common law doctrines, civilian rules on extrinsic evidence are simple. There are no counterparts to the common law exclusionary rules because extrinsic evidence is not excluded. Instead, extrinsic evidence is broadly admitted and then considered by the adjudicator together with the rest of the evidence. The extrinsic evidence may be of

³²⁶ Hoffman 1997, 667.

³²⁷ *Arrale v Costain Civil Engineering Ltd* [1976] 1 Lloyd's Rep 98.

³²⁸ In England, if an agreement is unintegrated, subsequent conduct evidence may be admitted in order to determine what the full terms of the contract were. *Wilson v Maynard Shipbuilding Consultants AG Ltd* [1978] QB 665.

³²⁹ [1970] AC 583.

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little weight in the face of a clearly drafted contract, but it will be admitted nonetheless. In sharp contrast to the common law's approach, the admissibility of subject extrinsic evidence extends even to purely unilateral intentions of a single party. As Zweigert and Kötz relate, the German BGB 'rejects as "unacceptable" the perfectly reasonable view that in contracts what matters is not what real intention lay behind what one contractor said but what the other contractor must in the circumstances have understood him to mean.'³³²

As discussed above, interpretation in the civil law is subjective: the purpose of interpretation is to divine the true intention of the parties, even if this contradicts the apparent meaning of the contractual terms. This is emphatically so in France ('One must in agreements seek what the common intention of the contracting parties was, rather than pay attention to the literal meaning of the terms.'³³³), Germany ('In the interpretation of a declaration of intention the true intention is to be sought without regard to the literal meaning of the expression.'³³⁴) and Switzerland. ('As regards both the form and content of a contract, the real intent which is mutually agreed upon shall be considered.'³³⁵)

The seriousness with which the civil law takes subjective interpretation is exemplified by a 1980 decision of the Swiss Federal Court. The court was called upon to interpret a 1973 employment agreement that provided for consultations between management and trade unions over individual dismissals but had no provisions regarding layoffs as a result of downsizing. During the recession of 1978, the company closed several of its factories and the trade unions sued for compensation. The Swiss Federal Court found for the unions on the ground that the employment agreement had a 'gap' because, at that time, the economy was strong and the parties did not consider the possibility of factory closures. The court reasoned that there was 'no doubt' that the unions had 'expressed their desire for a comprehensive protection of the employees and that the employers could not misunderstand them'.³³⁶

In practice, the civil law's dedication to subjective interpretation is not unconditional, and all judges will begin by looking at the words of the contract in their ordinary and natural sense. Indeed, since judges rarely have definitive evidence of the parties' true intentions, they have no choice but to focus on the natural meaning of the contract's words and any

³³² Zweigert & Kötz 1998, 403 (quotation omitted).

³³³ Code civil art 1156. Official translation available online:

<http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm> accessed 28 November 2010.

³³⁴ BGB s 133, translated in AT von Mehren, *The Civil Law System: Cases and Materials for the Comparative Study of Law* (Prentice Hall, Englewood Cliffs 1957) 880.

³³⁵ OR art 18. Translated in Swiss-American Chamber of Commerce, *Swiss Contract Law* 20 (New York 1984).

³³⁶ Hermann 1983, 11, quoting (and translating) 'Einigungsamt Baselland, Chemical Workers' Union and other v Firestone', *Neue Zürcher Zeitung*, 1 February 1980.

relevant usages or practices. Nevertheless, decisions must be justified on the basis of the parties' subjective intent. Of course, the judge remains 'perfectly free to come to his conclusion on the basis of objective considerations and call it the [common intention of the parties] when he comes to write his judgment.'³³⁷

The civil law has a rough counterpart to the plain meaning rule, in the form of the brocard *in claris non fit interpretatio* (what is clear needs no interpretation), and code provisions expressing this concept. Danneman's formulation is typical: 'If the declarations by the parties are ambiguous in wording or intent, interpretation is required to find out if, and what, the parties have agreed.'³³⁸ As Zweigert and Kötz note, such a doctrine is nonsensical: all terms must be interpreted, if only to determine that they are clear.³³⁹ However, the doctrine remains influential and is 'effective in constraining any undue tendency on the part of courts to overly subjective constructions'.³⁴⁰

Thus, in cases where a term of the contract appears to be clear on its face (in French, a *clause claire et précise*), the court will not generally consider or request the production of extrinsic evidence. However, to fail to consider certain evidence is not the same thing as to exclude it, and if a party seeks to introduce such evidence the court will admit it to the record, even if only to assign it little weight and disregard it.

Where common law interpretation begins by asking 'To what terms did the parties agree?', a civilian asks 'Into what type of contract did the parties enter?'.³⁴¹ This is because the interpretive starting-point in civil law is that 'the incidents of a contract are fixed by law, subject to the parties' power to vary them'.³⁴² Thus, a court must first 'qualify' (characterise) the agreement before it as belonging to one of the categories of nominate contracts.³⁴³ Even if the contract is innominate, the obligations created by it 'will often be determined by reference to the one (or more) of the special contracts to which it is most analogous'.³⁴⁴

Once the contract is characterised, its terms will be determined largely according to the mandatory (*ius cogens* / *zwingend* / *lois imperatives*) and supplementary (*ius dispositivum* /

³³⁷ Zweigert & Kötz 1998, 402.

³³⁸ Danneman 1993, 14.

³³⁹ Zweigert & Kötz 1998, 403.

³⁴⁰ Ibid.

³⁴¹ Nicholas 1992, 49-50.

³⁴² Ibid, 49.

³⁴³ Markesinis et al 1997, 34.

³⁴⁴ Nicholas 1992, 49.

nachgiebig / lois supplétives) rules pertaining to that type of contract.³⁴⁵ The mandatory rules apply as a matter of course and the supplementary rules apply unless the parties specifically derogate from them. Similarly binding are any relevant practices established by the parties or usages prevailing in the industry. Thus, the French *Code civil* provides that 'Agreements are binding not only as to what is therein expressed, but also as to all the consequences which equity, usage or statute give to the obligation according to its nature.'³⁴⁶ Scholarly treatments of 'contractual interpretation' are generally restricted to the proper application of these rules.³⁴⁷ Of course, the common law contains similar concepts, but they form only a part of the doctrines relating to the interpretation of contracts.³⁴⁸

Rules analogous to the common law exclusionary rules apply to certain nominate contracts. The most important example is the requirement, similar to the common law statutes of frauds, that certain contracts be made in writing, be notarised or comply with other formalities. In cases involving contracts which must be in writing, oral evidence is frequently inadmissible to contradict the written terms. For example, article 1341 of the French *Code civil* provides:

An instrument before notaries or under private signature must be executed in all matters exceeding a sum or value fixed by decree, even for voluntary deposits, and no proof by witnesses is allowed against or beyond the contents of instruments, or as to what is alleged to have been said before, at the time of, or after the instruments, although it is a question of a lesser sum or value.

Since most international arbitrations occur between incorporated entities, it should be noted that contracts between merchants are often governed (in France and Germany but not in Switzerland) by a separate commercial code. The restrictions that apply to methods of proof in contracts governed by the civil codes (such as contracts between merchants, on the one hand, and consumers, on the other) may not apply to contracts between merchants. As with the civil codes, the commercial codes delineate types of nominate contracts, some of which

³⁴⁵ Markesinis et al 1997, 28.

³⁴⁶ Art 1135.

³⁴⁷ Nicholas 1992, 34.

³⁴⁸ The two types of rules are not separately labelled in the common law; both are subsumed under the heading of contractual terms implied by law, and such terms may be either mandatory or derogable (in which case they may be characterised as presumptions as to the intent of the parties).

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must follow written formalities. However, even if a writing is required, for contracts between merchants, commercial instruments are by default provable by any means.³⁴⁹

While the civil law permits adjudicators freely to go beyond the text of the contract, it does insist that that is where the process of interpretation must begin. Civilian jurisdictions tend to 'accept the probative force of a writing on the assumption that when there is no indication of the existence of a vice of consent ... [then] the instrument is an accurate mirror of the entire agreement of the parties.'³⁵⁰ For example, under German law, the good faith principle of *Treu und Glauben*³⁵¹ has been interpreted to mean that, unless there is evidence of a defect of consent, a rebuttable presumption exists that written agreements correctly reflect the intent of the parties.³⁵²

Another fundamental difference between the common law and civil law perspectives is that, under the civil law, interpretation of contracts is a matter of fact, not of law. The most important consequence of this is that determination of the facts is within the sole jurisdiction of the trial judge, and cannot be reviewed on appeal.³⁵³ The subjective method of interpretation and the restriction of contractual interpretation to the trial level mean that 'in world of standard form contracts each court is free to interpret each contract as if it were unique. There are standard terms but, strictly speaking, no standard interpretation.'³⁵⁴ For the sake of loyalty to the parties' intentions, the civil law thus sacrifices some of the standardisation and stability prized by the common law.

The only substantial limitation on the 'sovereign power' of trial courts over contractual interpretation is that, in France, they may not 'denature' contractual provisions that are *clauses claires et précises*.³⁵⁵ In other words, where there is no ambiguity in a contractual term, the issue becomes one of law and the appeal courts may intervene to overturn lower courts' interpretations. Such intervention is justified according to two premises. First, under article 1134 *Code civil*, a contract constitutes law between the parties. Second, clear contractual provisions are deemed to need no interpretation. Therefore, any

³⁴⁹ See, e.g., the French *Code de Commerce*, art L110-3, official English translation available online: <<http://195.83.177.9/code/liste.phtml?lang=uk&c=32&r=2940#art11946>> accessed 28 November 2010.

³⁵⁰ Zuppi 2007, 258.

³⁵¹ BGB s 157.

³⁵² Zweigert & Kötz 1998, 404.

³⁵³ Nicholas 1992, 47. Perhaps due in part to the fact that there is no appeal from the decision of an arbitral tribunal on the merits, none of the arbitral awards discussed below mentions the issue of whether contractual interpretation is an issue of fact or of law.

³⁵⁴ Ibid, 48.

³⁵⁵ Ibid, 49.

attempt by a trial court to interpret a *clause claire et precise* would not be a ruling on the facts, but rather a contravention of the law that may be appealed.³⁵⁶ However, since the rule stands in opposition to the general civilian method of interpretation, it is perhaps not surprising that *Cour de cassation* has only rarely used its power to enforce the terms of *clauses claires et précises*.³⁵⁷

Just as the common law's focus on the written terms has led drafters to craft lengthy, detailed contracts, civil law courts' interpretive practices have shaped the terser style of civilian contracts. 'Just as the judge begins by qualifying the contract before him, so also the draftsman begins by asking himself the same question and then proceeds in the knowledge that the main incidents of the contract are provided for and that he need concentrate only on those points which are of particular concern to the parties.'³⁵⁸ In the end, these two systems are self-reinforcing. The common law judge knows that commercial contracts were probably negotiated in great detail, so a strict textual interpretation is likely to reflect the true intention of the parties and is unlikely to lead to injustice. The civil law judge knows that commercial parties rely on the relevant mandatory and supplementary rules and the force of business custom when they draft their agreements.

3. International contract law instruments

All of the major international contract law instruments except the ULIS contain clauses which specify the method of interpretation and the admissibility of extrinsic evidence. All these instruments employ concepts from both the civil law and the common law. They direct a tribunal to look at the unilateral subjective intent of each party but, if this cannot be determined or if the other party could not have been aware of this subjective intent, then objective interpretation must lie to determine the contract's content. The CISG rules exemplify this trend. CISG article 8 directs the adjudicator to a two-stage approach, first subjective, then objective:

(1) ... statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted

³⁵⁶ Zweigert & Kötz 1998, 403 (citing Civ. 14 Dec. 1942, D. 1944, 112; Civ. 23 April 1945, D. 1945, 261, obs Lerebours-Pigeonnière).

³⁵⁷ Nicholas 1992, 49.

³⁵⁸ Ibid, 57.

according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

The CISG thus inhabits an area in between the civil law and the common law. It admits direct evidence of parties' subjective intentions, but disregards evidence of unexpressed or undeclared intentions. Instead, for one party's subjective understanding of the contract to govern, the other party must either know or ought to know of that intention. If no subjective intention was made known, then the contract must be interpreted objectively.

With respect to extrinsic evidence, the CISG is widely inclusive. Article 8 continues:

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

It is therefore clear that the CISG contains no version of the plain meaning rule or the parol evidence rule.³⁵⁹ Indeed, at the Vienna diplomatic conference the Canadian delegation attempted to introduce into the convention a version of the parol evidence rule, but a majority rejected the proposal.³⁶⁰ Thus, where a federal trial court in Florida refused to abandon Florida's parol evidence rule in a case governed by the CISG, the 11th Circuit Court of Appeals overruled and held that CISG article 8(3) governs the admissibility of parol evidence and is 'a clear instruction to courts to admit and consider all evidence that could reveal the parties' true intent'.³⁶¹

The CISG makes no mention of entire agreement clauses, but courts applying the convention have consistently given force to them.³⁶² However, in determining the effect of an entire agreement clause (*e.g.*, whether the clause bars evidence of trade usages), all of the relevant circumstances, including the parties' conduct, must be taken into account.³⁶³

The UNIDROIT Principles enunciate a rubric for interpretation that is essentially identical to the CISG's. Article 4.2 contains the same two-stage subjective and objective

³⁵⁹ This conclusion has been affirmed by the CISG Advisory Council, a private body of academic experts. CISG-AC Opinion No. 3. On the nature and role of the CISG Advisory Council, see Karton & de Germiny 2009.

³⁶⁰ United Nations Conference on Contracts for the International Sale of Goods, Official Records, UN Doc A/Conf./97/19, UN Sales No. E.81.IV.3, 90 (1981), reprinted in Honnold 1989, 662.

³⁶¹ *MCC-Marble Ceramic Center Inc v Ceramica Nuova d'Agostino SpA*, 144 F.3d 1384, 1389 (11th Cir. 1998).

³⁶² Schmidt-Kessel Art 8 2010, 163; see also CISG-AC Opinion No. 3 [4.5].

³⁶³ *Ibid.*

method of interpretation and article 4.3 contains a similar list of types of extrinsic evidence that must be admitted. While the UNIDROIT Principles do not include any version of the parol evidence rule, they do explicitly direct adjudicators to give effect to entire agreement clauses. Article 2.17, states that if a contract contains 'a clause indicating that the writing completely embodies the terms on which the parties have agreed', then the written contract 'cannot be contradicted or supplemented by evidence of prior statements or agreements'.

The PECL sets out a similar but not identical three-stage interpretive rubric:

(1) A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words.

(2) If it is established that one party intended the contract to have a particular meaning, and at the time of the conclusion of the contract the other party could not have been unaware of the first party's intention, the contract is to be interpreted in the way intended by the first party.

(3) If an intention cannot be established according to (1) or (2), the contract is to be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.³⁶⁴

As with the CISG and the UNIDROIT Principles, the subsequent provision, PECL article 5:102, lists various types of extrinsic evidence, declaring them all to be admissible.

PECL article 2:105 states explicitly that 'prior statements may be used to interpret the contract', unless the contract includes an 'individually negotiated' entire agreement clause. If the contract does contain such a clause, adjudicators are to give it effect. If the contract contains an entire agreement clause, but it was not individually negotiated (such as when it appears in one party's standard terms), then 'it will only establish a presumption that the parties intended that their prior statements, undertakings or agreements were not to form part of the contract.'

In addition to the international contract law instruments, tribunals have also looked to the Vienna Convention on the Law of Treaties (VCLT)³⁶⁵ for rules for the interpretation of contracts. This convention does not purport to relate to the interpretation of private contracts. It is a law of 'treaties', which the VCLT defines as 'international agreement[s] concluded

³⁶⁴ PECL art 5:101.

³⁶⁵ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

between States'.³⁶⁶ Nevertheless, it may be applied by agreement of the parties or as indicative of general principles on the interpretation of agreements in international law. After all, both treaties and contracts are consensual, binding agreements between autonomous parties. As Crawford has noted in another context, the two may be different things, 'But they are not clean different things, in the sense of inhabiting different worlds.'³⁶⁷

In the *Eurotunnel* arbitration,³⁶⁸ the tribunal was called upon to interpret both a contract and a treaty. The dispute arose from operation of the fixed rail link passing through the Channel Tunnel between France and the UK. The concessionaires who operated the fixed link alleged various violations by the two governments of both the Concession Agreement in force between the governments and the concessionaires and a treaty between the two governments (the Treaty of Canterbury).³⁶⁹ The tribunal considered in detail the 'principles of interpretation' that would apply to the Concession Agreement. The parties agreed that, although the Concession Agreement was not a treaty, it was an 'international contract' governed by 'international law'.³⁷⁰ The tribunal therefore agreed that 'international law principles of interpretation are to be applied'.³⁷¹ The parties further agreed that application of 'international law principles' meant that the VCLT applied to both the Treaty of Canterbury and the Concession Agreement.³⁷²

The general rule of interpretation under the VCLT is stated in article 31: interpretation should be 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.' If the ordinary meaning, context and purpose of the text do not resolve an ambiguity or obscurity, or if they lead to an absurd or unconscionable result, '[r]ecourse may be had to supplementary means of interpretation, including preparatory work of the treaty and circumstances of its conclusion'.³⁷³

In summary, the international contract law instruments (the CISG, UNIDROIT Principles and PECL) and the VCLT all direct adjudicators to discern the parties' subjective intention via a two-stage interpretive method. The international contract law instruments instruct the adjudicator to begin by assessing the parties' common subjective intention and,

³⁶⁶ Art 2(1)(a).

³⁶⁷ Crawford 2008, 21.

³⁶⁸ Permanent Court of Arbitration Case 2003-06, Partial Award of 30 January 2007.

³⁶⁹ France-United Kingdom, Treaty concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link, Canterbury (adopted 12 February 1986) 1497 UNTS 334.

³⁷⁰ *Eurotunnel* [92].

³⁷¹ *Ibid.*

³⁷² *Ibid.*

³⁷³ Art 32.

only if this cannot be discerned, to interpret the contract objectively. On the other hand, the VCLT directs adjudicators to take a textual approach, beginning with the 'ordinary meaning' of the words of the agreement, in context and in light of the agreement's 'object and purpose'. The VCLT and the international instruments all agree that extrinsic evidence should be used. The difference is that the Vienna Convention declares the examination of such materials to be 'subsidiary', *i.e.*, to be used only when the objective interpretation fails to produce a reasonable result, while the international instruments direct adjudicators to consider all relevant extrinsic evidence from the outset.

B. EXTRINSIC EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION

A review of the arbitral literature identified forty-three awards whose published extracts included interpretations of contracts. Not included are instances where the breaching party pleaded an excuse, such as *force majeure*, unconscionability or changed circumstances (*rebus sic stantibus*), because the pleading of an excuse entails a concession that a breach of contract occurred. In such cases (unless excuse is pleaded in the alternative), there is no disagreement as to the contract's content. Also excluded are cases where the existence of a contract was challenged, unless this challenge was rejected and the parties proceeded to dispute the content of the contract. Finally, cases are excluded where the contractual term being interpreted is the arbitration clause. Arbitration clauses are considered autonomously from the remainder of the contract under the well-established principle of separability, and the substantive law governing the underlying contract (whether a national law or international contract law instrument) is not ordinarily applied to interpret them.³⁷⁴

In theory, the awards ought to be neatly divisible into three groups based on whether they are governed by common law, civil law or an international contract law instrument. Awards governed by common law would presumably begin with objective interpretation of the plain meaning of the contract and exclude most extrinsic evidence, while awards governed by civil law or an international contract law instrument would employ subjective interpretation and liberally admit extrinsic evidence into the record. A fourth group of awards, those adjudicated under amiable composition or governed by general principles of international law, will not necessarily be consistent with each other because tribunals may differ as to the fair result in a given case or as to the content of the relevant general principles.

³⁷⁴ Redfern & Hunter 2004, 193-195.

The awards are indeed largely divisible in this manner, as detailed below. However, two additional factors must be considered: first, confusion over whether the rules governing extrinsic evidence are substantive or procedural; second, a bias among international tribunals toward admission into the record of whatever evidence the parties submit.

1. The substance/procedure dichotomy and rules of evidence

With an eye to efficient resolution of disputes and informality in the arbitral proceedings, tribunals often conduct hearings and draft awards with a minimum of investigation into the requirements of substantive law. Many disputes are resolved 'by arbitral tribunals with no more than a passing reference to the law. They turn on matters of fact: what was said and what was not said; what was promised and what was not promised; what was done and what was not done.'³⁷⁵ This assertion, though undoubtedly true, is striking: every legal system has rules that govern the admissibility of evidence. Thus, decision without reference to law ought to be possible only in cases of amiable composition. Nevertheless, arbitrators often consider questions of the admissibility of evidence without reference to any rules of law, a tendency that seems not to have been diminished by the purported 'judicialisation' of ICA.³⁷⁶

For example, in ICC Case No. 6281 of 1989,³⁷⁷ the parties concluded a contract for delivery of steel in instalments. After the market price of steel increased, the claimant exercised an option to purchase additional instalments at the same price. The respondent refused to send the additional instalments and the claimant initiated arbitration. Among other arguments, the respondent justified its refusal to sell the additional steel on the ground that the claimant had not opened a letter of credit to pay for the order (which it was required to do prior to delivery). The sole arbitrator rejected this argument without referring to the terms of the contract; he found for the claimant, reasoning that it would be irrational to require a buyer to open a letter of credit for goods that it is not certain the seller will provide. In other words, the arbitrator interpreted the contract according to his sense of what the parties must have intended, without reference to rules of admissibility.

Tribunals tend not to set out their reasoning on questions of the admission of evidence. Only fifteen of the forty-three published awards canvassed in this case study explicitly discuss the admissibility of extrinsic evidence. The others either do or do not consider such

³⁷⁵ Ibid, 89.

³⁷⁶ See below, fns 909-917 and accompanying text.

³⁷⁷ (1990) XV Ybk Comm Arb 96.

evidence, but do so without any consideration of its admissibility. This makes it difficult to determine the reasons why the most of the tribunals decided as they did.

In ICA, substance and procedure will normally be governed by different sources of law. In general, the applicable evidentiary rules will be the procedural rules promulgated by convening arbitral institutions or the rules chosen to govern *ad hoc* arbitrations.³⁷⁸ However, arbitral rules typically leave questions of evidence (and of the conduct of hearings generally) up to the discretion of the tribunal and the agreement of the parties. Of the major arbitral rules, only those of the London Court of International Arbitration (LCIA) even address the weight or admissibility of evidence, and these rules say only that the tribunal has the 'additional powers':

to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any matter of fact or expert opinion; and to determine the time, manner and form in which such material should be exchanged between the parties and presented to the Arbitral Tribunal...³⁷⁹

As discussed above, the common law exclusionary rules are undoubtedly substantive; although they deal with evidence, they are not evidentiary rules. The latter regulate the means by which facts may be proved, while the exclusionary rules regulate what facts may be proved, regardless of the means. On the other hand, such civil law rules excluding evidence as do exist are characterised as procedural. Examples of these include rules permitting contracts between merchants to be proved by any type of evidence³⁸⁰ or rules prohibiting oral testimony to contradict a written agreement for the types of nominate contracts that require a writing.³⁸¹

Thus, it might seem that a tribunal may be drawn into an absurd result. If the tribunal finds that the national law of a common law jurisdiction applies to the substance of the dispute, then there is no problem: the national law will apply to exclude extrinsic evidence and the arbitral rules will govern all procedural issues. If, on the other hand, the tribunal finds that the national law of a civil law jurisdiction applies to the substance of the dispute, then questions of extrinsic evidence will not be settled by that law. However, the only

³⁷⁸ Parties sometimes contract for application of a set of evidentiary rules drafted by a committee of the International Bar Association. See below, fn 389 and accompanying text.

³⁷⁹ Art 22(f).

³⁸⁰ For example, Code de commerce (France) art L110-3 ('*A l'égard des commerçants, les actes de commerce peuvent se prouver par tous moyens à moins qu'il n'en soit autrement disposé par la loi.*'). Official English translation available at <<http://195.83.177.9/code/liste.phtml?lang=uk&c=32>> accessed 28 November 2010.

³⁸¹ For example, Code civil (France) art 1341. See above, Chapter Four, Section A.2.

applicable procedural rules—the institutional or *ad hoc* rules of procedure and the national arbitration law of the *situs*—are silent on the question of extrinsic evidence, and indeed on contractual interpretation generally. The tribunal seems to be left with no rules to apply.

This apparent dead end is illusory. Although the few civil law rules that do exist to exclude extrinsic evidence are procedural, rules governing the interpretation of contracts—including those enshrining the subjective method of interpretation—are clearly substantive. The different perspectives from which the two systems operate dictate at least some of the types of extrinsic evidence they include or exclude. The objective method requires adjudicators to exclude direct evidence of the parties' intentions, while the subjective method requires adjudicators to consider it. In other words, the role of extrinsic evidence in the interpretation of a contract, whether inclusive or exclusive, is determined by substantive law; rules on the admissibility of such evidence must be classified as substantive, even if they are contained in codes of civil procedure. It would be nonsensical to characterise rules that exclude extrinsic evidence as substantive and rules that admit extrinsic evidence as procedural. This conclusion is supported by the fact that the international contract law instruments, which include only rules of substantive contract law and draw from both the common law and civil law, contain provisions on interpretation of contracts that address both the method of interpretation and the admissibility of extrinsic evidence.

Of the published arbitral awards that do discuss the admissibility of extrinsic evidence, only one held expressly that rules governing admissibility are procedural.³⁸² In that case, an Indian claimant and an Austrian respondent entered into negotiations regarding the construction of a chemical plant in India. These led to a 'draft contract' and a 'supplemental agreement', both of which were initialled by the two parties but not signed. When the respondent commenced work on the project with a different Indian partner, the claimant initiated arbitration, citing 'understandings of exclusivity' in the two agreements.

The respondent alleged that no binding contract existed. It sought to introduce the diaries of two of its employees who were present at the discussions with the claimant. They each kept a daily notebook in German, to which they referred when giving evidence at an oral hearing. The tribunal requested and was provided with English translations of the diaries. The claimant objected to their admission, citing exclusionary rules in Indian law, which the parties agreed was the governing law. Under Indian law, the diaries should actually have

³⁸² ICC Case No. 7626 of 1995 (1997) XXII Ybk Comm Arb 132. This award is not discussed in detail below because it deals with the existence of a contract, rather than interpretation of a contract.

been admitted. India is a common law jurisdiction and, under the common law, extrinsic evidence is admissible to prove the existence of a contract. However, the tribunal did not apply Indian law to determine the admissibility of extrinsic evidence. Instead, it held that the admission of the diaries was a question of procedure. Noting that the ICC Rules give tribunals discretion over what evidence may be considered, the tribunal admitted the diaries without further comment.

The result was the same, but the tribunal ought to have held that the applicable Indian substantive law governed the admissibility of extrinsic evidence. In the other cases where tribunals explicitly discussed the admissibility of extrinsic evidence in cases governed by a national substantive law or the CISG, they applied that substantive law to determine admissibility. Therefore, it is fair to conclude that, when tribunals do consider the issue, they find that extrinsic evidence is a matter of substantive law.

As to the majority of awards that do not discuss the admissibility of extrinsic evidence, it is impossible to say with certainty whether those tribunals would have concluded that substantive law applied to determine the issue. However, all these tribunals either admitted or excluded extrinsic evidence, and such decisions must have been guided by some identifiable—even if inchoate—interpretive or evidentiary model. Such a model could not have come from the arbitral rules of procedure (since these are silent as to interpretation of contracts), which leaves either the applicable substantive law or some other principles of interpretation, which might be general principles of international law or an interpretive method devised by the specific tribunal. It is therefore necessary to investigate whether there exist general principles of evidence in international law and, if so, what these might be.

2. General principles of evidence in international law

In cases where the tribunal makes no explicit analysis of the law applicable to extrinsic evidence, the awards show the influence of a bias in favour of admitting extrinsic evidence. The source of such a bias is likely to be some assumption as to customary practices in arbitration or general principles of international law applicable to the admission of evidence. It is worth considering whether such practices and principles exist.

With respect to rules of evidence generally, Pietrowski argues that current arbitral practice resembles—and in fact owes much to—the practices established by public international law tribunals, principally the ICJ and its predecessor, the PCIJ. These international tribunals have traditionally 'taken the view that they should hear and consider

everything that each party has to say concerning the dispute. The tribunal itself determines the relevance, materiality and probative value of all evidence submitted by the parties, and does not need to hear argument from the parties concerning these matters.³⁸³

For example, in 1925, when the PCIJ amended its rules of procedure, Judge Huber (Switzerland) wrote that, under the established practices of the court as codified in the amended rules, 'The Parties may present any proof that they judge useful, and the Court is entirely free to take the evidence into account to the extent that it deems pertinent.'³⁸⁴ Such practices have been maintained by the ICJ, as evidenced by this statement of ICJ President Spender (Australia) in ruling on an objection to the admission of testimonial evidence during proceedings on the *South-West Africa* cases (Second Phase):

The evidence will remain on the record; the Court is quite able to evaluate evidence This court is not bound by the strict rules of evidence applicable in municipal courts and if the evidence established by the witness does not sufficiently convey that the evidence is reliable in point of fact, then the Court, of course, deals with it accordingly when it comes to its deliberation.³⁸⁵

These doctrines, although developed in a public international law context, are relevant to ICA. The PCIJ was itself a 'product of the arbitral process'—its rules, and by derivation those of the ICJ, came out of the Hague Peace Conferences of 1899 and 1907, which also established the Permanent Court of Arbitration.³⁸⁶ More importantly, as Reisman notes, 'All contemporary international judicial institutions, whether named courts, tribunals, panels or commissions are arbitral, in that at least the formal contingency for their authority in specific cases emanates from the joint will of the litigating parties.'³⁸⁷ The common link is the principle of party autonomy; international tribunals, whether nominally arbitral or judicial, derive their jurisdiction from the consent of disputing parties.

Over time, the inclusionary bias among international tribunals has solidified into practice. There have been two main avenues for such a process of solidification: express agreement by the parties in arbitral *compromis*, terms of reference or bilateral treaties, or codification in conventions, model laws and the rules of international organisations.³⁸⁸ Such

³⁸³ Pietrowski 2006, 378.

³⁸⁴ Huber 1926, 250.

³⁸⁵ [1966] ICJ Rep, Pleadings, vol 10, 122; vol 11, 460.

³⁸⁶ Pietrowski 2006, 373 fn 2.

³⁸⁷ Reisman 1971, 66.

³⁸⁸ Pietrowski 2006, 374.

rules are evidentiary in that they pertain only to means of proof, not to the admissibility of extrinsic evidence. They also exhibit the mixture of common and civil law traditions that is typical of international procedure. For example, the type of common law restrictive rules concerning competence, relevance and materiality of evidence, which were developed primarily in the context of jury trials, are not often applied in international proceedings. In addition, international tribunals have developed a preference for—and tend to place greater weight on—documentary evidence, another civil law trait.³⁸⁹ On the other hand, most international institutions permit witnesses to be directly examined by counsel and cross-examined by opposing counsel—a practice derived from the common law—and tend to admit affidavits and written witness statements—also products of the common law tradition.³⁹⁰

Many of these procedures have been codified in such international instruments as the UNCITRAL Arbitration Rules and the rules of procedure of the various international courts and arbitral institutions. However, as noted above, such documents tend to deal only minimally with the conduct of proceedings, including rules of evidence.

The International Bar Association (IBA) has promulgated a set of Rules on the Taking of Evidence in International Commercial Arbitration.³⁹¹ However, the IBA Rules contain no provision relating to the interpretation of contracts. With respect to admissibility of evidence, the IBA Rules state only that ‘The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence.’³⁹²

Since all of these rules are procedural, they should not govern the admissibility of extrinsic evidence. General principles of evidence in international law or practice seem to go no further than that tribunals ought to consider whatever evidence the parties think relevant. However, even if such procedural principles were universally accepted in arbitration, they still would not yield any substantive principle of contractual interpretation. Only such a substantive principle could govern the admissibility of extrinsic evidence. Nevertheless, DiMatteo’s statement that international tribunals are ‘freed of the limitations of the parol evidence rule’ represents a widespread attitude.³⁹³ Arbitral procedure continues to be

³⁸⁹ Sandifer 1975, 197.

³⁹⁰ Pietrowski 2006, 375.

³⁹¹ <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> accessed 28 November 2010. The IBA Rules were intended to be applied directly by arbitrators as a codification of general principles or to be incorporated into arbitration agreements. However, despite the urging of the IBA and various prominent commentators (many of whom were involved in drafting the rules), they are only infrequently applied in practice. Salomon 2004, 117.

³⁹² Art 9(1).

³⁹³ DiMatteo 1997, 71.

determined on a case-by-case basis, shaped by the choice of the parties and (in the absence of such choice) by the arbitrators' preferences.³⁹⁴ Therefore, tribunals will generally admit all evidence the parties submit.

Furthermore, most arbitral rules of procedure empower tribunals to require the parties to produce additional evidence.³⁹⁵ However, tribunals tend not to exercise this power; they seldom inquire beyond what the parties place in front of them. Such a trend is striking in light of the fact that most arbitral rules enshrine inquisitorial powers derived from the civil law tradition. However, this does not necessarily mean that arbitrators take their lead from the common law model of the judge's role. Tribunals' reticence to demand additional production of potentially relevant evidence is better explained by deference to party autonomy. If neither party argues based on the applicable substantive law that extrinsic evidence should be excluded, the tribunal is likely to admit the extrinsic evidence.

3. Analysis of published awards

Forty-three published awards include interpretation of a contract.³⁹⁶ Given the small sample size and the fact that most arbitrators do not state their reasons for considering or failing to consider extrinsic evidence, no firm statement can be made about the 'preferences' of international arbitrators. As noted above, care must be taken not to read too much into the awards where the arbitrator's use of evidence is not explicitly discussed. For example, if the award focuses solely on the language of the contract, it is impossible to tell whether extrinsic evidence was excluded on legal grounds, was never introduced by the parties, was presented in an unconvincing manner and discounted or was unnecessary because the answer seemed clear from the text of the contract. Moreover, most of the awards are published in extracted form. It is possible that relevant discussions were excluded from the public extract. Nevertheless, despite these caveats, certain patterns can be observed.

(i) *Awards applying the law of common law jurisdictions*

Of the forty-three published awards, six involved cases where the applicable substantive law was that of a common law jurisdiction. One of these was ICC Case No. 7626, discussed above, in which the tribunal characterised questions of the admissibility of extrinsic evidence as procedural and declined to apply the applicable (Indian) substantive law.

³⁹⁴ Strong & Dries 2005, 301.

³⁹⁵ See, e.g., ICC Rules art 20(5); ICDR Rules art 19(3); UNCITRAL Rules art 24(3).

³⁹⁶ There is no discussion of the tribunals' choice of law in the analysis that follows. None of the forty-three awards contained a choice of law analysis, in most cases because the parties agreed as to the applicable law.

Therefore, the tribunal in that case did not engage in application of substantive law, so its reasoning will not be discussed here. A summary of the results reached in the remaining five cases can be found in Table 4.1:

Award	Applicable Law	Mode of Interpretation and Treatment of Extrinsic Evidence
ICC Case No. 4555 of 1985 ³⁹⁷	Not stated, but clearly the law of a US state. Sole American arbitrator.	Declared that it would proceed by an objective method of interpretation. Applied the parol evidence rule, citing an exception thereto in order to admit evidence of a usage. However, also admitted other extrinsic evidence of one party's subjective understanding of a term of the contract.
ICC Case No. 4975 of 1988 ³⁹⁸	English law. Three English barristers.	Declared that it would proceed by an objective method of interpretation. Citing relevant English case law, ruled that evidence of preliminary negotiations could only be considered as part of the surrounding circumstances of the contract.
ICC Case No. 5946 of 1990 ³⁹⁹	New York law (applies the UCC).	Applied an objective method of interpretation. Began by interpreting 'plain meaning' of the disputed contractual term. Also admitted a wide range of extrinsic evidence, noting that such evidence led to the same interpretation as the plain meaning. Did not discuss admissibility.
ICC Case No. 6955 of 1993 ⁴⁰⁰	Illinois law (applies the UCC).	Applied an objective method of interpretation. Excluded extrinsic evidence, citing UCC s 2-202, which expresses the parol evidence rule. Admitted evidence of a trade usage under s 202(a), which permits admission of evidence of usages so long as these do not contradict the plain meaning of the contract.
ICC Case No. 8694 of 1996 ⁴⁰¹	New Hampshire law (applies the UCC).	Declared that it would proceed by an objective method of interpretation and would apply the plain meaning rule. Excluded extrinsic evidence and interpreted the contract by reference to its text alone.

Table 4.1

The picture presented by these five awards is not entirely consistent. In four awards,⁴⁰² the tribunal proceeded according to the letter of the applicable substantive law, following an objective method of interpretation and treating evidence in accordance with the

³⁹⁷ (1986) XI Ybk Comm Arb 140.

³⁹⁸ (1989) XIV Ybk Comm Arb 122.

³⁹⁹ (1991) XVI Ybk Comm Arb 97.

⁴⁰⁰ (1999) XXIVa Ybk Comm Arb 107.

⁴⁰¹ [1997] JDI 1056 (published in French translation; unpublished original in English).

⁴⁰² ICC Cases Nos. 4975, 5946, 6955 and 8694.

common law rules. In the other case,⁴⁰³ the tribunal stated its intention to adhere to objective interpretation but then admitted extrinsic evidence of the parties' subjective intent.

The four awards in the first category are unremarkable: the tribunals applied substantive law in the same way that courts in England or the United States would have. In ICC Cases Nos. 4975 and 6955, the tribunals explicitly cited appropriate authorities for the exclusionary rules they then applied—in the former, the two then-leading English cases on the use of extrinsic evidence,⁴⁰⁴ and in the latter, the relevant provisions of the UCC.⁴⁰⁵ In ICC Case No. 8694, the tribunal cited no legal rule to support its interpretation of the contract but did explicate a mode of interpretation consistent with the applicable New Hampshire law:

It is mutually agreed that the tribunal is to determine the ordinary and evident intent of the parties in the words used in the written contract. The tribunal may not in any case divine the intention of the parties or substitute their presumed intention for their expressed intention. In determining the intention of the parties, [the tribunal] will consider the documents that comprise the contract and will attempt to interpret in a coherent manner the various clauses of the contract so long as it is not impossible to give to one clause a meaning compatible with the other clauses of the contract. To the extent that the terms used are clear and unambiguous, they must be interpreted according to their plain meaning.

Similarly, in ICC Case No. 5946, the tribunal found that the contract was ambiguous on its face and could not be interpreted according to its plain meaning alone. The tribunal then admitted evidence of the parties' negotiations in order to clarify the ambiguity. In this regard, its decision was in line with what a New York court would normally have done; a facially ambiguous contract may be clarified by extrinsic evidence, so long as that evidence does not contradict the contractual terms.

In contrast, ICC Case No. 4555 presents a situation in which the sole arbitrator, an American attorney, stated his adherence to standard common law modes of interpretation, but then proceeded to admit extrinsic evidence that a common law court would likely have excluded. That case involved a contract for the sale of furniture by the claimant to the respondent.

⁴⁰³ ICC Case No. 4555.

⁴⁰⁴ *Prenn v Simmonds and Reardon Smith Line v Hansen-Tangen*. See above, Chapter Four, Section A.1.

⁴⁰⁵ UCC s 2-202, which sets out the parol evidence rule, and s 1-205, which sets out rules for the pleading and proof of trade usages. See above, Chapter Four, Section A.1.

The dispute centred on the meaning of the word 'unconditional' in the contract. The arbitrator stated that his intention, in interpreting the contract, was to 'place substantial weight on the objective, commonly understood meaning of the contract language actually employed, and to give less weight to unarticulated and undocumented understandings'. This statement is consistent with objective interpretation; however, the arbitrator relied not on any source of law, but rather on what is referred to above as the disciplinary rationale for the common law exclusionary rules: '[i]nternational commerce is served by encouraging contracting parties to state the terms of their agreement clearly and fully.'

The arbitrator defined 'unconditional' by reference to its ordinary, dictionary meaning. He allowed that '[t]his meaning of the term could be overridden by persuasive evidence of standard commercial usage or the clear intent of the parties', a citation from a well-known (if dated) American treatise, *Williston on Contracts*. Thus far, the arbitrator had followed the approach that an American court would likely have followed. However, he then admitted testimony to the effect that the claimant believed its letter of credit to conform to the contract, thus allowing into the record subjective, extrinsic evidence that a court would likely have excluded. The arbitrator did eventually find that evidence of the parties' expressed agreement held more weight than evidence of one party's subjective intent, but an American court is unlikely to have admitted such direct evidence of party intent in the first place.

(ii) *Awards applying the law of civil law jurisdictions*

The largest group of the published awards, nineteen of the forty-three, involved application of the substantive law of a civil law jurisdiction. A summary of the results reached in these cases is found in Table 4.2:

Award	Applicable Law	Mode of Interpretation and Treatment of Extrinsic Evidence
ICC Case No. 1250 of 1964 ⁴⁰⁶	Lebanese law (based on French law). French Chair and Lebanese and Swedish co-arbitrators.	Decided based on text of the contract alone. No reasoning given in the extract.
ICC Case No. 1434 of 1975 ⁴⁰⁷	French law.	Cited the <i>Code civil</i> for principles of interpretation, admitted extrinsic evidence, but found that the evidence did not prove either side's interpretation of the contract. Applied a third interpretation which it found in the text of the contract.
ICC Case No. 2708 of 1976 ⁴⁰⁸	French law.	Found written document to be clear but also found relevant trade usage. Admitted extrinsic evidence, but found it insufficient to show that parties derogated from the usage.
ICC Case No. 3055 of 1980 ⁴⁰⁹	Swiss law.	Decided based on text of the contract alone. Did not discuss admissibility of extrinsic evidence.
ICC Case No. 3130 of 1980 ⁴¹⁰	French law. Sole French arbitrator.	Decided based on text of the contract alone, including expressly incorporated INCOTERM. Did not discuss admissibility of extrinsic evidence.
ICC Case No. 3894 of 1981 ⁴¹¹	West German law.	Decided based on text of the contract alone, including expressly incorporated INCOTERM. Did not discuss admissibility of extrinsic evidence.
ICC Case No. 4131 of 1982 ⁴¹²	French law. Tribunal composed of Dutch chair and two French co-arbitrators.	Admitted and considered a variety of extrinsic evidence, basing its decision largely on the parties' negotiations and their subsequent conduct. Did not discuss admissibility of extrinsic evidence.
ICC Case No. 5080 of 1985 ⁴¹³	Swiss law. Sole Swiss arbitrator.	Admitted extrinsic evidence of the parties' negotiations, which was dispositive of their intent. Did not discuss admissibility of extrinsic evidence.
ICC Case No. 5485 of 1987 ⁴¹⁴	Spanish law. French chair and two Spanish co-arbitrators.	Admitted extrinsic evidence of parties' subjective intentions, but found disputed contractual term to be clear on its face. Citing the maxim <i>in claris not fit interpretatio</i> , and a provision of the Spanish civil code that embodies it, interpreted the term literally and disregarded the extrinsic evidence.
ICC Case No. 5505 of 1987 ⁴¹⁵	Swiss law. Sole Swiss arbitrator.	Declared its intention to seek the parties' true intention by beginning with the ordinary meaning of the contract's terms but admitting extrinsic evidence. Found the clause to be ambiguous and extrinsic evidence insufficient to establish the parties' intent, so interpreted the clause objectively.

⁴⁰⁶ (1980) V Ybk Comm Arb 168.

⁴⁰⁷ [1976] JDI 978.

⁴⁰⁸ [1977] JDI 943.

⁴⁰⁹ [1981] JDI 937.

⁴¹⁰ [1981] JDI 932.

⁴¹¹ [1982] JDI 987.

⁴¹² [1983] JDI 899.

⁴¹³ (1987) XII Ybk Comm Arb 124.

⁴¹⁴ (1989) XIV Ybk Comm Arb 156.

⁴¹⁵ (1988) XIII Ybk Comm Arb 110.

Award	Applicable Law	Mode of Interpretation and Treatment of Extrinsic Evidence
ICC Case No. 1250 of 1964 ⁴⁰⁶	Lebanese law (based on French law). French Chair and Lebanese and Swedish co-arbitrators.	Decided based on text of the contract alone. No reasoning given in the extract.
ICC Case No. 1434 of 1975 ⁴⁰⁷	French law.	Cited the <i>Code civil</i> for principles of interpretation, admitted extrinsic evidence, but found that the evidence did not prove either side's interpretation of the contract. Applied a third interpretation which it found in the text of the contract.
ICC Case No. 2708 of 1976 ⁴⁰⁸	French law.	Found written document to be clear but also found relevant trade usage. Admitted extrinsic evidence, but found it insufficient to show that parties derogated from the usage.
ICC Case No. 3055 of 1980 ⁴⁰⁹	Swiss law.	Decided based on text of the contract alone. Did not discuss admissibility of extrinsic evidence.
ICC Case No. 3130 of 1980 ⁴¹⁰	French law. Sole French arbitrator.	Decided based on text of the contract alone, including expressly incorporated INCOTERM. Did not discuss admissibility of extrinsic evidence.
ICC Case No. 3894 of 1981 ⁴¹¹	West German law.	Decided based on text of the contract alone, including expressly incorporated INCOTERM. Did not discuss admissibility of extrinsic evidence.
ICC Case No. 4131 of 1982 ⁴¹²	French law. Tribunal composed of Dutch chair and two French co-arbitrators.	Admitted and considered a variety of extrinsic evidence, basing its decision largely on the parties' negotiations and their subsequent conduct. Did not discuss admissibility of extrinsic evidence.
ICC Case No. 5080 of 1985 ⁴¹³	Swiss law. Sole Swiss arbitrator.	Admitted extrinsic evidence of the parties' negotiations, which was dispositive of their intent. Did not discuss admissibility of extrinsic evidence.
ICC Case No. 5485 of 1987 ⁴¹⁴	Spanish law. French chair and two Spanish co-arbitrators.	Admitted extrinsic evidence of parties' subjective intentions, but found disputed contractual term to be clear on its face. Citing the maxim <i>in claris not fit interpretatio</i> , and a provision of the Spanish civil code that embodies it, interpreted the term literally and disregarded the extrinsic evidence.
ICC Case No. 5505 of 1987 ⁴¹⁵	Swiss law. Sole Swiss arbitrator.	Declared its intention to seek the parties' true intention by beginning with the ordinary meaning of the contract's terms but admitting extrinsic evidence. Found the clause to be ambiguous and extrinsic evidence insufficient to establish the parties' intent, so interpreted the clause objectively.

⁴⁰⁶ (1980) V Ybk Comm Arb 168.

⁴⁰⁷ [1976] JDI 978.

⁴⁰⁸ [1977] JDI 943.

⁴⁰⁹ [1981] JDI 937.

⁴¹⁰ [1981] JDI 932.

⁴¹¹ [1982] JDI 987.

⁴¹² [1983] JDI 899.

⁴¹³ (1987) XII Ybk Comm Arb 124.

⁴¹⁴ (1989) XIV Ybk Comm Arb 156.

⁴¹⁵ (1988) XIII Ybk Comm Arb 110.

ICC Cases Nos. 6515 and 6516 (joined) of 1994 ⁴¹⁶	Greek law.	Decided based on text of the contract alone. Neither party adduced any extrinsic evidence, nor did the tribunal request its production.
ICC Case No. 6527 of 1991 ⁴¹⁷	Turkish law (adopted without amendment from Swiss law).	Declared its intention to follow Swiss rules of interpretation. Held that the disputed term was vague and extrinsic evidence did not clarify it, but found term was implied by international trade usages.
ICC Case No. 6653 of 1993 ⁴¹⁸	French law.	Admitted extrinsic evidence of parties' negotiations, which was decisive.
ICC Case No. 6673 of 1992 ⁴¹⁹	French law.	Decided based on text of the contract alone. Unclear whether extrinsic evidence was considered.
ICC Case No. 7518 of 1994 ⁴²⁰	Portuguese law.	Declared it would proceed by a subjective method of interpretation. Admitted extrinsic evidence of one party's undeclared subjective intent, negotiations and subsequent conduct. Did not discuss admissibility of extrinsic evidence.
ICC Case No. 7792 of 1994 ⁴²¹	Spanish law.	Began by analysing the terms of the contract, but also admitted extrinsic evidence of the parties' negotiations, which were decisive. Did not discuss admissibility of extrinsic evidence.
ICC Case No. 10188 of 1999 ⁴²²	German law.	Declared that it would follow German methods of interpretation, citing BGB s 133. Found that the contract contained a gap. Admitted extrinsic evidence of prior dealings between the parties and of the negotiations to fill the gap.
ICC Case No. 11440 of 2003 ⁴²³	German law.	Declared that it would follow German methods of interpretation, citing BGB ss 133, 157. Did not consider extrinsic evidence, stating that it could determine 'the will the parties presumably had' from the available materials.
Netherlands Arbitration Institute, Partial Award of 17 May 2005, Final Award of 5 July 2005 ⁴²⁴	Dutch law.	Interpreted the plain meaning of the text to arrive at a 'provisional' interpretation, which it 'corroborated' with extrinsic evidence of negotiations and related contractual documents. Did not discuss admissibility.

Table 4.2

There was little discussion of the rules of admissibility in the awards applying national civil laws. This is to be expected; the civil law does not have a system of rules that specifically regulates the admission of extrinsic evidence. In no case was extrinsic evidence

⁴¹⁶ (1999) XXIVa Ybk Comm Arb 80.

⁴¹⁷ (1993) XVIII Ybk Comm Arb 44.

⁴¹⁸ [1993] JDI 1040.

⁴¹⁹ [1992] JDI 992.

⁴²⁰ [1998] JDI 1034.

⁴²¹ [1995] JDI 993.

⁴²² (2003) XXVIII Ybk Comm Arb 68.

⁴²³ (2006) XXXI Ybk Comm Arb 127.

⁴²⁴ (2006) XXXI Ybk Comm Arb 172.

excluded. In less than half the awards (eight), the tribunal did not consider any extrinsic evidence,⁴²⁵ in most cases because the tribunal found the contract to be clear on its face.

In the next group of cases (three), the tribunal admitted and considered extrinsic evidence but declined to rely upon such evidence because the contract was clear.⁴²⁶ In these cases, the parties either declined to introduce any extrinsic evidence or the tribunal found the extrinsic evidence proffered to be insufficient to overcome the ordinary meaning of a clearly-drafted contractual term.

In the other awards, the tribunals appear to have disregarded extrinsic evidence on the ground that it is unnecessary where the contract is clear. This approach appears to be taken for granted—all but one of the tribunals that adopted it did so without separate justification. The only tribunal to cite a legal basis for this textualist approach was that in ICC Case No. 5485, where the parties entered into a joint venture in which each held a half interest. The contract, governed by Spanish law, required the parties to cause their representatives on the joint venture's board of directors to vote to distribute all yearly profits as dividends. When the respondent's directors sought to reinvest some of the profits, the claimant initiated arbitration to enforce this provision.

The tribunal found the disputed term to be clear on its face. Although it permitted the respondent to call witnesses to testify that the term did not conform to the parties' intentions, the tribunal enforced the term's literal meaning. To support this decision, it cited the maxim *in claris non fit interpretatio* and article 1281 of the Spanish civil code, which states that, 'If the terms of a contract are clear and leave no doubt as to the intention of the contracting parties, the clauses are to be interpreted literally.' Such an approach is consistent with that which a Spanish court would have taken: admitting extrinsic evidence and disregarding when it conflicts with the plain meaning of a clear contractual term.

This pattern—first looking at whether the written contract, in its context, is clear, and then if necessary moving on to examine extrinsic evidence—also marks the remaining awards. In this regard, the awards in ICC Cases Nos. 5505 and 10188 are exemplary. In the former, the tribunal declared the relevant contractual term to be ambiguous, while in the latter, the tribunal found the written contract to be silent on the issue in dispute. In both cases, the tribunal went on to consider evidence of the parties' negotiations. Such reasoning is not

⁴²⁵ ICC Cases Nos. 1250, 3055, 3130, 3894, 5485, 6515/6516, 6673 and 11440.

⁴²⁶ This occurred in three awards: ICC Cases Nos. 2708, 6515/6516 and 11440.

controversial—in both common law and civil law courts, extrinsic evidence may be admitted to clarify an ambiguity or fill a gap.

More distinctly civilian in their approach are cases where the tribunal considered extrinsic evidence regardless of the clarity or completeness of the written contract. In every case applying a national civil law in which extrinsic evidence was admitted, the tribunal considered evidence of the parties' subjective intentions, from statements made in negotiations⁴²⁷ to internal memoranda of one party.⁴²⁸ In three awards, the tribunal considered evidence of one or both parties' subsequent conduct.⁴²⁹

Taken together, these awards tend to show that tribunals, when applying the law of civil law countries, will not hesitate to consider any extrinsic evidence that may be helpful in determining the intent of the parties. However, there were no cases where the parties did not seek to introduce such evidence but the tribunal requested its production.

Tribunals were similarly consistent in expressing their fidelity to the principle of subjective interpretation. In six awards, the tribunal declared its intention to seek the 'true intention' of the parties or otherwise indicated that it would proceed by a subjective interpretive method.⁴³⁰ In some of these cases, the tribunal cited the articles of the relevant civil code that express the principle of subjectivity.

All of the awards applying the civil law adhered to subjective interpretation, except for two awards where the tribunal found that there was insufficient evidence to determine the parties' true intent.⁴³¹ In civil law jurisdictions, when the true intent of the parties cannot be determined, even with the help of relevant usages, implied terms, and evidence of the parties' prior negotiations and subsequent conduct, courts will determine the parties' 'hypothetical' intention by application of a reasonableness standard—in other words, objective interpretation. Here, too, the tribunals acted consistently with the course of action which the corresponding domestic court would likely have taken.

⁴²⁷ ICC Cases Nos. 1434, 4131, 5080, 5485, 5505, 6527, 6653, 7518 and 10188 and the Netherlands Arbitration Institute award.

⁴²⁸ ICC Case No. 7518.

⁴²⁹ ICC Cases Nos. 4131, 6527, 7518.

⁴³⁰ ICC Cases Nos. 1434, 5505, 6527, 7518, 10188 and 11440.

⁴³¹ ICC Cases Nos. 1434 and 5505.

(iii) *Awards applying international contract law instruments*

Seven of the forty-three published awards involved the application of an international contract law instrument as the substantive law of the contract. A summary of the results reached in these cases can be found in Table 4.3:

Award	Applicable Law	Mode of Interpretation and Treatment of Extrinsic Evidence
ICC Case No. 6309 of 1991 ⁴³²	The ULIS, via West German private international law.	Did not refer to lack of interpretive guidance from the ULIS. Admitted extrinsic evidence of the parties' negotiations and of other, related contractual documents. Did not discuss admissibility of extrinsic evidence.
ICC Case No. 7585 of 1994 ⁴³³	The CISG, as express choice of the parties.	Decided based on text of the contract alone, which it characterised as clear. Unclear whether either party sought to introduce extrinsic evidence.
ICC Case No. 7645 of 1995 ⁴³⁴	The CISG, via Austrian private international law.	Declared that it would proceed by the methods contained in CISG art 8, but resolved dispute without reference to extrinsic evidence.
ICC Case No. 8324 of 1995 ⁴³⁵	The CISG, via French private international law.	Declared that it would proceed by the methods contained in CISG art 8. Considered the plain meaning of the contract, but also admitted a variety of extrinsic evidence. Did not discuss admissibility.
ICC Case No. 8782 of 1997 ⁴³⁶	The CISG, via Danish private international law.	Admitted extrinsic evidence of negotiations and subsequent conduct. Did not discuss admissibility.
ICC Case No. 8817 of 1997 ⁴³⁷	The CISG, via Spanish private international law.	Admitted extrinsic evidence of the parties' negotiations and subsequent conduct. Did not discuss admissibility.
ICC Case No. 10377 of 2002 ⁴³⁸	The CISG, as express choice of the parties.	Decided based on text of the contract and evidence of a trade usage, proved by testimony from an expert appointed by the tribunal.

Table 4.3

The treatment of extrinsic evidence is consistent in these awards. In every case, extrinsic evidence was admitted; it was specifically mentioned in five of the seven awards. In the other two, the tribunals admitted extrinsic evidence but did not rely on it to reach a decision. In ICC Case No. 7585, the tribunal characterised the contract as 'clear' and neither party sought to introduce any extrinsic evidence. In ICC Case No. 7645, the tribunal stated that it would follow the interpretive rules contained in CISG article 8. However, the tribunal

⁴³² [1991] JDI 1046.

⁴³³ [1995] JDI 1015.

⁴³⁴ (2001) XXVI Ybk Comm Arb 130.

⁴³⁵ [1996] JDI 1019.

⁴³⁶ (2003) XXVIII Ybk Comm Arb 39.

⁴³⁷ (2000) XXV Ybk Comm Arb 355.

⁴³⁸ (2006) XXXI Ybk Comm Arb 72.

never examined extrinsic evidence because the contract was clear in light of the established meaning of the INCOTERM 'CFR',⁴³⁹ which the parties had incorporated into the contract.

The other awards applying the CISG are more than merely consistent with its interpretive rules—they follow those rules closely.⁴⁴⁰ In ICC Case No. 8324, the tribunal, in describing the rules contained in CISG article 8, noted that these 'differ profoundly' from the more purely subjective method prescribed by French law. (The contract contained a clause applying French law, but the CISG applied via French private international law rules.) All these tribunals admitted extrinsic evidence pertaining to the parties' conduct both before and after the conclusion of the contracts, in accordance with CISG article 8(3). It is unlikely that a French court would have proceeded differently.

The award in ICC Case No. 6309 (where the ULIS was the applicable law) is of interest because the ULIS contains no provision relating to the interpretation of contracts or to the admissibility of extrinsic evidence. The claimant contracted to sell to the respondent a lift system for an office building. The claimant had attached to its offer a copy of the General Conditions of the Association of German Mechanical Construction Firms ('the VDMA Conditions'). However these were not attached to the 'order confirmation' that the claimant sent after receiving the respondent's acceptance. The respondent argued that the VDMA Conditions had not been incorporated into the contract. The sole arbitrator admitted extrinsic evidence, which proved to be decisive. He held that the respondent must have been aware of the VDMA Conditions because of their attachment to the claimant's offer. Its failure to object to the VDMA Conditions meant that they became binding obligations of the contract. Unfortunately, the award does not address the admissibility of this evidence.

(iv) *Awards applying general principles or stating no applicable substantive law*

Five of the forty-three published awards involved application of general principles of international law to the substance of the contract. For the purposes of this analysis, these have been placed in the same category as the seven awards that contained no discussion of substantive law. When interpretation occurs without any reference to substantive law, the tribunal must have drawn its interpretive principles from what it saw as those which are common sense or are generally applied—an implicit application of general principles. A summary of the results reached in these cases can be found in Table 4.4.

⁴³⁹ 'Cost and freight'. See *INCOTERMS 2000* (ICC Press, Paris 2000).

⁴⁴⁰ ICC Cases Nos. 8324, 8782, 8817 and 10377.

Award	Applicable Law	Mode of Interpretation and Treatment of Extrinsic Evidence
ICC Case No. 2103 of 1972 ⁴⁴¹	No applicable law stated.	Admitted extrinsic evidence of parties' negotiations but disregarded it. Found the contract to be 'clear and explicit' so interpreted according to its plain meaning.
ICC Case No. 2291 of 1975 ⁴⁴²	No applicable law stated. Some reference to general principles.	Decided based on extrinsic evidence of negotiations, justified because contract was concluded by exchange of correspondence.
ICC Case No. 2478 of 1974 ⁴⁴³	No applicable law stated.	Decided based on text of contract alone.
ICC Case No. 3267, Partial Award of 1979 ⁴⁴⁴	Amiable composition. Swiss chair and two French co-arbitrators.	Detailed 'Anglo-American' style contract, interpreted without reference to extrinsic evidence. Classified the contract by type and implied terms accordingly.
ICC Case No. 3267, Final Award of 1984 ⁴⁴⁵	See above.	Addressing issues unresolved in the previous award, continued to interpret text of contract alone. Neither party argued for admission of extrinsic evidence. Declined to use equitable powers of <i>amiable compositeur</i> to vary the terms of the contract.
ICC Case No. 3820 of 1981 ⁴⁴⁶	No applicable law stated. Sole Dutch arbitrator.	Refused to apply literal reading of the contract because it conflicted with rules on documentary credits expressly incorporated into the contract. Noted that result reached would be 'understandable and acceptable' in international trade.
ICC Case No. 5953 of 1989 ⁴⁴⁷	'The common usages of international commerce, also called <i>lex mercatoria</i> '. Sole arbitrator.	Began with analysis of text of contract interpreted according to its ordinary meaning the type of contract. Considered extrinsic evidence of parties' negotiations and prior course of dealing. Did not address admissibility of extrinsic evidence.
ICC Case No. 6281 of 1989 ⁴⁴⁸	No applicable law stated.	Decided based on 'reasonableness' alone, without reference to the text of the contract or extrinsic evidence.
ICC Case No. 6378 of 1991 ⁴⁴⁹	No applicable law stated.	Admitted extrinsic evidence of parties' negotiations. Did not address admissibility.
ICC Case No. 8035 of 1995 ⁴⁵⁰	No applicable law stated.	Admitted extrinsic evidence of parties' negotiations and of trade usages. Did not address admissibility.
Permanent Court of Arbitration, <i>Eurotunnel</i> Partial Award of 2007 ⁴⁵¹	'International Law Principles of Interpretation', specifically the VCLT	Interpreted in accordance with 'ordinary meaning' of the text; admitted extrinsic evidence of negotiations by analogy to admission of treaty <i>travaux</i> permissible under the Vienna Convention. Stated that extrinsic evidence would be considered with 'due caution'.

Table 4.4

⁴⁴¹ (1978) III Ybk Comm Arb 218.

⁴⁴² [1976] JDI 989.

⁴⁴³ (1978) III Ybk Comm Arb 222.

⁴⁴⁴ (1982) VII Ybk Comm Arb 96.

⁴⁴⁵ (1987) XII Ybk Comm Arb 87.

⁴⁴⁶ (1982) VII Ybk Comm Arb 134.

⁴⁴⁷ [1990] JDI 1056.

⁴⁴⁸ (1990) XV Ybk Comm Arb 96.

⁴⁴⁹ [1993] JDI 1018.

⁴⁵⁰ [1997] JDI 1040.

⁴⁵¹ Permanent Court of Arbitration Case No. 2003-06, Partial Award of 30 January 2007.

Cases involving the application of general principles of substantive international law—especially those involving amiable composition—provide the clearest evidence of the thought processes of international commercial tribunals; these principles give tribunals the greatest latitude to apply whatever rules they consider appropriate. However, only in the *Eurotunnel* arbitration did the tribunal discuss explicitly what rules it would apply with respect to the interpretation of the contract and the use of extrinsic evidence.

The *Eurotunnel* award is worthy of separate attention, both because it was the only award applying general principles of international law to discuss its mode of interpretation, and because it involved interpretation of both a contract and a treaty under the rules of the VCLT.⁴⁵²

The five-member tribunal, convened under the auspices of the Permanent Court of Arbitration, was composed of prominent arbitrators from both civilian and common law backgrounds.⁴⁵³ It hewed closely to the principles set out in the VCLT, beginning with the ordinary meaning of the parties' contract, viewed in its context, and then making a 'supplementary interpretation' based on extrinsic evidence. Both parties sought to introduce extrinsic evidence of their negotiations, which the tribunal admitted with the caveat that it would consider this evidence with 'due caution'.⁴⁵⁴ The award does not explain what the tribunal meant by 'due caution', but this likely refers to the unreliability of testimonial evidence and to the fact that evidence of negotiations should not be allowed to contradict the clearly expressed agreement of the parties.

There were two claims asserted by the claimants, only one of which potentially involved extrinsic evidence. The concessionaires who operated the fixed rail link under the English Channel claimed that the French government had improperly given assistance to SeaFrance, a company operating a ferry service between France and England. The dispute focused on clause 34.3 of the contract, which stated that, 'The Principals [France and the UK] agree that throughout the Concession Period no link shall be financed with the support of public funds, either directly or by the provision of government guarantees of a financial or commercial nature.'⁴⁵⁵ The claimants argued that the assistance to SeaFrance constituted financing of another 'link' between the UK and France.

⁴⁵² The background of the *Eurotunnel* award is discussed above in Chapter Four, Section A.3.

⁴⁵³ An Australian chair, with one English, two French, and one French-Canadian co-arbitrators.

⁴⁵⁴ *Eurotunnel* [94].

⁴⁵⁵ *Ibid* [280].

The tribunal embarked on a close textual analysis of the contract, noting that while 'link' could refer to a ferry service, the equivalent word in the equally authoritative French version of the contract, '*ouvrage*', could not refer to a ferry. Reading the term in its 'context', the tribunal concluded that there was no evidence that the parties had intended to prohibit assistance to any trans-channel operator, but only to potential competitors in the operation of a fixed link, in the manner of a railroad or motorway.⁴⁵⁶ Finally, the tribunal stated that accepting the claimant's interpretation of 'link' to include ferry services would lead to absurd results: air cargo flights between Paris and London would also qualify as a link.⁴⁵⁷

Finally, the tribunal considered the claimants' argument that the Invitation to Promoters, a document by which the two governments had initially publicised the concession opportunity, stated that the governments would ensure that the concessionaires would not be 'subject to any inequality of treatment likely to distort free competition between types of international transport, including maritime and air transport'.⁴⁵⁸ The claimants alleged that this clause, and other broad protectionist language in the Invitation to Promoters, created a 'legitimate expectation' of protection from competition from ferry operators. However, no clause similar to that paragraph of the Invitation existed in the contract. The tribunal characterized the contract, and not the Invitation, as determining the parties 'legal relationship'. Thus, if expectations were raised by the Invitation, this 'would have been a reason to insist on their inclusion in the Concession Agreement. But it is not a reason for reading into that Agreement stipulations which are notably absent from it.'⁴⁵⁹ This reasoning is reminiscent of the common law perspective of a contractual relationship, that it crystallises at a particular moment, with the signing of the written contract. At the same time, however, a common law court probably would not have admitted such evidence of the parties' negotiations.

Eurotunnel aside, the lack of reasoning in the published extracts of awards applying general principles leaves the reader with no choice but to attempt to divine the tribunals' intentions from the results reached in their awards, much as a civil law court attempts to divine the parties' true intentions from their outward expressions of intent. Taking the twelve awards as a group, five patterns emerge:

⁴⁵⁶ Ibid [374-375].

⁴⁵⁷ Ibid [376].

⁴⁵⁸ Ibid [378].

⁴⁵⁹ Ibid [384].

- Tribunals begin by examining the natural and ordinary meaning of the contractual terms in dispute.
- Tribunals faced with an apparently clear contractual term are unlikely to allow extrinsic evidence of the parties' subjective intentions to overtake the natural meaning.⁴⁶⁰
- In contrast to their treatment of subjective extrinsic evidence, tribunals will broadly enforce practices established between the parties and trade usages that may contradict the apparent meaning of the contract; tribunals are particularly likely to take such an approach with 'codified' usages like the INCOTERMS or widely-adopted standard contractual terms.⁴⁶¹
- Tribunals which are free to choose the applicable law (in particular those acting as *amiables compositeurs*) do not prohibit parties from introducing whatever extrinsic evidence the parties may think relevant, including direct evidence of subjective intent and evidence of subsequent conduct.
- Although tribunals acting under all major arbitral rules have the power to request the production of extrinsic evidence, they do not usually exercise this power.

4. Trends discernable in the published arbitral awards

Derains writes that 'The interpretation of contracts is one of the areas in which international commercial arbitrators are most inclined to disengage from national laws in order to resort to general principles of law.'⁴⁶² The results of this case study indicate that arbitrators are indeed quick to refer to generally-accepted maxims or 'canons of construction', such as *pacta sunt servanda*, *contra proferentem* and (with arbitrators from civil law jurisdictions) interpretation according to good faith.

However, the awards described here show that arbitrators tend to follow applicable national laws when it comes to the admissibility of extrinsic evidence. In the cases that do not follow the applicable law precisely, or where there is no applicable law discussed in the award, tribunals tend to act in ways inconsistent with any individual national law but consistent with each other and with the exigencies of international commercial arbitration.

⁴⁶⁰ ICC Cases Nos. 2103, 2478 and 3267 and *Eurotunnel*.

⁴⁶¹ ICC Cases Nos. 3267, 3820, 5963 and 8035.

⁴⁶² ICC Case No. 2291 of 1975 [1976] JDI 989, obs Y Derains.

For example, tribunals tend to admit extrinsic evidence that contradicts the apparent meaning of a contract, but then disregard that evidence if they find the contract to be clear.

In the cases decided under common law rules, the tribunals tended to follow those rules closely. They interpreted the contracts before them objectively and applied the common law exclusionary rules to a wide range of extrinsic evidence, especially evidence of the parties' subjective intent and of their subsequent conduct. In only one case, ICC Case No. 4555, which was decided under US law, did the arbitrator admit extrinsic evidence that an American court would likely have excluded.

However, in all of awards not applying common law, the tribunals demonstrated receptivity to the subjective method of interpretation and to the admission of extrinsic evidence. It is not surprising that these should go together; subjective interpretation necessitates the admission of evidence of the parties' subjective intentions. All of the tribunals operating under civil law rules or international contract law instruments admitted the extrinsic evidence introduced by the parties. Nevertheless, pure subjectivity does not reign; the ordinary meaning of the written contract remains the interpretive starting point in all of the published arbitral awards and clear contractual terms normally prevail over contrary subjective evidence.

In all of the awards which were not decided under the common law and in which extrinsic evidence was not mentioned, the tribunals seem to have been able to reach a satisfactory interpretation based on the words of the contract alone. Conversely, in all of the cases where extrinsic evidence was mentioned, the contract was either vague or ambiguous on its face or a party sought to introduce extrinsic evidence that contradicted the plain language of the contract. Thus, tribunals do not actively seek extrinsic evidence to interpret contracts, but do consider it when it is necessary or when the parties adduce it.

In this regard, ICC Case No. 8324 (decided under the CISG) is exemplary. In that case, disputes arose over two different obligations under the contract; as to the first, the tribunal found the contract to be clear and did not mention any extrinsic evidence; as to the second, the tribunal found itself unable to determine the intent of the parties from the text of the contract alone, and so admitted extrinsic evidence to interpret the contract.

In contrast to the issue of suspension of performance,⁴⁶³ arbitral tribunals operating under national laws or under general principles did not issue sweeping statements about the

⁴⁶³ See above, Chapter Three, Section C.

existence of general principles of law governing the admissibility of extrinsic evidence. However, as noted above, arbitral tribunals acting in cases which gave them wide latitude to interpret contracts tended to give primacy to the written text of a contract, but admitted extrinsic evidence in all cases where it was submitted.⁴⁶⁴ Tribunals were unlikely to request the production of additional extrinsic evidence but did investigate and apply relevant trade usages.

Taken together, these trends seem to indicate that tribunals are primarily concerned with discerning the true (subjective) common intention of the parties, and will restrict themselves to objective interpretation only when the applicable law is that of a common law jurisdiction. Tribunals tend to see the written contract as the best evidence of the parties' true intent, and consider extrinsic evidence only if they think it necessary to determine that intent. A civil law bias seems to be developing. This conclusion is reinforced by the fact that the ULIS, promulgated in 1964, has no rules on the interpretation of contracts, but all of the more recently-drafted international contract law instruments contain rules directing adjudicators to interpret contracts subjectively and to admit a wide range of extrinsic evidence.

⁴⁶⁴ In the one case decided under common law where extrinsic evidence was admitted, the sole American arbitrator seems to have subscribed to this methodology. The award states that 'unarticulated and undocumented understandings' can be considered, but should be given 'less weight' than 'the objective ... meaning of the contract language'. ICC Case No. 4555 of 1985 (1986) XI Ybk Comm Arb 140.

PART II: A GROUNDED THEORY OF INTERNATIONAL ARBITRAL DECISION-MAKING

...‘pure legal analysis’ is a highly problematic concept. The analysis of legal doctrine ... involves numerous decisions as to how far and in what manner logical analysis can be developed. Considerations of policy cannot be excluded from the analysis since legal doctrine is continually being shaped in the practice of courts and other agencies of interpretation by reference to assumed social purposes of law.⁴⁶⁵

The case studies presented above provide evidence that the outcomes reached in ICA diverge from those reached in national courts. That divergence cannot be explained entirely by the legal rules that apply to substantive law determinations in ICA. The choice of law rules pertaining in ICA empower arbitrators to choose the substantive law (in the absence of a choice by the parties) but do not direct the use of that power. The rules endow arbitrators with the authority to recognise and apply general principles of international contract law, but give no direction as to what those principles are or how to apply them. They permit arbitrators (with the express consent of the parties) to act as *amiables compositeurs*, but the exercise of the amiable composition power is by definition unconstrained. As the case studies demonstrate, even when arbitrators apply the same national substantive laws that a court would, they do not always decide contract law issues in the same ways as courts. Moreover, despite the lack of any hierarchy of tribunals or *stare decisis* doctrine, disparate arbitral tribunals tend to decide substantive law issues in ways consistent with each other. Some factors beyond the applicable legal rules must be at work.

As discussed in Chapter One, the extra-legal factors that affect the decision-making of international commercial arbitrators are varied. This thesis focuses on the contributions of what it identifies as an incipient ICA culture, not to the exclusion of all other factors, but because ‘culture’ emerged as a core category or unifying theme during the process of data collection and analysis. In addition, the existing literature largely fails to address culture as a factor in arbitral decision-making.

The culture identified here is only ‘incipient’ because it is doubtful whether the individual norms that are currently identifiable amount to ‘a culture’ of international

⁴⁶⁵ Cotterrell 1992, 2.

commercial arbitration.⁴⁶⁶ Yet the component norms of what may come to constitute an international arbitration culture can be identified and their impact assessed. This thesis argues that a complete analysis of arbitral decision-making would have to identify and account for these factors. Despite the analytical baggage the word 'culture' carries, it is the best word to encompass the various norms identified and the overall subject of this enquiry—the social context within which arbitrators decide disputes. No word besides culture adequately encompasses the various social factors that affect decision-making: standard practices, norms, interests, values, goals and attitudes.

Part II develops a theory that arbitral decision-making is affected in identifiable ways by an incipient culture specific to ICA. It argues that this culture can, like the cultures that prevail within the legal communities of different states, be characterised for analytical purposes as composed of identifiable social norms. International commercial arbitrators tend to share a set of distinct norms; no one of these is unique to ICA, but the combination of them norms that prevails in ICA is particular to it. This theory helps to explain whether and in what ways arbitrators are likely to reach different outcomes on substantive law matters than do national court judges.

Research was conducted in accordance with the grounded theory method, developed by sociologists Glaser and Strauss in the 1960s. When working under grounded theory, the researcher 'does not begin a project with a preconceived theory in mind.... Rather, the researcher begins with an area of study and allows the theory to emerge from the data.'⁴⁶⁷ Here, the goal was to understand what factors—other than the applicable law itself—affect the decisions international commercial arbitrators make. The data analysed are comprised primarily of statements by arbitrators and commentators, whether contained in awards or in other publications. After data analysis began, it soon became apparent that these statements could be characterised as relating to a set of social norms specific to ICA. These norms, in turn, all share the characteristic of being cultural, in that they are unwritten social forces pervasive in ICA that both express and shape arbitrators' preferences and ways of making decisions. This made culture the 'core category' (in the terminology of grounded theory) that unifies the various social norms related to arbitral behaviour.⁴⁶⁸

⁴⁶⁶ See below, Chapter Five, Section B.

⁴⁶⁷ Strauss & Corbin 1998, 12.

⁴⁶⁸ Corbin & Strauss 2008, 104-05. See below, fn 574 and accompanying text.

Chapter Five attempts a definition of 'culture' as the term is used in this thesis, explains culture's importance as an analytical tool, and sets out the methodology used here to examine ICA culture. The remainder of Part II explores various social norms that emerged from analysis of the data. The social norms identified can be categorised as arising from either the institutional structure of ICA (discussed in Chapter Six) or the values shared by international arbitrators (discussed in Chapter Seven). Collectively, these social norms constitute what is described here as the incipient culture of international commercial arbitration.

CHAPTER FIVE: STUDYING INTERNATIONAL ARBITRAL CULTURE

The concept of legal culture is at the same time stimulating and disappointing. It is stimulating because it raises the expectation that it will lead us directly to the root of the differences between legal systems, but disappointing because claims about legal culture are so often forced to remain impressionistic. One cannot talk 'scientifically' because so little that is important is quantifiable, and the use of numbers only serves to reassure the researcher.⁴⁶⁹

This chapter defines culture and explains its importance to arbitral decision-making, argues that exploration of an international arbitral culture is warranted even though such a culture may not now exist and sets out the methodology adopted in Part II and why it was chosen.

A. DEFINING CULTURE: ITS IMPORTANCE AND ITS LIMITATIONS AS AN ANALYTICAL TOOL

'Culture' makes for an unsatisfying explanation for observed behaviour—broad enough to be vague but narrow enough be reductionist. Yet some concept of culture is required. When Flood conducted a series of interviews for a study of international law firm business, he discovered to his surprise that 'the concept of culture was continuously invoked as a means of explaining many things. I rarely raised the subject myself, but others found it inescapable.'⁴⁷⁰ Moreover, an understanding of legal rules alone is insufficient to explain the outcomes reached in legal disputes—the entire field of socio-legal studies⁴⁷¹ is premised on this notion. An explanation of arbitral decision-making that does not at least acknowledge cultural realities cannot be complete.

References to an international arbitration culture do appear in the existing literature. However, previous explorations of a putative arbitral culture have focused on procedural matters, and in particular on the growing acceptance of a set of standardised ICA procedures.⁴⁷² While standardised procedures are related to culture, they are a product of

⁴⁶⁹ Garapon 1995, 495.

⁴⁷⁰ Flood 1996, 175. The author's own experience in researching this thesis was similar.

⁴⁷¹ Also called 'law and society' or 'sociology of law'.

⁴⁷² See, e.g., Bjorklund 2009; Carbonneau 'Approbation' 2009; Drahozal 'Private Ordering' 2009; Trakman 2006; Alford 2003; Kaufmann-Kohler 2003; Ginsburg 2003; Elsing & Townsend 2002; Lazareff 1999.

culture but do not themselves constitute culture. Consequently, catalogues of harmonised practices constitute illustrations of specific manifestations of ICA culture, not analyses of the culture itself.

It sometimes seems that as many definitions of culture exist as there are researchers in the field. A fairly standard definition is given by Cotterrell: 'the complex of beliefs, attitudes, cognitive ideas, values and modes of reasoning and perception typical of a particular society or social group'.⁴⁷³ Culture develops from the repeated interactions of actors in the community.⁴⁷⁴ Over time, the norms that this process produces gain the force of tradition and habituate the members of the social group, forming a community with a common identity. Culture is a process by which the interactions between members of a community become self-reinforcing and determine the contours of future interactions. When this process is complete, the various elements of a culture create a harmonious whole that 'gives people a sense of who they are, of belonging, of how they should behave and what they should be doing.'⁴⁷⁵

In sum, culture exists where members of a community share a set of norms that produce reflexive behaviour conditioned by tradition or community approbation; it both shapes and is shaped by the conduct of the community's members. In other words, culture consists of a complex of norms that condition behaviour both by shaping the thinking of individual members of the community and by creating a community consensus or peer pressure that discourages deviation from community norms. The key aspect of culture that differentiates it from other factors which shape behaviour is that it is reflexive. It operates prior to—and therefore frequently obviates—deliberate decision-making. Cultural factors 'make it unnecessary to think out afresh our reactions to situations. The situations become standardised. Their meaning and the appropriate way to act in relation to them become taken for granted.'⁴⁷⁶

For analytical purposes, culture is often broken down into individual social norms. The literature indicates that social norms have the same effects on specific behaviours as culture does on behaviour generally: they both condition and are conditioned by the interactions between members of the community. Social norms and culture are micro-level and macro-level equivalents. For example, Cooter identified three effects of social norms:

⁴⁷³ Cotterrell 1992, 23 (citation omitted).

⁴⁷⁴ Ginsburg 2003, 1337 (citation omitted).

⁴⁷⁵ Harris & Moran 1991, 12.

⁴⁷⁶ Cotterrell 1992, 146-147.

expression, internalisation, and deterrence. That is, norms express the customs and values of a given community. They in turn inculcate those customs and values into members of the community and they deter violation of norms by sanctions.⁴⁷⁷

Social norms are obligations backed by social sanctions, which are 'punishments' meted out by fellow members of one's community, as when a citizen who does not pay his taxes or a dog-owner who does not clean up after her dog is shunned by his or her neighbours.⁴⁷⁸ In practice, sanctions such as shunning are rarely imposed because they are not necessary; members of the community will likely have internalised the norm, and thus feel that they ought to pay taxes or clean up after their dogs. It is important to remember that the enforcement of social norms arises not just from the threat of legal punishment, but endogenously within the community. As Eric Posner puts it, behaviour in conformity with social norms represents the equilibrium position:

... the social norm describes the behavior that arises in equilibrium. It is not that X punishes Y for violating a social norm; rather, X (and many other people) avoids Y because Y's behavior reveals to X that association with Y will not serve X's interests. Although in common speech we say that Y's behavior violates a social norm, the punishment is endogenous, not imposed by an external force.⁴⁷⁹

Moreover, legal rules are themselves often crystallisations of social norms. For example, municipal ordinances requiring dog-owners to clean up after their dogs express a broader social norm about keeping common spaces clean for all members of the community. However, the imposition of a rule can in turn reinforce the norm. Cooter gives the example of a dog ordinance enacted in Berkeley, California:

After the Berkeley town council enacted an ordinance requiring owners to clean up after their dogs the sidewalks became much cleaner, even though officials never issued citations for breaking the law. The law apparently tipped the balance in favor of informal enforcement. Citizens became more aggressive about complaining to inconsiderate dog owners, and, anticipating this fact, dog owners became more considerate.⁴⁸⁰

This anecdote highlights a fundamental aspect of culture mentioned above: it both conditions and is conditioned by the behaviour of individuals.

⁴⁷⁷ Cooter 2000, 3.

⁴⁷⁸ Ibid, 5.

⁴⁷⁹ EA Posner 1998, 797.

⁴⁸⁰ Cooter 2000, 10-11.

Using norms (on the micro level) or culture (on the macro level) to explain observed behaviour is a necessarily uncertain proposition. Culture is 'indeterminate'—it amalgamates a 'variety of activities and attributes into one common bundle' and thereby may confuse them or disguise the differences between them.⁴⁸¹ Culture is also 'impressionistic',⁴⁸²—it lacks 'sufficient analytical precision ... to allow it to indicate a significant explanatory variable in empirical research'.⁴⁸³ For these reasons, it is impossible to identify causal relationships between specific cultural factors and corresponding behaviours; specific behaviours cannot be ascribed with certainty to the effects of culture generally, let alone to any one cultural factor. Similarly, it is impossible to separate entirely the effects of culture from the effects of other factors, such as the threat of punishment or economic self-interest. Nevertheless, so long as the researcher is careful not to indulge in false determinism, '...the malleability surrounding the notion of "culture" does not prevent the ascription of determinative efficacy and the articulation of various characteristics which can prove of direct relevance'.⁴⁸⁴ In other words, an impressionistic account of ICA which includes the 'essential variable' of culture is preferable to a concrete-seeming but incomplete account without it.⁴⁸⁵

B. WHETHER AN INTERNATIONAL ARBITRAL CULTURE ALREADY EXISTS

Arbitrators are a heterogeneous group, in that they come from different backgrounds. Arbitrators will continue to bring to ICA the baggage associated with the various national cultures in which they were trained. This thesis proposes that as a culture specific to ICA develops, what arbitrators have in common will increasingly overshadow their disparate backgrounds and legal traditions.

Scholars have for some time written about the distinct cultures of the legal professions in different jurisdictions.⁴⁸⁶ While disagreements persist as to the particular characteristics of

⁴⁸¹ Legrand 1999, 27 (quoting EP Thompson, *Customs in Common* (Penguin, London 1991) 13).

⁴⁸² Cotterrell 1997, 21.

⁴⁸³ Ibid, 14.

⁴⁸⁴ Legrand 1999, 28-29 (calling the indeterminacy of culture 'a handicap only for the positivist').

⁴⁸⁵ Friedman 1997, 34.

⁴⁸⁶ See, e.g., the studies collected in Bruinsma & Nelken 2007 and Gessner et al 1996; recent examples of these kinds of studies include Kurkchiyan 2009 (describing 'Russian legal culture'); Cooper 2008 (describing competing cultures within the Chilean legal profession); Smits 2007 (describing the effects of divergent national legal cultures on European Union law making); Arold 2007 (describing the 'legal culture of the European Court of Human Rights'); Sellers 2006, 68-69 (asserting that 'The practice of precedent may differ slightly as applied to the common law, constitutions, and legislation, ... but all depend ultimately on the culture of American lawyers.');

⁴⁸⁷ Bell 2001 (describing multiple, distinct legal cultures within the French bar, judiciary and legal academy); Haskell 1998 (elucidating various aspects of US professional legal culture to explain 'why lawyers behave as they do').

a given state's legal culture, the concept of a culture shared by the legal professionals of a state (or province, or municipality) is uncontroversial.⁴⁸⁷ It is altogether more problematic to claim that a legal culture now exists in ICA, where there is no common nationality, language or training. In fact, most of the studies of culture in ICA that have been published focus on the divergent effects of the multiplicity national legal cultures in which arbitrators and counsel were trained.⁴⁸⁸

However, the notion that that so varied a group as international arbitrators might possess a common culture is consistent with the growing importance and autonomy of transnational commercial legal practice and private governance regimes. Commerce is always embedded in a mixture of public and private governance mechanisms. In ordinary domestic commercial dealings, private governance mechanisms—including not only arbitration, but also negotiation and trade practices—take place in the shadow of the national legal system. In international trade, on the other hand, 'the relative weight of public governance mechanisms decreases while the importance of private governance mechanisms increases as compared to commerce within the territorial limits of the nation state.'⁴⁸⁹ The globalisation of commerce has boosted cross-border economic activity and its importance relative to domestic transacting. Scholars have identified a related trend of governance mechanisms that are 'increasingly decoupled from state legal systems ... at the same time internationalized and privatized'.⁴⁹⁰

It is only natural that internationalised legal regimes would lead to internationalised legal practice. Modern commercial law practice has become sufficiently complex that specialisation is necessary to attract clients,⁴⁹¹ and law firms increasingly market their international arbitration groups as specialist practices.⁴⁹² This trend has been abetted by the decoupling of legal practice from citizenship requirements; for example, within the EU, educational and citizenship requirements have been eliminated as a bar to transborder mobility.⁴⁹³ In a modern commercial practice, a lawyer of one nationality might be working in a second country on a transaction governed by a third country's law, and the dispute is

⁴⁸⁷ Cotterrell 1997, 17; Gessner et al 1996, xvii.

⁴⁸⁸ See, e.g., de Vera 2004; Slate 2004; Pair 2002; Stallard 2002; Borris 1999; Cremades 1999; Grigera Naón 1999; Lazareff 1999; Wilkey 1999.

⁴⁸⁹ Calliess & Renner 2009, 1342.

⁴⁹⁰ Calliess & Hoffmann 2009, 119 (citation omitted).

⁴⁹¹ Faulconbridge & Muzio 2009, 1352.

⁴⁹² See, e.g., Wittinghofer 2007, 5.

⁴⁹³ Glenn 2001, 981.

referred to arbitration in a fourth country. In such situations, practitioners 'effectively operate in a limbo'.⁴⁹⁴

When actors are placed outside existing systems of governance and interact repeatedly with each other, it is not surprising that new regimes specific to the new field of interaction might develop. This is a process that Teubner has called 'auto-constitutionalisation'—the tendency of private governance regimes operating outside the state to develop their own sets of norms.⁴⁹⁵ In other words, where economic globalisation has given rise to the establishment of a corpus of specialist transnational legal practitioners who work primarily with each other and outside the governance of any one state, autonomous professional norms will coalesce—into a culture of international commercial arbitration.

A number of commentators have already posited an existing or emerging international arbitration culture.⁴⁹⁶ Despite these testimonials, the proposition that ICA already possesses a culture is susceptible to two criticisms: first, that arbitrators are too heterogeneous to constitute a unified community, and second, that arbitrators' actions are not reflexively conditioned by a common tradition.

A culture is a characteristic of an identifiable group; although definitions of culture vary, they all share this aspect.⁴⁹⁷ Yet international arbitrators speak a variety of languages, come from different national cultures and adhere to diverse religions and ethical traditions. They were trained in different legal systems or may have no legal training whatsoever.⁴⁹⁸ They are practicing lawyers, academics, former judges and (though less frequently than in the past) diplomats, politicians or industry experts such as accountants or engineers. While the most prominent arbitrators tend to be specialists in arbitration law who have built their careers around ICA, others may act as arbitrator only once or twice.⁴⁹⁹

However, the same objections can be made about lawyers working within a single domestic legal system. As Cotterrell points out, 'the distance between the work environment, career pattern and outlook of the high prestige corporation lawyer and the sole practitioner in

⁴⁹⁴ Faulconbridge & Muzio 2009, 1347.

⁴⁹⁵ Teubner 2004.

⁴⁹⁶ Trakman 2006; Petsche 2005; Ginsburg 2003; Koch 2003; Kaufmann-Kohler 2003; Elsing & Townsend 2002; Pair 2002; Reed & Sutcliffe 2001; Gélinas 2000; Dezalay & Garth 1996; Cremades 1999; Lazareff 1999; Grigera Naón 1999. In addition, the theme of the 1996 Congress of the International Council for Commercial Arbitration was 'Towards an International Arbitration Culture'.

⁴⁹⁷ For a summary of different definitions of culture, see Cotterrell 1992, 23-24.

⁴⁹⁸ See Bisom-Rapp, 299-300.

⁴⁹⁹ For a contrary view, see Kerr 1997, 124 (referring to the 'community of lawyers specializing in international arbitrations'); Teubner 1997, 158 (calling the international arbitral legal order a 'global society').

a large American urban centre is so great as to make it difficult to see any significant bonds of common experience and interest between them within a single professional community.⁵⁰⁰ In some ways, international arbitration practitioners have more in common than the body of legal practitioners in any given country—ICA practitioners, especially arbitrators, tend to have an elite educational (if no longer socioeconomic) background, to work in large corporate firms or major universities and to travel in business and academic circles. They tend to share cosmopolitan, multinational backgrounds and speak multiple languages.⁵⁰¹ They work repeatedly with each other and on disputes within a relatively narrow band of commercial subjects. Therefore, it makes at least as much sense to speak of an ICA ‘community’ as it does to speak of a ‘legal community’ in any given country.

Social scientists have delineated concepts such as ‘epistemic communities’ and ‘issue networks’. Commentators have applied these terms to the body of ICA practitioners, with some justification.⁵⁰² After all, ICA practitioners from around the world deal with each other regularly; they thus constitute a network. In addition, as will be discussed below,⁵⁰³ arbitration practitioners tend to share similar conceptions of an ideal of international private justice. Accordingly, while this thesis describes ICA practitioners as forming a ‘community’, this term is used in a colloquial sense is not intended to argue that ICA practitioners constitute something different from—or more robust than—an epistemic community or transnational issue network.

The second reason to doubt whether ICA possess a culture is that arbitrators’ shared values and standard practices are not reflexively conditioned by one common tradition. Some commentators who support the notion that an ICA culture exists have argued that arbitration is differentiated from national processes by its ‘traditions’. For example, Trakman emphasises the influence on ICA of the public and private international law traditions,⁵⁰⁴ while several commentators have described the integration in ICA of common law and civil law traditions.⁵⁰⁵

It is true that private and public international law traditions have both influenced ICA and that modern arbitral procedures draw from both civil and common law practices.

⁵⁰⁰ Cotterrell 1992, 186 (citation omitted).

⁵⁰¹ See below, Chapter Seven, Section D.2.

⁵⁰² Most notably Dezalay & Garth 1996, 16. However, even these two agree that ICA is only ‘partly’ an epistemic community or issue network. Ibid.

⁵⁰³ See below, Chapter Seven.

⁵⁰⁴ Trakman 2006, 26.

⁵⁰⁵ See, e.g., Elsing & Townsend 2002.

However, while these arguments describe the sources of a purported common arbitral tradition, they do not demonstrate that ICA has developed its own, autonomous traditions—traditions the internalization of which have created a ‘conventional and unreflective consensus’.⁵⁰⁶

Culture shapes the identity of a community through repeated interactions ‘over the *longue durée*’.⁵⁰⁷ But ICA in its modern incarnation has existed for scarcely two generations; it is still an emerging field. As Dezalay and Garth point out, the first generation of prominent arbitrators, whom they called the ‘grand old men’, has been replaced by a generation of ‘technocrats’, specialists in the law of arbitration.⁵⁰⁸ Accordingly, the field is arguably still too early in its evolution to have developed a culture.

In addition, many of the practices and norms now widespread among international arbitrators result from conscious choices among competing options. Some are pragmatic and others ideologically motivated, but they are all deliberate; they therefore stand in contrast to cultural norms, which are by definition reflexive. As Hirsch points out, ‘the readiness to abide by norms depends largely on the internalization of the relevant social norm, and not on rational calculation of whether the behaviour is profitable’.⁵⁰⁹

There is thus good reason to doubt that there exists such a thing as ‘international commercial arbitration culture’. In the end, though, this issue may be moot. Although it may not be possible to determine whether sufficient incidents of culture (or ‘group’, or ‘community’) now exist to conclude that there is a culture of international arbitration, it is possible to determine whether arbitrators share specific, identifiable legal and social norms. These norms may not now be sufficiently comprehensive or pervasive to constitute a ‘culture’, but their existence suggests that such a culture is coming into existence.

C. METHODOLOGY

The questions raised in Part II are essentially empirical: why do arbitrators choose different substantive laws, interpret those laws differently and exercise discretion differently than national court judges? As with any empirical research, two methodological concerns are paramount: which analytical model to employ and what data to apply that model to.

⁵⁰⁶ Legrand 1999, 29.

⁵⁰⁷ Ibid, 27.

⁵⁰⁸ This process has been called the ‘professionalisation’ or ‘judicialisation’ of ICA. See below, fns 909-917 and accompanying text.

⁵⁰⁹ Hirsch 2008, 280 (citations omitted).

Part II adopts a sociological perspective. While sociology is not the only field in which cultural phenomena are analysed (psychology, economics and anthropology come to mind),⁵¹⁰ it provides a rich vein of theoretical models on which to draw that are specifically adapted to explaining the behaviour of defined groups. Sociology also deals as a matter of course in the language of norms: 'Social inquiry generally emphasizes that norms and roles constrain human behaviour.'⁵¹¹ Durkheim describes sociological analysis as focusing on 'social facts', which he defines as 'every way of acting, fixed or not, capable of exercising on the individual an external constraint; or again, every way of acting which is general throughout a given society, while at the same time existing in its own right independent of its individual manifestations.'⁵¹²

A distinct culture is not, of course, the only thing that distinguishes arbitral from judicial decision-making, nor is a sociologically-influenced method the only means by which to consider arbitral awards within their broader context. Two other fields, psychology and economics, have proven particularly useful in understanding the decision-making of national court judges. Psychological studies of judging—that is, studies of judges' moral and political preferences—abound in the literature on domestic litigation.⁵¹³ Similarly, many studies have been carried out that apply economic models to construct what might be called materialistic accounts of judicial decision-making.⁵¹⁴ However, neither approach was adopted here.

The psychological makeup and political predilections of judges and arbitrators undoubtedly affect the way they make decisions. However, international commercial arbitrations rarely involve the kinds of politically-charged issues where differences in adjudicators' political orientations are most likely to play a role.⁵¹⁵ As a result, psychological data are, on their own, unlikely to explain whether and how arbitrators and judges will reach different decisions in international commercial disputes. In addition, as Tamanaha notes in

⁵¹⁰ Some relevant research has been done in these areas. A large number of empirical psychological studies have examined the way heuristics, assumptions and cognitive biases shape decision-making by judges and juries; however, no psychological study has been published to date examining decision-making by international arbitrators. Drahozal 2003, 33.

⁵¹¹ Hirsch 2008, 280. Writing specifically of international law, Hirsch writes that sociological analysis 'begins from the premise that individuals' behaviour and normative choices are significantly affected by social factors'. Hirsch 2005, 893.

⁵¹² Cited in *ibid*, 898.

⁵¹³ The field has a long history, especially in the US. An early text is Haines 1922 (characterised by Maveety as 'the origins of what was to become behavioralism in public law', Maveety 2003, 8). Important recent examples include Staudt et al 2006; Sunstein et al 2006; Abel 2003; Segal & Spaeth 2002; Epstein & Knight 1998; McNollgast 1995; M Shapiro 1981. This line of scholarship, associated at first with political scientists and later with legal scholars, is anthologised and reviewed in Maveety 2003.

⁵¹⁴ See, e.g., Brennan et al 2009; Foxall 2005; R Posner 1993; Spiller & Gely 1992.

⁵¹⁵ See above, *fn*s 34-35 and accompanying text.

his meta-study of psychological studies of judicial decision-making, the personal idiosyncrasies of judges are likely to be overshadowed by the 'significant, predictable, social determinants that govern the course of judicial decision-making'.⁵¹⁶ The 'social determinants' to which Tamanaha refers include such factors as shared professional formation, mindset, practices and values—the kind of social norms that will be discussed below.⁵¹⁷ Sociological studies are thus more likely than psychological studies to produce the kind of insights that will better inform predictions about the outcomes reached in ICA.

As will be discussed below, economic competition between arbitrators and between arbitral fora is one of the core institutional differences between arbitration and litigation.⁵¹⁸ Indeed, some commentators have argued that the global convergence in arbitral rules and practices is better explained by economic factors than cultural ones. For example, Ginsburg writes that convergence is simply a case of network effects in action—the more members a network has, the more valuable it is to its members, so practices will tend toward convergence and newcomers will have an incentive to align with existing norms and practices.⁵¹⁹ However, pure economic analysis often fails to account for the influence of social norms, which function as constraints on behaviour that are difficult to model in terms of economic value. For this reason, sociologists who explore economic behaviour often criticise economists for ignoring the social dimension of human actions.⁵²⁰

Moreover, a sociological analysis can also account for the impact of economic forces. We usually associate 'culture' with religious, philosophical, or historical influences, such as when aspects of modern American culture are traced to Lockean political theory or the circumstances surrounding the establishment of the United States as a polity. But a culture may also develop out of market forces or business practices.⁵²¹ For example, Ogus argues that the characteristics of national legal cultures are largely explicable according to the economic value of networks.⁵²² As an instance of legal culture developing from routine business practices, Trakman cites the 'informal practice in which businessmen make "deals"

⁵¹⁶ Tamanaha 2009, 697, quoting F Cohen, "'Transcendental Nonsense" and the Functional Approach' (1935)

35 Columbia L R 809, 849.

⁵¹⁷ Personal characteristics that arbitrators tend to share as a group will be discussed in Chapter Seven.

⁵¹⁸ See below, Chapter Six, Section C.

⁵¹⁹ Ginsburg 2003, 1342.

⁵²⁰ Hirsch 2008, 280 (citing M Granovetter, 'Economic Action and Social Structure: The Problem of Embeddedness' in R Swedberg (ed), *Economic Sociology* (Edward Elgar, Cheltenham 1996) 245).

⁵²¹ Sociologists often cite market forces as underappreciated contributors to culture. See, e.g., Blankenburg 1998.

⁵²² Ogus 2002.

over the phone, rather than by relying on strict legal forms and precedents, and lawyers'.⁵²³ Thus, when commercial lawyers speak of 'trade usages', 'industry custom' or 'commercial practice', they are referring to aspects of the culture of business generally or of a particular industry. Since aspects of a culture are no less cultural for the fact that they evolved from economically-determined behaviours, a sociological analysis will highlight many of the same factors as a purely economic analysis, but will also provide insights that cannot be expressed in economic models.

1. Selection of grounded theory methodology

Durkheim asserts that the sociological researcher should 'treat social facts as things'.⁵²⁴ This means that 'social phenomena should be measured and analysed in basically the same manner as the natural scientist would measure and analyse substances and processes in laboratory experiments.'⁵²⁵ Social phenomena are intangible and cannot be measured directly; however, it is possible to discern them in observable matters, just as physicists might discern subatomic particles by the trails they leave in a cloud chamber. Here, the chamber is the field of international commercial arbitration and the trails are the statements and pronouncements of arbitrators.

Sociologists are concerned not just with identifying and describing social phenomena, but also with developing theories to provide comprehensive explanations for social behaviours. Classical sociological analysis is deductive; the researcher begins with one of the prevailing sociological theories and applies it to the social phenomena under consideration.⁵²⁶ These theories not only describe these phenomena differently, but also differ as to which phenomena ought to be the focus of social research.⁵²⁷

Only one previous large-scale sociological study of ICA exists, Dezalay and Garth's *Dealing in Virtue*.⁵²⁸ This 1996 book, based primarily on interviews with arbitration practitioners and academics, is influenced by the theory of 'social fields' advanced by the French sociologist Pierre Bourdieu.⁵²⁹ Although this thesis does not adopt Bourdieu's theory *in toto*, it does adopt some of his vocabulary, especially in relation to the role of competition

⁵²³ Trakman 2006, 3.

⁵²⁴ Durkheim 1988, 60, 161-162.

⁵²⁵ Cotterrell 1992, 11.

⁵²⁶ Glaser and Strauss describe such research as involving merely the 'verification' of theory. Glaser & Strauss 1967, 2.

⁵²⁷ Hirsch 2005, 892-893 (citations omitted).

⁵²⁸ Dezalay & Garth 1996.

⁵²⁹ *Ibid*, 17-19.

among members of a social field. As will be discussed below,⁵³⁰ competition for arbitration business—between individual arbitrators and between arbitral fora—plays an important role in shaping arbitral decision-making. It is well recognised in the sociological literature that the competition for pre-eminence in a social group plays an important part in shaping, disseminating and preserving the values and practices of the group. For Bourdieu, competition is the process by which a social field defines itself, generates and spreads its values, ensures conformity by new entrants and propels the field to evolve—in short, competition is one of the primary forces that constructs culture.⁵³¹ Thus, for Bourdieu, a term like ‘profession’ or ‘field’ is itself the social product of the construction of the group through the medium of competition.⁵³²

Success as an arbitrator, as in any field, is defined according to achievement in the areas which the field considers important. Arbitrators and would-be arbitrators seek to accumulate the indicia of such success, which Bourdieu called ‘symbolic capital’. The key to symbolic capital is ‘recognised power’; it constitutes the recognition, institutionalised or not, that successful members of a community receive from the rest of the group.⁵³³ The forms of symbolic capital which members of the field try to accumulate are closely related to social norms of the field. Leaders in the field have become leaders because of their stores of symbolic capital, while those seeking entrance to the field must conform to accepted norms and practices, thus reinforcing prevailing orthodoxies.

Today, symbolic capital in ICA includes such attributes as degrees from prestigious universities, partnerships at major law firms, professorships, academic publications, proficiency in technical aspects of arbitration practice, experience as an arbitrator, counsel or expert witness, connections to political or business power centres and facility with multiple languages and legal systems.⁵³⁴ These indicia might seem to depend on a circular argument: those who think these kinds of qualifications are important will find these kinds of qualifications important. However, it remains that the definition of arbitral excellence that tends to inform parties’ choice of arbitrators includes the prevailing forms of symbolic

⁵³⁰ Chapter Six, Section C.

⁵³¹ Trubek et al 1994, 414 (observing that ‘Conflict within the field gives it its dynamism, but also maintains it as a field: the contending players challenge each other, but not the field itself, so the struggle reaffirms and even strengthens the field.’).

⁵³² Bourdieu & Wacquant 1992, 243.

⁵³³ Dezalay & Garth 1996, 18 (quoting Bourdieu 1991, 72).

⁵³⁴ Cf a similar list in Dezalay & Garth 1996, 19.

capital.⁵³⁵ By contrast, other types of potentially-relevant experience do not tend to be important in appointments of arbitrators; for example, personal experience as a business person or technical subject area expertise (e.g., training as an engineer if the appointment concerns a construction dispute or a background in accounting if the dispute concerns financial products), do not seem to be influential.⁵³⁶ This pattern fits with the so-called 'judicialisation' or 'professionalisation' trend in ICA, in which arbitration awards have displayed increasingly rigorous legal analysis.⁵³⁷

This thesis draws on concept of symbolic capital and will highlight the correspondences between social norms of ICA and the types of symbolic capital sought by arbitrators. However, it does not adopt the theory of social fields more generally. While *a priori* sociological models such as Bourdieu's appear to increase analytical rigour, that rigour is often illusory; the population of international arbitrators is sufficiently heterogeneous that an attempt to fit all international arbitrators into a single model will necessarily distort the description. Instead, this thesis adopts the methodology of 'grounded theory' introduced by Glaser and Strauss in their 1967 work, *The Discovery of Grounded Theory*.

Glaser and Strauss challenged the prevailing, 'hypothetico-deductive' mode of sociological research,⁵³⁸ in which 'theories were first dreamed up ... and then subsequently "tested" against evidence through research'.⁵³⁹ They criticise 'the overemphasis in [then-] current sociology on the verification of theory, and a resultant de-emphasis on the prior step of discovering what concepts and hypotheses are relevant for the area that one wishes to research.'⁵⁴⁰

In place of such an approach, Glaser and Strauss urge the researcher to develop—'discover'—theory from data that they collect. The resultant theory is 'grounded' in the data.

⁵³⁵ See W&C 2010, 25-28, surveying commercial parties as to the factors they consider when choosing an arbitrator. Prior experience as an arbitrator, reputation, knowledge of arbitration law, language skills and experience of different legal cultures are all among the factors considered most important by parties.

⁵³⁶ The Chambers and Partners 2010 list of the twenty-four 'most in demand arbitrators' lists no individuals with significant education or professional experience in areas other than law or politics (including diplomacy). <<http://www.chambersandpartners.com/Global/Editorial/36194>> accessed 28 November 2010. The same is true of a similar list of twenty 'most highly regarded individuals' in international arbitration drawn up by Who's Who Legal in 2010. <<http://www.whoswholegal.com/news/analysis/article/19496/editorial-commercial-arbitration/>> accessed 28 November 2010. (Only twelve individuals appear on both lists.)

⁵³⁷ See below, fns 909-917 and accompanying text.

⁵³⁸ Kelle 2005, 2.

⁵³⁹ Dey 1999, 12.

⁵⁴⁰ Glaser & Strauss 1967, 1.

In the grounded theory method, 'data collection, analysis, and eventual theory stand in close relationship to one another.'⁵⁴¹

Grounded theory is 'a general methodology, a way of thinking about and conceptualising data'.⁵⁴² Grounded theory research leads to the development of theories of human actions that are derived from data that have been systematically gathered and analysed. Its core assumptions are:

Theory is *emergent* rather than predefined and tested.

Theory emerges from *data* rather than vice versa.

Theory generation is a consequence of, and partner to, *systematic* data collection and analysis.

Patterns and theories are implicit in data, waiting to be discovered.⁵⁴³

Grounded theory may be employed in any study involving human interactions, and is considered particularly appropriate for research into phenomena that have not been adequately described or for which no or few widely-accepted theories have been advanced.⁵⁴⁴ It is now considered to be one of the core techniques of socio-legal studies,⁵⁴⁵ although socio-legal scholars have taken to grounded theory only recently. A search of the Westlaw database identified nearly two hundred empirical studies published in English-language legal journals that employ grounded theory; the earliest was published in 1994 and only sixteen pre-date 2000.

Many of these are what might be called purely sociological inquiries; they examine the feelings of members of the general public about their interactions with the legal system. For example, researchers have studied parents' experiences with the Canadian legal system in cases of child sexual abuse,⁵⁴⁶ the reactions of traumatised victims of violent crime to the

⁵⁴¹ Strauss & Corbin 1998, 12.

⁵⁴² Strauss & Corbin 1994, 275.

⁵⁴³ L Cohen et al 2007, 491 (emphasis in original).

⁵⁴⁴ Ibid. Grounded theory has been particularly popular among researchers studying the health care professions, especially nursing, in part because the first two grounded theory monographs concerned dying in hospitals. Strauss & Corbin 1994, 275.

⁵⁴⁵ For example, the webpage of the University of Bristol School of Law's MSc programme in socio-legal studies lists one of the core activities of socio-legal studies as 'empirical work which leads to the development of grounded theory' <<http://www.bristol.ac.uk/law/pgdegrees/taughtdegrees/msc-socio-legal-studies.html>> accessed 28 November 2010. On the appropriateness of grounded theory for socio-legal research projects generally, see Outhwaite et al 2007.

⁵⁴⁶ Alaggia et al 2009.

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⁵⁴⁶ Alaggia et al 2009.

prospect of victim-offender mediation,⁵⁴⁷ feelings of stress and workplace burnout among US immigration judges⁵⁴⁸ and the perspectives of Latin American government agency employees on government transparency initiatives.⁵⁴⁹

More relevant are explorations of the norms prevailing in specific (thematic or geographic) areas of legal practice. There are several such studies in the existing literature. They consider the rationales given by Canadian judges in deciding wrongful dismissal suits,⁵⁵⁰ American judges' assessments of the credibility of complainants alleging child sexual abuse in the distant past,⁵⁵¹ the effects of culture and politics on procedural rules in the California juvenile justice system,⁵⁵² the degree of importance American mediators place on achieving consensus⁵⁵³ and jurors' evaluations of the credibility of expert witnesses in American civil trials.⁵⁵⁴ However, to the author's knowledge, no study of international arbitration makes use of grounded theory.

2. The grounded theory method

Grounded theory research proceeds through the following stages: identification of a general topic area, simultaneous gathering and coding of the data through a 'constant comparative' method until no new categories emerge, and finally identification of a core theme or category that unifies the various categories and gives shape to the emergent theory.

⁵⁴⁷ Madeira 2009.

⁵⁴⁸ Lustig et al 2008.

⁵⁴⁹ Pinto 2009. Similar studies have been conducted on the tasks assigned to skilled contractors and regular employees in different workplaces (Bidwell 2009), sexual harassment victims' awareness of the available legal remedies (Blackstone et al 2009), the process of defining the crime of aggression under public international law (Weisbord 2009), the attitudes of deaf and hard-of-hearing victims of institutional sexual abuse toward the possibility of legal redress (Battersby et al 2008), the purposes and goals of plaintiffs in medical injury suits in the US (Relis 2007) and peacebuilding professionals' perspectives on the use of facilitative alternative dispute resolution techniques in conflict-torn regions (Erbe 2004).

⁵⁵⁰ Nierobisz 2010.

⁵⁵¹ Connolly et al 2009.

⁵⁵² Harris 2007.

⁵⁵³ Della Noce 2004.

⁵⁵⁴ Ivkovic & Hans 2003. Similar studies have been carried out on small businesses' use of cash transactions to evade taxes (Morse et al 2009), American civil juries' consideration of information withheld from them and the effects of such consideration on damages awarded (Greene et al 2008), variations in the rules governing access to records among the fifty US states (Chamberlin et al 2007, adopting multiple research methodologies, including grounded theory), the effects of a statute regulating the performance of government agencies on the practices of five US federal health care agencies (Frederickson & Frederickson 2006), the efficacy of defence lawyer advocacy on criminal sentences handed down by US federal judges after the enactment of mandatory sentencing guidelines (Etienne 2004) and corporate in-house counsel's understandings of their professional ethical duties (Gunz & Gunz 2002).

In grounded theory, researchers are admonished not to begin with a specific research question, but only a broad area for investigation.⁵⁵⁵ This prevents data gathering from being constrained by preconceptions and helps the researcher to avoid subconsciously 'forcing' the data to fit a preconceived theory.⁵⁵⁶ In this thesis, a general topic area—arbitral decision-making on substantive law matters—was selected prior to data gathering, but no explanatory theoretical framework was conceived or considered in advance.

In classical sociological research (and in empirical research generally) data are gathered according to statistical principles of sampling. Before data gathering begins, an attempt is made to identify the characteristics of the population being studied and a statistically representative sample of that population is drawn for study. If the sample is not representative of the whole, the results will not be generalisable to the entire population.⁵⁵⁷

Data gathering in grounded theory differs from the classical methodology in two ways. First, data are sampled to help develop theory, rather than to be statistically generalisable (what Glaser and Strauss call 'theoretical sampling'); second, data gathering continues concurrently with data analysis, rather than being completed before analysis begins.⁵⁵⁸

The 'basic premise' of theoretical sampling is that the researcher chooses participants (or other data sources) based on whether they will help to identify and describe emerging categories or properties, and not on the basis of increasing representativeness or generalisability.⁵⁵⁹ Sampling data theoretically maximises the researcher's opportunities to develop concepts about the data, uncover similarities and differences, and identify relationships between concepts. Theoretical sampling is responsive to the data rather than determinative of what data are gathered.⁵⁶⁰ The underlying assumption is that if data are sampled theoretically, a theory developed from those data is more likely to be robust.⁵⁶¹

Accordingly, data were gathered from any written source that might contribute to the development of a theory of arbitral decision-making, including all writings that express or describe standard practices in ICA or international arbitrators' values, interests, goals, or decision-making processes.⁵⁶² These data would be inadequate for rigorous statistical

⁵⁵⁵ Corbin & Strauss 2008, 162.

⁵⁵⁶ Kelle 2005, 3.

⁵⁵⁷ L Cohen et al 2007, 108.

⁵⁵⁸ Dey 1999, 5.

⁵⁵⁹ Skeat & Perry 2008, 102-103.

⁵⁶⁰ Corbin & Strauss 2008, 143-144.

⁵⁶¹ Ibid, 76.

⁵⁶² The sources of data considered are discussed in more detail in the next section.

analysis. However, with theoretical sampling, the researcher 'need not be ... concerned with random sampling or similar procedures designed to provide a firm basis for generalization'.⁵⁶³ Theoretical sampling permits the researcher to generate a robust theory based on whatever data are available.

Thus, for example, most of the institutional awards considered here were issued by ICC tribunals, although the ICC accounts for a small percentage of the total awards issued around the world. If data were sampled statistically—as opposed to theoretically—a smaller number of ICC awards would have to be considered so that the proportions of institutional awards discussed reflected the actual share of arbitrations conducted by the various institutions. However, the ICC publishes a larger proportion of its awards than the other commercial arbitration institutions,⁵⁶⁴ so that the total sample of published awards is skewed toward the ICC. Many arbitral institutions make no provision to publish any of their awards, so an attempt to ensure proportionality between the different institutions would leave the researcher without sufficient data to generate a theory.

The data surveyed here also include the various rules of procedure applicable in international commercial arbitrations. More than most fields, law codifies its procedures, rendering them discernable without extensive interviewing or field observation.⁵⁶⁵ The various arbitral institutions tend to update their rules of procedure frequently, so these rules are likely to reflect the current consensus (or at least broadly-held beliefs) as to how arbitrations ought to be conducted. Accordingly, rules of procedure are good sources of evidence of the social norms of ICA.

As data are gathered, they are categorised (coded) according to the 'constant comparison' method:

As the researcher moves along with analysis, each incident in the data is compared with other incidents for similarities and differences. Incidents found to be conceptually similar are grouped together under a higher-level descriptive concept This type of comparison ... allows the researcher to differentiate one category/theme [from another] and to identify properties and dimensions specific to that category/theme.⁵⁶⁶

⁵⁶³ Dey 1999, 38.

⁵⁶⁴ Many ICSID awards are published, but these deal only with investment treaty arbitrations.

⁵⁶⁵ Corbin & Strauss 2008, 93-94.

⁵⁶⁶ Ibid, 73.

To be valid, categories must be 'analytic'; that is, they must not merely rephrase the raw data but conceptualise their characteristics.⁵⁶⁷ Thus, for example, if arbitrators were frequently to describe 'cost-effectiveness' as a virtue of ICA, the category would not merely be 'cost-effectiveness', but might instead be 'client service', since the motivation for arbitrators' concern for cost-effectiveness is that consumers of arbitration services want dispute resolution to be quick and cheap. Other aspects of ICA rules and practices, such as the ability of the parties to appoint their own arbitrators, would also fall under the category of 'client service'.

In practice, the 'constant comparison' method requires the researcher to consider new items of data one-by-one and compare them with previously-analysed items. Data are coded for assignment into one of the categories that have already been identified or, if they do not fit into one of the existing categories, a new one is created. In addition, items of data that have been given the same code are continually compared with each other. This within-code comparison is intended to 'uncover the different properties and dimensions of the code'.⁵⁶⁸

In his later writing (with Corbin), Strauss developed a strict paradigm for coding data. Glaser never accepted the coding paradigm, which he saw as inviting the imposition of 'pet theories' onto the data.⁵⁶⁹ The primary disagreement between Strauss and Corbin on the one hand, and Glaser on the other, is whether knowledge of existing theories and concepts ought to play a role in data analysis. Strauss and Corbin emphasise the researcher's creativity and sensitivity to data, which are manifested in an ability to 'aptly name categories, ask stimulating questions, make comparisons, and extract an innovative, integrated, realistic scheme from masses of unorganized raw data'.⁵⁷⁰ To develop this theoretical sensitivity, it is helpful to have a background in the sociological theories that have previously been proposed, although the researcher should 'refuse to privilege any one theoretical perspective in advance of the ideas generated by the evidence itself'.⁵⁷¹ Glaser, on the other hand, was concerned that the theory 'really exist in the data', and so argued that the researcher's prior knowledge

⁵⁶⁷ Dey 1999, 7.

⁵⁶⁸ Corbin & Strauss 2008, 74.

⁵⁶⁹ Dey 1999, 14.

⁵⁷⁰ Strauss & Corbin 1998, 12-13. In his later methodological writing, Glaser disagreed with this approach, concerned that researchers would end up 'forcing' the data into categories rather than letting the categories 'emerge' from the data. See generally Glaser 1998.

⁵⁷¹ Dey 1999, 4.

ought to play as minimal a role as possible in the development of that theory—researchers embarking on data collection and analysis should actively ignore the existing literature.⁵⁷²

In line with both Glaser's and Strauss and Corbin's conceptions of grounded theory, the conceptual categories that this thesis describes as 'social norms' were not dictated by existing theories but instead emerged from data analysis. However, knowledge of the existing socio-legal literature informed both the identification and categorisation of these norms. For example, this thesis's emphasis on competition was inspired partly by Dezalay and Garth's similar emphasis in *Dealing in Virtue*.⁵⁷³ Accordingly, although this thesis does not expressly follow Strauss and Corbin's coding paradigm, it must be considered as falling in with the Strauss-Corbin camp.

In standard sociological research, data analysis cannot begin until data collection is complete because the analysis would be invalid unless the sample is sufficiently large and representative.⁵⁷⁴ By contrast, under the grounded theory method, data gathering and data analysis continue concurrently until the data have become 'saturated'. Data saturation occurs when no new categories or themes emerge.⁵⁷⁵

Once data saturation is achieved, the researcher may be able to integrate the various categories by discovering a single category or theme that dominates or unites the other categories of data identified during the coding process:

The core category ... is the concept that all the other concepts will be related to.... A central category may evolve out of the list of existing categories. Or, a researcher may study the categories and determine that though each category tells part of a story, none captures it completely. Therefore, another more abstract term or phrase is needed, a conceptual idea under which all the other categories can be subsumed.⁵⁷⁶

Here, the various categories that emerged from the data analysis—the social norms of ICA—were organised into two broader categories: those norms that arise from the institutional structure of the ICA system and those that arise from international arbitrators' shared values. However, all of the individual norms are united in their shared characteristic of being aspects of the professional culture of ICA. Accordingly 'culture' emerged as the core category and unifying theme.

⁵⁷² Annells 1996, 386-387.

⁵⁷³ See above, fns 524-533 and accompanying text.

⁵⁷⁴ L Cohen et al 2007, 100.

⁵⁷⁵ Corbin & Strauss 2008, 148.

⁵⁷⁶ Ibid, 104-105.

3. The types of data analysed

Grounded theory is most associated with the traditional sociology data gathering strategies—interviews, surveys and field observations—but it is equally appropriate for a study of written texts. Glaser and Strauss emphasise that such ‘library research’ is useful to grounded theory researchers not only to sensitise them to theoretical categories that may emerge in later field research, but also as a source of data, which can include just about anything related to the group under study, including secondary sources found in the library.⁵⁷⁷

Glaser and Strauss came to disagree on the extent to which researchers should immerse themselves in the secondary literature, which may contain explanatory theories relevant to the field of study.⁵⁷⁸ Strauss and Corbin encourage the researcher to review existing literature before, during, and after data collection and analysis, not only as a source of data, but also to generate ideas for study and provide useful theoretical frameworks.⁵⁷⁹ Glaser, who emphasises the emergent nature of grounded theory, cautions that literature should not be reviewed before data collection, so that the researcher will not generate preconceived ideas about what categories will exist in the data.⁵⁸⁰ However, Glaser agrees with Strauss and Corbin that secondary literature is itself a valid source of data.⁵⁸¹

In traditional legal research, secondary sources—scholarly commentaries, for the most part—are considered inferior data when compared to the primary sources of legal research: treaty, statute and case law. For this thesis, however, commentaries and arbitral awards are equally useful—and equally primary—sources of information about norms in ICA.

The academic writings, conference presentations and interviews given by the various scholar-practitioners of arbitration are particularly useful because arbitrators are successively adjudicators, counsel, expert witnesses and commentators:

In arbitration, perhaps more than any other field of law, the line between scholar and practitioner is blurred so that many leading scholars are involved in arbitrations, and many leading arbitrators take the time to write academic articles and books.⁵⁸²

This phenomenon is due largely to two facts: the primary generators of law in domestic systems—legislatures and judges—play a secondary role in arbitration, and most arbitral

⁵⁷⁷ Glaser & Strauss 1967, 176-80; Strauss & Corbin 1998, 58.

⁵⁷⁸ See above, fns 565-568 and accompanying text.

⁵⁷⁹ Strauss & Corbin 1998, 58-59.

⁵⁸⁰ Glaser 1998, 72.

⁵⁸¹ Ibid, 102.

⁵⁸² Ginsburg 2003, 1340 (citing, in particular, the writings of Gabrielle Kaufmann-Kohler and William W Park).

awards are not published. 'Scholarly (and institutional) production of arbitration law and rules fills the void.'⁵⁸³

However, the descriptions of arbitral practices that exist in the literature must not be taken entirely at face value. The writings of arbitrators may depict only their personal experiences or their beliefs about how arbitrations ought to be conducted. Accordingly, they are at best anecdotal evidence of actual arbitration practices. Nevertheless, such writings are important to the extent that they indicate the values with which ICA as a field markets itself and the characteristics that international arbitrators consider to be important.

The published arbitral awards are also useful not for their *rationes decidendi* (i.e., doctrine) but rather for statements or actions by arbitrators that declare or express ICA social norms. However, we cannot with confidence generalise from the published arbitral awards to make conclusions about ICA as a whole or to compare arbitration with litigation.

First, the disputes resolved in international arbitrations are not necessarily representative of all cross-border commercial disputes. Disputes in ICA generally involve large multinational corporations or government entities on both sides of the contract. Moreover, at least with respect to arbitrations that arise out of submission agreements (where the parties agree to arbitration only after a dispute arises), parties may choose arbitration because they want the dispute to be resolved under rules that are not strictly legal (such as decision under amiable composition or according to industry usages).⁵⁸⁴ As Drahozal notes, the differences in the types of cases that are brought to courts and to arbitral tribunals 'interfere with attempts to compare litigation with arbitration'.⁵⁸⁵

Second, it is impossible to determine whether the awards that are published are representative of the whole body of awards. There is no available data on a matter so simple as the total number of awards rendered, let alone on the results reached, because 'there are no agreed-upon criteria for what should be counted'.⁵⁸⁶ There is no reliable way of determining how many *ad hoc* awards are published, and not every arbitral institution releases caseload statistics.⁵⁸⁷ When institutions do report their caseloads, they do so inconsistently. Some

⁵⁸³ Ibid, 1340-41.

⁵⁸⁴ Carlston 1967, 47.

⁵⁸⁵ Drahozal 'Numbers' 2006, 298 (citation omitted). Drahozal observes that for this reason, claims that arbitration is faster and cheaper than litigation may not be accurate.

⁵⁸⁶ Dezalay & Garth 1996, 6 fn 4.

⁵⁸⁷ However, institutional arbitration appears to be preferred to *ad hoc* arbitration in the majority of cases; survey indicated that only 14% of arbitrations from 1998-2008 involving corporate parties were *ad hoc*. Even among arbitrations involving a state or state entity as a party, only 33% percent were *ad hoc*. Corporations

report the number of open cases in their systems (which creates overlaps from year-to-year), others report only the number of cases filed since the institution's foundation, while still others include *ad hoc* arbitrations that rent the facilities of the institution.⁵⁸⁸ Most report only the number of arbitrations filed, not the number of awards rendered; some do not distinguish domestic and international arbitrations; some count requests for the appointment of arbitrators together with requests for arbitration.⁵⁸⁹

All that can be said with certainty is that published awards represent a small percentage of the total. The ICC publishes more arbitral awards than any other institution, and yet even the percentage of ICC awards published remains minute. By the end of 2004, approximately 13,000 arbitrations had been initiated at the ICC since its establishment as an arbitral institution. Of these, only 390 (3% of the total) have been published in the five-volume *Collection of ICC Arbitral Awards*.⁵⁹⁰

It is not only impossible to determine whether the sample of published awards is representative of the whole, but it is in fact likely that this sample is biased. The arbitral institutions, which are responsible for publishing the vast majority of the awards, do not publish a random sample. Institutions seek the permission of the parties to publish an award when they believe the award will be of particular interest to the arbitration community (as opposed to the legal community generally) or when publication advances the interests of the institution or of arbitration as a whole. Thus, for example, awards that address the jurisdiction of arbitral tribunals are more likely to be published, as are awards involving general principles or amiable composition. A former Secretary-General of the ICC Court of International Arbitration observed of the ICC's collection of awards: '[o]nly those awards in which arbitrators have felt least constrained to apply national law have been published.'⁵⁹¹

Given such selective publication policies, it is difficult to tell whether a given award is an outlier or represents a mainstream perspective. However, awards that are published

surveyed cited the reputations of the institutions and administrative convenience as their reasons for preferring institutional arbitration. PwC/QMUL 2008, 15.

⁵⁸⁸ Naimark 2003, 105; Drahozal 2003, 25. As Dezalay and Garth note, successful arbitral institutions are likely to release at least this information, since 'the statistics ... serve the promotional purpose of attracting new clients by seeking to persuade them of past successes.' Dezalay & Garth 1996, 25.

⁵⁸⁹ Drahozal 2003, 25.

⁵⁹⁰ This figure was obtained by counting the number of distinct awards listed in the Table of Cross-Referenced Cases included in the most recent volume of the *Collection of ICC Arbitral Awards* (ICC Publishing, Paris 2009), which lists every ICC award originally published between 1974 and 2007. This statistic must be qualified by noting that not every arbitration that is initiated results in the issuance of an award, so the 3% figure refers to the percentage of initiated arbitrations in which an award was published, not the percentage of awards that were published.

⁵⁹¹ Quoted in Craig, Park & Paulsson 2001, 639 fn 39.

receive disproportionate attention and may therefore have a disproportionate effect on subsequent decision-making (which may well be the purpose of the institutions' publication policies). The *Hilmarton* case, in which French courts enforced both a vacated arbitration award in favour of the respondent and a subsequent award in favour of the claimant,⁵⁹² generated much scholarly hand-wringing.⁵⁹³ However, as Paulsson colourfully notes, the case is probably 'like a two-headed white rhinoceros which might give us a thrill in the cinema but does not really endanger our daily walk to work'.⁵⁹⁴

This thesis also considers the available quantitative data about ICA, which is composed primarily of statistics compiled by arbitral institutions and surveys of parties and arbitration practitioners. Quantitative information is available on such matters as:

- the choice of arbitration versus litigation (whether and why parties choose arbitration);⁵⁹⁵
- the matters specified in arbitration agreements (such as the place of arbitration, the applicable law, the number of arbitrators, the arbitral institution selected and the language in which the arbitration is to be conducted);⁵⁹⁶
- the frequency with which cases are settled (both pre- and post-award);⁵⁹⁷
- the frequency with which (unspecified) interim relief is applied for and granted;⁵⁹⁸
- the factors that influence parties' choice of arbitrator;⁵⁹⁹
- the parties' attitudes toward confidentiality;⁶⁰⁰
- the causes of delay;⁶⁰¹

⁵⁹² The mess was eventually cleaned up by the *Cour de Cassation*. See *Hilmarton Ltd v Omnium de traitement et de valorisation (OTV)* (1994) XIX Ybk Comm Arb 655 (Cour d'appel Paris, Dec. 19, 1991) (enforcing vacated award in favour of OTV), *aff'd*, *Hilmarton Ltd v Omnium de traitement et de valorisation (OTV)* (1995) XX Ybk Comm Arb 663 (Cour de cassation, Mar. 23, 1994); *Omnium de traitement et de valorisation (OTV) v Hilmarton Ltd* (1996) XXI Ybk Comm Arb 524 (Cour d'appel Versailles, June 29, 1995) (enforcing subsequent award in favour of Hilmarton), *rev'd*, *Omnium de traitement et de valorisation (OTV) v Hilmarton Ltd* (1997) XXII Ybk Comm Arb 696 (Cour de cassation, June 10, 1997).

⁵⁹³ See, e.g., Davis 2002, 63-66; Gaillard 1999, 509-11.

⁵⁹⁴ Paulsson 1998, 21.

⁵⁹⁵ Bühring-Uhle 1996, 129-134 (surveying 68 attorneys and arbitrators as to the advantages of arbitration relative to litigation); Naimark & Keer 2002 (surveying parties and attorneys involved in arbitrations administered by the American Arbitration Association (AAA) from January to November 2000 as to their reasons for choosing arbitration).

⁵⁹⁶ W&C/QMUL 2010 (surveying commercial parties' preferences on a variety of issues, including choice of the seat of arbitration, the arbitral institution and the number of parties); PwC/QMUL 2008 (surveying commercial parties on preferences among arbitral institutions and between institutional and *ad hoc* arbitration); Drahozal 2002 (surveying new or revised national arbitration statutes enacted in 1994-1999 and the place of arbitration in ICC proceedings to estimate the effect of enactment of new arbitration statutes on parties' choice of the place of arbitration); Bond 1990 (examining the provisions of arbitration clauses in proceedings filed with the ICC from 1987 to 1989).

⁵⁹⁷ PwC/QMUL 2008.

⁵⁹⁸ Naimark & Keer 2001 (surveying arbitrators on the AAA international panel as to their participation in cases where interim relief was sought).

⁵⁹⁹ W&C/QMUL 2010, 25-28.

⁶⁰⁰ *Ibid.*, 29-32.

- the substantive laws that parties tend to prefer;⁶⁰²
- the frequency with which general principles⁶⁰³ and trade usages⁶⁰⁴ are applied;
- the frequency with which arbitral tribunals render compromise awards ('split the baby');⁶⁰⁵
- the rate of voluntary compliance with awards; and⁶⁰⁶
- the success rate of court applications to enforce arbitral awards.⁶⁰⁷

Such surveys have much to contribute to the sociological analysis of ICA. However, there are no published quantitative studies of ICA culture. The closest are the interviews with arbitration practitioners found in Dezalay and Garth's *Dealing in Virtue*.⁶⁰⁸ These interviews provide data that is empirical but qualitative in character, and therefore cannot be expressed in terms of degrees of statistical confidence.

Interview data must be used with caution because it is necessarily anecdotal and may present a skewed picture of the actual norms espoused by the bulk of arbitrators. Drahozal, one of the few empiricists studying ICA, bemoans this state of affairs:

Much of our understanding of what happens in arbitration proceedings is based on anecdotal sources of information, such as reported court cases, published arbitral awards, and attorney 'war stories'. The problem with anecdotes, of course, is that it is difficult to evaluate whether the event described is typical or atypical, frequent or infrequent, ordinary or extreme.⁶⁰⁹

As Ginsburg notes, even the much-touted harmonisation of arbitral procedure may be an illusion formed from anecdotal evidence and a biased sample.⁶¹⁰

An additional methodological difficulty relates to the magnitude of cultural effects. The available data indicate that social norms do have some effect on arbitral decision-making,

⁶⁰¹ Ibid, 32.

⁶⁰² Ibid, 11-16.

⁶⁰³ Ibid, 15; Berger et al 2001, 91-93 (surveying 2733 attorneys, arbitrators and academics, of whom 639 replied, as to their experience with arbitrations involving the use of general principles or *lex mercatoria*).

⁶⁰⁴ Drahozal 2000 (examining arbitration statutes and rules and published awards).

⁶⁰⁵ Keer & Naimark 2001 (examining a sample of fifty-four AAA international arbitration proceedings from 1995 to 2000 to study the frequently-asserted claim that arbitrators 'split the baby').

⁶⁰⁶ PwC/QMUL 2008 (surveying commercial parties on their experiences with opposing parties' rates of compliance with awards).

⁶⁰⁷ Ibid (surveying commercial parties on their experiences in national court enforcement proceedings); van den Berg 1999 (finding that enforcement was refused in 10% of reported cases worldwide); Peerenboom 2001, 263-265 (comparing enforcement rates and percentage of awarded damages recovered in Chinese courts as between awards rendered by the Chinese International Economic and Trade Arbitration Commission and foreign arbitral institutions).

⁶⁰⁸ Dezalay & Garth 1996.

⁶⁰⁹ Drahozal 2003, 23.

⁶¹⁰ Ginsburg 2003, 1340.

but it is impossible to determine the magnitude of this effect. Tamanaha has pointed out that many studies of cultural factors in judicial decision-making (most of which do not employ grounded theory) suffer from a 'distorting slant'—they set out to prove that judges' political ideology affects their decisions.⁶¹¹ These studies typically take the form of quantitative analyses of whether cultural factors such as political ideology correlate to a statistically significant degree with the outcomes of judicial decisions. Such a focus on *whether* culture matters obscures an arguably more important question: *how much* it matters.⁶¹²

This thesis considers qualitative, not quantitative, data, but nevertheless may suffer from the same weakness as the studies cited by Tamanaha: the effects of social norms on arbitrators' decision-making may be negligible. There is no definitive reply to this concern, except to say that the social norms described below are consistent with the published awards and help to explain the divergence in outcomes between ICA and national court litigation.

Finally, no claim is made that data saturation was attained as a result of this research process. A comprehensive survey of written sources was made, so that new categories ceased to emerge from the data; saturation with respect to this type of data was achieved. However, other sources of data, in particular from surveys of or interviews with arbitrators, have not been gathered. Conducting this kind of research may lead to the identification of additional social norms and will also help to develop further the norms that have been identified.

⁶¹¹ Tamanaha 2009, 686.

⁶¹² Ibid, 754.

CHAPTER SIX: NORMS ARISING FROM THE INSTITUTIONAL STRUCTURE OF INTERNATIONAL COMMERCIAL ARBITRATION

Judges are state officials, while arbitrators are private citizens. Judges are paid by the government, and may be part of the broader civil service, while arbitrators are paid by the parties. Judges are randomly assigned to cases, while the parties individually select their arbitrators. Judges adjudicate full-time, while arbitrators are freelancers, openly competing with each other for work. Judges enjoy strong job security, regardless of the quality of their decisions, while arbitrators are reliant on maintaining a reputation for high quality decision-making. Judges can order enforcement of their own judgments, while arbitrators must rely on the goodwill of courts to enforce their awards. Judges make a fixed salary, while arbitrators earn more the more they work (and are usually paid by the hour or by the day).⁶¹³ Judges' decisions may be appealed on points of law, while there is in general no appeal on the merits from the decision of an arbitral tribunal. Courts are tied to a particular country's laws and legal system, while arbitral tribunals apply and are regulated by many different laws—they have no *lex fori*. Courts are permanent, while arbitral tribunals are *ad hoc*. Courts are physically rooted, while successful arbitrators regularly work with a variety of arbitral institutions and in a variety of locations all over the world.

These are the most notable of the institutional differences between national court litigation and international commercial arbitration. Institutional structures are an important component of communities and their cultures.⁶¹⁴ This chapter deals with three categories of institutional differences that correspond to distinct aspects of ICA culture: the different sources of authority and constraints on the exercise of that authority, the different professional contexts in which arbitrators and judges work, and the effects of competition.

⁶¹³ A 2000 survey by Gotanda revealed that when given the choice (*i.e.*, when the administering institution does not impose a particular fee system) most arbitrators charge fees based on the amount of work done (by an hourly or daily rate) rather than under a fixed fee or *ad valorem* (percentage of the amount in dispute) calculation. In addition, a significant percentage of arbitrators (although still a minority) charge cancellation fees if a case is settled prior to the hearing. Gotanda 2000.

⁶¹⁴ See, *e.g.*, Bell's comparative study of the judiciaries in five European countries, which focuses on the effects of institutional factors such as recruitment and selection methods, avenues of promotion and means of management and governance. Bell 2006, 13-34. Bell justifies his adoption of an institutional perspective on three bases: that law is an 'institutional fact', that legal actors operate primarily through institutions and that judiciaries relate to and are accountable to the wider society as institutions. *Ibid*, 6-10.

A. SOURCES OF AND CONSTRAINTS ON ARBITRAL AUTHORITY

The most fundamental difference between arbitrators and judges is that judges are officers of state—they derive their authority ultimately from the coercive power of their respective governments—while arbitrators are private contractors—they derive their authority from the will of parties who conclude arbitration agreements. The extent to which arbitral authority is a function of party autonomy is disputed. Some arbitrators maintain that ICA derives its force *entirely* from the parties' choice. Robert was among the first to make this argument:

Except for the eventual necessity of rendering an enforceable award, the law has no influence on the formulation, the promulgation, and the voluntary execution of an award. It is possible to consider that arbitration derives none of its institutional force from the law, and develops entirely from the will of the parties, via the contractual expression of that will.⁶¹⁵

This position is controversial, especially among common lawyers. Indeed, the so-called 'consensual' theory of arbitration is only one of several competing conceptions.⁶¹⁶ The consensual theory, also called the transnational approach, is controversial in part because it is based on a conception of arbitration as autonomous from all national legal systems.⁶¹⁷ Courts, especially in common law jurisdictions, have long resisted the transnational conception of arbitral authority. In *Bank Mellat v Helliniki Techniki SA*, Kerr LJ, himself a leading figure in ICA, wrote that, '...despite suggestions to the contrary by some learned writers under other systems, our jurisprudence does not recognise the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law'.⁶¹⁸

An opposing theory, which is sometimes called the 'jurisdictional' theory and which Gaillard labels the 'monolocal approach', emphasises that arbitration can only exist to the extent that a specific national legal order—the jurisdiction that is the *situs* of arbitration—permits them to exist.⁶¹⁹ The classic formulation of this theory is Mann's 1967 screed against the consensual theory, '*Lex Facit Arbitrum*'. Mann argues against the notion that 'the autonomy of the parties ... may produce a contract without law ... so that arbitrators are not called upon to apply any fixed rules of a specific system of law, but may have resort to a law

⁶¹⁵ Robert 1967, 229.

⁶¹⁶ For an overview of the different theories of arbitral authority Yu 2004 and 2005. The philosophical underpinnings of the different theories are explored in Gaillard 2010.

⁶¹⁷ Gaillard 2010, 15.

⁶¹⁸ [1984] 1 QB 2901, 301.

⁶¹⁹ Gaillard 2010, 35-39.

of their own creation.’⁶²⁰ Of course, it is true that ‘in the legal sense no international commercial arbitration exists’, since arbitration cannot exist without national laws and national courts, at least as an enforcement system.⁶²¹

More recent commentators have elaborated on this position:

Transnational private law is one among multiple regimes of cross-border governance, but one distinguished by its particular mode of governance: indirect intervention through private contestation and ordering. Through private law, the state offers a set of background norms and processes that can be used by private parties to make claims against each other. The state has a necessary role in this plural system, but it forgoes dominant ‘command and control’ regulation, and acts rather as a kind of indirect ‘facilitative’ actor.⁶²²

Gaillard describes this theory, which is intermediate between the monolocal and transnational conceptions of ICA, as ‘multilocal’ or ‘westphalian’. It sees arbitration as deriving not from a single order—that of the *situs*—but rather from ‘all the legal orders that are willing, under certain conditions, to recognise the effectiveness of the award’.⁶²³

Nevertheless, it is equally undeniable that arbitrations cannot exist without the will of the parties. Thus, on the macro level, arbitrators’ and judges’ obligations flow in different directions: ‘Unlike the state official or politician, whose duty is to the national interest, the lawyer-diplomat can develop an intellectual capital which transcends particular national legal fields.’⁶²⁴ More concretely, the difference in who ‘employs’ judges (the state) and arbitrators (the parties) affects how these adjudicators are selected and remunerated.⁶²⁵

Whether this difference in the sources of judicial and arbitral authority makes it impossible for arbitrators to be independent of the parties is controversial.⁶²⁶ Menkel-Meadow argues that conflicts of interests are ‘systemic’ and ‘inherent’ in ICA;⁶²⁷ others, such as Franck, argue that, in the abstract, the differences in arbitrators’ and judges’ sources of authority ‘are minor and should not affect an adjudicator’s capacity and willingness to render

⁶²⁰ Mann 1967, 158 (citations omitted).

⁶²¹ Ibid, 159.

⁶²² Wai 2005, 475

⁶²³ Gaillard 2010, 24-25.

⁶²⁴ Picciotto 1997, 1021.

⁶²⁵ Franck 2006, 509.

⁶²⁶ The effect of the arbitrator-party relationship on arbitral decision-making on the individual level will be discussed in the following section.

⁶²⁷ Menkel-Meadow 2002, 956.

impartial decisions.⁶²⁸ However, it is reasonable to conclude that this institutional difference in sources of authority makes arbitrators more likely than judges to see matters from the point of view of the parties and to be more attuned to the interests of the parties than to the interests of the legal system and the society as a whole. (This is apart from the issue of party-appointed arbitrators' relationships with the parties that appoint them, a potential source of bias that will be discussed below.⁶²⁹)

Differences in sources of authority are accompanied by corresponding differences in the constraints on authority. The decision-making of arbitrators and judges occurs within the boundaries delineated by those constraints; accordingly, the outcomes in litigation and arbitration will be affected by the differences in the constraints on judges and arbitrators. This issue will be examined with respect to the jurisdiction of the adjudicator, the decision on the merits, and the procedure—dealing first with formal, rule-based constraints, and second with informal ones.

Arbitrators are constrained by three layers of formal, rule-based constraints. First is the agreement of the parties: whether through an arbitration clause in a contract, by a submission agreement or (in the case of ICC arbitration and sometimes in *ad hoc* arbitrations) by terms of reference, the parties determine the scope of the tribunal's authority. If the tribunal exceeds this authority, such as when the parties did not freely and lawfully choose arbitration, the tribunal rules on issues not submitted to it, or the tribunal is constituted in a manner contrary to the agreement of the parties, then can set aside the award or refuse to recognise or enforce it, as per articles V(1)(a), (c) and (d) of the New York Convention.⁶³⁰

The second layer of constraints is the rules of procedure, *i.e.*, the rules of the convening institution if there is one (and frequently the UNCITRAL Rules if the arbitration is *ad hoc*).⁶³¹ Failure to abide by the rules of procedure can result in removal of an arbitrator or annulment of the award. However, when it comes to the conduct of the hearing, these rules are often very general or provide for flexibility. Thus, they place few constraints arbitrators' power to structure the proceedings in the manner they deem appropriate. Moreover, they place no constraints on arbitrators' ability to choose, determine and apply the governing substantive law.

⁶²⁸ Franck 2006, 508-09 (citations omitted).

⁶²⁹ See below, Chapter Six, Section B.

⁶³⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force on 7 June 1959) 330 UNTS 3 (New York Convention).

⁶³¹ The UNCITRAL Rules were designed to be used in *ad hoc* international arbitrations and, when promulgated in 1976, were the only rules available for that specific purpose. Born 2009, 151. See also Lew et al 2004, 25.

Applicable national laws constitute the third layer of formal constraints on arbitral authority. The New York Convention provides that recognition and enforcement of an award can be refused if the party against whom the award is invoked was 'unable' to present its case.⁶³² As a result, many national arbitration laws permit the annulment of an award or the refusal of recognition or enforcement if the tribunal did not give both parties full and equal opportunities to state their cases and to respond to the other parties' cases. For example, the UNCITRAL Model Law on International Commercial Arbitration requires that 'The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.'⁶³³ Similarly, the UK Arbitration Act 1996 requires the tribunal to 'act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent'.⁶³⁴

In addition, under Article V(2)(b) of the New York Convention and every national arbitration law, courts may annul awards or refuse them recognition or enforcement if they contravene the public policy of the state in which the application is made. Generally, the tribunal is bound by any mandatory provisions of law of the seat of arbitration; however, tribunals also consider the mandatory laws of other states where enforcement of the award is likely to be sought.

A key characteristic of the relationship between national law and arbitration is that, in annulment or recognition and enforcement proceedings, the focus is entirely on procedural issues. Not only is there no appeal procedure within commercial arbitration, but also, generally speaking, judges may not set aside an award or refuse enforcement on grounds that the arbitrators made an error of law or otherwise made a wrong decision. There are, in essence, no formal constraints on the arbitrators' ability to err in choosing the governing substantive law, determining the content of that law, or applying the law to the facts.⁶³⁵ Carbonneau wryly puts the matter thus: 'The content of the governing *lex*, however chosen, is quite malleable then, with the degree of malleability being determined by the arbitrator's ingenuity.'⁶³⁶ As Rogers points out, this state of affairs vests arbitrators with broad, virtually

⁶³² Art V(1)(b).

⁶³³ Art 18.

⁶³⁴ S 33. Violation of s 33 can result in annulment of the award under s 68(2)(a) if the violation caused 'substantial injustice' to one party.

⁶³⁵ The lack of substantive control of arbitration will be discussed in greater detail below. See Chapter Seven, Section A.1.

⁶³⁶ Carbonneau 2004, 1204.

unreviewable decision-making power: 'Even clear mistakes of law in arbitral awards are virtually immune from appellate review.'⁶³⁷

By contrast, judges must apply the law—substantive and procedural—as written in domestic statutes and as interpreted by superior courts. If they make an error of law, it may be overturned on appeal. In some jurisdictions, arbitrators are subject to liability for negligent performance of their duties, while judges everywhere enjoy blanket immunity.⁶³⁸

However, the gap between the constraints on judicial and arbitral authority does not seem so wide when one includes informal constraints. Arbitrators, like judges, do not like to have their awards annulled or denied enforcement. Rendering an award that is the subject of a successful challenge is a black mark on an arbitrator's resume and may affect his or her ability to garner future appointments. Even if an award is not published or challenged in a public court proceeding, the parties will see it and, since reasoned awards are generally required, will be able to evaluate the arbitrator's skill and conscientiousness. Given how small and tightly-knit the arbitration community remains, both exemplary and incompetent work will affect an arbitrator's prospects. Franck is therefore correct to conclude that, 'While arbitrators and judges are subject to different review processes, both processes provide an opportunity to evaluate their conduct.'⁶³⁹

In addition, increasing publication of awards, greater sophistication of the parties and more frequent use of ready-made rules like those promulgated by the IBA mean that arbitrators now have less control over procedures than they did in the past.⁶⁴⁰ Modern arbitral rules have also removed earlier constraints on the parties' freedom to choose the applicable substantive and procedural rules.⁶⁴¹ The parties' power in these areas balances the almost unconstrained power that arbitrators have over the decision on the merits.

In accordance with these constraints, arbitrators rarely disregard the express terms of the contract or violate mandatory provisions of relevant national law. This is particularly so when the jurisdiction of the tribunal or the enforceability of an eventual award are at stake. Many institutional rules make it an affirmative duty of the arbitrators to render an enforceable

⁶³⁷ Rogers 2002, 414-415 (citations omitted).

⁶³⁸ Arbitrator immunity is a controversial subject and the rules vary greatly from jurisdiction to jurisdiction. See Rutledge 2004; Franck 2000.

⁶³⁹ Franck 2006, 511.

⁶⁴⁰ Rogers 2002, 416 (citation omitted).

⁶⁴¹ See below, Chapter Seven, Section A.2.

award,⁶⁴² but even without such provisions, arbitrators would continue to be solicitous of national courts, aware that their cooperation is necessary for the success of ICA.

For example, Case Study 2 concerned the admissibility of extrinsic evidence to interpret contracts. As discussed in Chapter Four, parties are unlikely to approve of the exclusionary rules applied in common law jurisdictions.⁶⁴³ Moreover, these rules are much-criticised even by common lawyers. Nevertheless, in all but one of the awards discussed in Case Study 2,⁶⁴⁴ when tribunals were applying the law of a common law jurisdiction, they excluded the extrinsic evidence that the law courts would likely have excluded.

At the same time, attention to the arbitral context and the differing constraints on judges and arbitrators helps to explain why, when not applying the law of a common law jurisdiction, arbitrators tend to admit all relevant extrinsic evidence when interpreting a contract. The exclusionary rules evolved largely to keep unreliable evidence away from unreliable lay juries, an issue that does not arise in arbitration. Another rationale for the exclusionary rules is that, by prioritising the objective meaning of the written terms of a contract, they help to give similar terms in different contracts a uniform meaning; this promotes predictability and protects third parties who may have arranged their affairs on the basis of their understanding of the terms of the contract. Arbitrators, on the other hand, are not institutionally concerned with the broad issues that may arise from individual cases, but rather with vindicating the intentions of the parties who selected those arbitrators to resolve their dispute. After all, most arbitral awards are only read by the parties and, even if published, cannot bind future tribunals. In addition, arbitrators are not likely to hear from third parties whose interests may be affected by interpretation of the contract in dispute.⁶⁴⁵

B. THE PROFESSIONAL CONTEXT OF ARBITRATION

International arbitrators work in a professional milieu entirely different from that of judges. Two important factors specific to arbitration must be addressed: the multiple roles played by arbitrators and fact that arbitrators are appointed by the parties.

⁶⁴² For example, the LCIA Rules require tribunals to 'make every reasonable effort to ensure that an award is legally enforceable'. Art 32(2).

⁶⁴³ See above, fns 301-305 and accompanying text.

⁶⁴⁴ ICC Case No. 4555 of 1985 (1986) XI Ybk Comm Arb 140.

⁶⁴⁵ Note, however, that this may change as arbitral awards are published in greater numbers (and therefore are more likely to have precedential value) and as third parties increasingly find their way into arbitral proceedings (a trend that has been observed by a variety of commentators).

1. Arbitrators' multiple roles

An important difference between judges and arbitrators is that the individuals who are appointed as arbitrators also participate in arbitrations in other capacities: as advocates, consultants, expert witnesses (hired by the parties or by the tribunal itself) and (in the case of the ICC's Court of International Arbitration) substantive reviewers of awards. Indeed, it is practically impossible to be appointed as an arbitrator in a major international dispute without prior experience in one or more of these roles.⁶⁴⁶

Three consequences arise from this state of affairs. The first is the greater likelihood in arbitration than in litigation that an adjudicator will have a prior professional relationship with a party that could create an inference of bias or an outright conflict of interest and duty. However, such relationships are, with adequate disclosure by arbitrators, relatively easy to police. Moreover, they do not substantially differ from potential conflicts experienced by judges, many of whom (at least in common law countries) were previously practicing lawyers.

The second consequence is that arbitrators, counsel and expert witnesses often maintain ongoing personal and professional relationships. Arbitrators are not only likely to have worked together with counsel or expert witnesses in the past, they may have already arranged to together on an unrelated dispute, as co-counsel, as consultant and client, or as counsel and arbitrator with the positions reversed. In addition, while members of the same law firm may not appear in front of each other, arbitrators who are barristers may generally hear arguments by barristers from the same chambers.⁶⁴⁷

Repeated interactions between arbitration practitioners are often not coincidental, but rather the result of mutual referrals. As Dezalay and Garth note, the 'exchange of favours is essential to success in arbitration, a career dependent on personal relations.'⁶⁴⁸ For this reason, international arbitration is often described as a 'club'.⁶⁴⁹ Judges, on the other hand, must not fraternise with advocates or potential witnesses, especially in states where judges are drawn from the ranks of prominent advocates, and may not act as advocates or expert witnesses while they are on the bench. For example, the House of Lords held in 2003 that

⁶⁴⁶ Retired judges, who are popular as arbitrators, are an exception to this trend. However, high-level judicial experience can substitute for experience as an arbitrator; in addition, the retired judges who find success as arbitrators may have had experience as arbitration counsel prior to being elevated to the bench.

⁶⁴⁷ *Hrvatska Elektroprivreda, dd (Croatia) v Slovenia*, ICSID ARB/05/24 (May 6, 2008) (Tribunal's Ruling regarding the participation of David Mildon QC in further stages of the proceedings).

⁶⁴⁸ Dezalay & Garth 1996, 124.

⁶⁴⁹ See, e.g., Menkel-Meadow 2002, 958-959; Ridgway 1999, 51; Dezalay & Garth 1996, 10 (quoting a 'well-informed New York partner').

lawyers who serve as part-time judges may not appear as counsel before a panel of the Employment Appeal Tribunal consisting of one or two lay members with whom they had previously sat, because such arrangements give rise to a real possibility of subconscious bias, and thereby undermine public confidence in the administration of justice.⁶⁵⁰ The internecine nature of ICA gives rise to legitimate concerns regarding the independence of arbitrators.

Even more importantly, arbitrators are likely to have in the past and will in the future encounter the advocates appearing before them, with the positions reversed. Dezalay and Garth see such fluidity of roles as a benefit:

The principal players ... acquire a great deal of familiarity with each other, and they develop also, we suspect, a certain connivance with respect to the role held by the adversary of the moment. The extraordinary flexibility of this rotation of roles contributes greatly to the smooth running of these mechanisms of arbitration.⁶⁵¹

Such a statement may well be shocking to those who take conflicts of interest seriously. Indeed, there is cause for concern, given that an arbitrator's future livelihood may depend on the goodwill of the other participants in a current arbitration. As Garth notes, 'the world of international commercial arbitration operates to a great extent as a 'favour bank': 'Those who can provide a favour for the individuals at the core tend to get rewarded with referrals and recognition.'⁶⁵² There is thus a strong incentive to cooperate with the other participants in an arbitration and to conform to accepted practices and standards.

The collegiality prized by arbitrators is illustrated by ICC Case No. 8694 of 1996. There, the tribunal thanked 'the parties' counsels for their competence, professionalism, courtesy, and good humour manifested during the course of the arbitration. Without such a cooperative and constructive approach, our work would have been much more difficult.'⁶⁵³ Former ICC Secretary-General Yves Derains characterised the tribunal's statement, which

⁶⁵⁰ *Lawal v Northern Spirit Ltd* [2003] UKHL 35 [21-23].

⁶⁵¹ Dezalay & Garth 1996, 49.

⁶⁵² Garth 1997, 11; Dezalay and Garth also note, in this connection, that 'It is good arbitration politics to thank business lawyers or other acquaintances who bring nice arbitration matters by letting them have limited access to the arbitration market. This system of exchange of favours is essential to success in arbitration, a career dependent on personal relations.' Dezalay & Garth 1996, 124.

⁶⁵³ Award in ICC Case No. 8694 of 1996 [1997] JDI 1056 ('*Le Tribunal exprime sa reconnaissance aux conseils des parties pour leur compétence, professionnalisme, courtoisie, et bonne humeur manifestés pendant le déroulement de l'arbitrage. Sans une telle coopération et approche constructive, notre travail aurait été beaucoup plus difficile.*').

was not unusual, as 'refreshing', 'encouraging' and characteristic of the 'comradely spirit' of ICA.⁶⁵⁴ Dezalay and Garth go even further:

In the community of the initiated, the proximity and interchangability of roles makes the advocates comport themselves in a very subtle manner as auxiliaries of the arbitral tribunal. Defending the interests of their clients in a case does not push them to actions that jeopardize their own credibility or, worse still, the social legitimacy of arbitration. Such an attitude would have been equivalent to professional suicide in building the practice of international commercial arbitration.⁶⁵⁵

A third consequence of the fluid roles played by arbitrators is so called 'issue conflicts', situations where actual bias, or an appearance of bias, arises from the adjudicator's relationship with the subject matter of the dispute, as opposed a relationship with a party.⁶⁵⁶ Because they tend to speak and publish frequently in academic and professional contexts, arbitrators may have committed themselves to particular points of view on issues that arise in a dispute in which they have been appointed; they may also have taken a position on the same legal issue in an unrelated dispute.

Parties are free to choose arbitrators who are generally predisposed to the legal or factual theory of their case.⁶⁵⁷ Indeed, party-appointed arbitrators are often selected because a party and its counsel expect the arbitrator to be sympathetic to the arguments that the party intends to make. As Mosk notes, 'Doctrinal sympathies or antipathies are not disqualifying. A small distributor bringing an action for wrongful termination might be attracted to an arbitrator who is known to believe that the law should be zealously applied to curtail abuse of a dominant position.'⁶⁵⁸ Carter even asserts that '[s]uch potential receptivity is one of the advantages of arbitration, whether international or domestic, in which parties can quite legitimately "shop" for arbitrators with specific backgrounds and experience.'⁶⁵⁹ However, these kinds of predispositions can cross into outright bias. The problem of issue conflicts (although not necessarily under that name) has been noted by commentators⁶⁶⁰ and, on

⁶⁵⁴ Ibid (author's translation).

⁶⁵⁵ Dezalay & Garth 1996, 56-57. This is explicable in part by mere professional courtesy and something similar could be said of judges. However, due to the interests and constraints described here, the effect is likely to be stronger among arbitrators than among judges.

⁶⁵⁶ See Brubaker 2008.

⁶⁵⁷ Craig, Park & Paulsson 2001, 196.

⁶⁵⁸ Paulsson 1997, 15.

⁶⁵⁹ Carter 2000, 295-296.

⁶⁶⁰ See, e.g., Grigera Naón 1999, 119 ('Neutrality should be understood not only as premised upon the independence and impartiality of arbitrators but also upon their mental openness and disposition...'); Singhal 2008, 125; Brubaker 2008.

occasion, has arisen in proceedings challenging arbitrators.⁶⁶¹ Nevertheless, existing codes of conduct and impartiality standards may be insufficient to address issue conflicts.⁶⁶²

2. Appointment of arbitrators by the parties

Perhaps the most obvious concern regarding the independence of arbitrators arises from the fact that the parties appoint the arbitrators, or most of them, in the majority of international disputes.⁶⁶³ The perception that party-appointed arbitrators are by definition biased has serious implications for the legitimacy of ICA.⁶⁶⁴ All arbitrators are required by the rules of procedure to act neutrally, that is, both to judge the dispute with an open mind and to refrain from advocating for the parties who appointed them.⁶⁶⁵ However, 'A certain perception of reality and a distaste for hypocrisy cause some practitioners to conclude that one should simply expect that a party-appointed arbitrator will not behave as impartially as one appointed jointly or by a neutral authority.'⁶⁶⁶

The bare fact that arbitrators depend for their livelihood on the continuing favour of the parties—or more properly their counsel—affects their independence and impartiality. As a 'leading member of the pioneering generation' put it when interviewed by Dezalay & Garth, to be 'really independent', an arbitrator must be older than seventy-five and so not dependent on further arbitration business.⁶⁶⁷ A 'senior English arbitrator' interviewed by Dezalay and Garth mused that 'You're often appointed a party arbitrator by someone with whom you have worked before.... You know you're going to work with him again. Does that unconsciously bias one? I think it's a difficult one.... not everybody is 100 percent honest.'⁶⁶⁸

⁶⁶¹ See, e.g., a pair of Dutch cases arising from an investment treaty dispute: *Republic of Ghana v Telekom Malaysia Berhad* (District Court of the Hague, 18 Oct 2004), HA/RK 2004, 667; *Republic of Ghana v Telekom Malaysia Berhad* (District Court of the Hague, 5 Oct 2005), HA/RK 2004, 788, reprinted in (2005) 23(1) ASA Bull 186.

⁶⁶² For analysis of the relevant provisions of the major institutional rules, see Brubaker 2008, 126-134.

⁶⁶³ All the institutional rules permit the parties to agree that they will appoint (separately or jointly) one or more of the arbitrators. Selection by the parties is the default position under most of the major arbitral rules of procedure. See, e.g., ICC Rules art 8(3)-(4); ICDR Rules art 6; UNCITRAL Rules art 6-7. An exception is the LCIA Rules, art 5 of which makes the default position selection by the LCIA Court. However, under art 7, the parties can agree that they will nominate the arbitrators, and such agreement will derogate from the default rule in art 5. In practice, there is little difference from the other sets of rules.

⁶⁶⁴ It has also been blamed for other negative perceptions of arbitration, such as 'the persistent myth that arbitrators "split the baby"'. Keer & Naimark 2001, 576.

⁶⁶⁵ Redfern & Hunter 2004, 236. Some domestic arbitration rules allow for the appointment of explicitly non-neutral arbitrators. For example, the Commercial Arbitration Rules of the AAA, which apply to US domestic arbitrations, provide that party-appointed arbitrators need not meet standards of impartiality and independence if the parties 'have specifically agreed ... that the party-appointed arbitrators are to be non-neutral'. S R-12(b).

⁶⁶⁶ Paulsson 1997, 13-14.

⁶⁶⁷ Dezalay & Garth 1996, 35 fn 3.

⁶⁶⁸ Ibid, 50.

Yet, there is no objective evidence that party-appointed arbitrators systematically favour the parties who appoint them, and there is anecdotal evidence that most awards are unanimous. Lowenfeld writes, 'The suspicion ... that the chairperson decides and the other two arbitrators are simply other kinds of advocates is not borne out in the practice I have seen in the international commercial arena.'⁶⁶⁹ Moreover, a reputation for overt partisanship will harm an arbitrator's career prospects in the long run, as he will lose influence over his fellow arbitrators:

For those 'repeat-players,' reputation and credibility as a fair, independent, and reasoned decision maker is vital. In multi-million and multi-billion dollar disputes, parties are likely to be unwilling to appoint an arbitrator who is likely to be challenged, who cannot fully consider ... the facts and laws at issue and who may be incapable of rendering an enforceable award.⁶⁷⁰

The most significant danger lies with those who arbitrate infrequently, and who therefore 'may not appreciate or be cognizant of these informal market mechanisms'.⁶⁷¹ As Park notes, 'A considerable disjunction exists between the arbitration aficionado and the newcomer. For the latter, there exists no arbiter of proper procedure.'⁶⁷² Arbitrators who seek repeated appointments by the same party present a particular problem. An arbitrator 'who considers that his only chance lies with the party which has already named him once, this might result in more or less dissimulated, but nevertheless systematic, favouritism'.⁶⁷³

Despite the risk of bias presented by party-appointed arbitrators and the cost of employing three arbitrators rather than one, tripartite tribunals 'are not withering away'.⁶⁷⁴ Of parties that reported a preference as to the number of arbitrators, 87% preferred three-member tribunals.⁶⁷⁵ Carter concludes that the sense of control that accompanies the act of choosing one's own adjudicator outweighs cost and bias concerns.⁶⁷⁶ The presence of a party-appointed arbitrator also reassures parties that at least one arbitrator is a known quantity,

⁶⁶⁹ Lowenfeld 1987, 53.

⁶⁷⁰ Franck 2006, 517.

⁶⁷¹ Ibid.

⁶⁷² Park 2002, 292.

⁶⁷³ Paulsson 1997, 14.

⁶⁷⁴ Carter 2000, 295.

⁶⁷⁵ W&C/QMUL 2010, 25. 'Respondents said that three arbitrators lead to greater neutrality, less risk of a poor decision and a more 'balanced' award. The desirability of being able to appoint one of the three arbitrators was another factor cited by respondents. A panel of three arbitrators also offers the opportunity to have a diversity of background and experience that may be useful in particular disputes, such as those with a great deal of technical evidence.' Ibid.

⁶⁷⁶ Carter 2000, 295.

reducing the risk of a 'runaway tribunal'.⁶⁷⁷ As Lowenfeld puts it, 'one of the principal functions of a party-appointed arbitrator is to give confidence in the process to the parties and their counsel.'⁶⁷⁸ Finally, the presence of party-appointed arbitrators is said to improve the legitimacy of arbitration as a whole by making awards more acceptable to the losing party.⁶⁷⁹

C. INTERNATIONAL COMMERCIAL ARBITRATION AS A COMPETITIVE MARKETPLACE

On the level of each individual dispute, arbitrators have an incentive to make decisions that benefit the parties generally, and in particular the party that appointed them. On a broader level, however, arbitrators, arbitral institutions and even states compete with each other for a larger share of the dispute resolution market. The pervasive impact of market competition constitutes an important institutional distinction between arbitration and litigation.

The field of ICA was once 'the delightful discipline of a handful of academic aficionados on the fringe of international law' but has now become 'a matter of serious concern for a great numbers of professionals'.⁶⁸⁰ Starting with the high-profile oil arbitrations of the 1970s, large US- and UK-based multinational law firms began to enter the field. These firms, with clients and offices around the world, expanded the ICA market. ICA became a multinational market because its primary consumers were themselves multinational: multinational forums for multinational firms.⁶⁸¹ This phenomenon, combined with an explosion in cross-border transactions generally, has led to an increase in the use of ICA services.⁶⁸² The potential profits have increased accordingly, leading to the entry into the field of many new practitioners.⁶⁸³ Today, it encompasses a variety of arbitrators, arbitral institutions and fora, all anxious to distinguish themselves from their competitors. As Dezalay and Garth describe it:

⁶⁷⁷ Paulsson 1997, 14.

⁶⁷⁸ Lowenfeld 1995, 62.

⁶⁷⁹ Mosk 1988, 254; Paulsson 1997, 14.

⁶⁸⁰ Paulsson 1985, 2.

⁶⁸¹ Dezalay & Garth 1996, 7 (citation omitted).

⁶⁸² Since different institutions use different systems to count arbitrations filed with them, it is difficult to come up with global numbers. However, the rate of change within a single institution can be measured. The ICC registered 32 new arbitrations in 1956, 210 arbitrations in 1976, 337 arbitrations in 1992, 452 arbitrations in 1997, 529 arbitrations in 1999 and 599 arbitrations in 2007—an increase of about 20 times over fifty years. Similarly, the AAA-ICDR administered approximately 100 international arbitrations in 1980, 207 in 1993, 510 in 2000 and 621 in 2007—an increase of more than six times in just 27 years. Born 2009, 68.

⁶⁸³ Helmer 2003, 41.

Arbitration is often presented quite overtly as a kind of market where the clients are able to choose from a palette of potential arbitrators according to the nature of their problems, their affinities, and above all their strategies. The parties—and their advisors—thus choose their terrain, their arms, and the rules of the game that will govern their confrontation.⁶⁸⁴

As this observation highlights, the key factor in competition within arbitration is that the parties call the shots. Carbonneau and Janson conclude: 'At the end of the day, transborder adjudication will be guided by the dictates of the marketplace and the international commercial community.'⁶⁸⁵

Despite the existence of increasing numbers of international arbitrators and arbitral institutions, there is 'a growing convergence in procedures and mutual goals'.⁶⁸⁶ Since a rising tide of arbitral business lifts all boats, cooperative efforts to improve the standing of ICA as a whole have accompanied the increase in competition among arbitrators and institutions.⁶⁸⁷ The process of competition reveals rules and practices that are more effective and more attractive to disputing parties; these are quickly copied, so that the field progresses *en masse*. Thus, even without any *stare decisis* doctrine (and even without most decisions being reported), ideas and trends become disseminated when arbitrators work together, and also through social interactions and conferences.

A dramatic example of the role of competitive forces is provided by Rogers. She charts the increase of transparency within ICA in recent years and ascribes this change to the effects of market competition among arbitrators and arbitral institutions:

... rather than external pressure, [transparency gains] are the product of a range of collective, institutional and individual initiatives, leavened by a healthy dose of competition and drawing upon collaterally disclosed information.⁶⁸⁸

Understanding the operation of market forces in ICA is key to understanding 'the justice that arbitration provides'.⁶⁸⁹ Indeed, competition is so pervasive in the international arbitral system that it constitutes a social norm of ICA. There are the three levels of competition within ICA: arbitrators and would-be arbitrators compete with each other for appointments, arbitral fora (institutions and states) compete with each other to host

⁶⁸⁴ Dezalay & Garth 1996, 209.

⁶⁸⁵ Carbonneau & Janson 1994, 221-222.

⁶⁸⁶ Thirgood 2004, 342.

⁶⁸⁷ Rogers 2006, 1313-1314 (citations omitted).

⁶⁸⁸ Ibid, 1322.

⁶⁸⁹ Dezalay & Garth 1996, 8-9.

arbitrations, and practitioners of arbitration collectively compete for market share against other forms of dispute resolution.

1. Competition between arbitrators

Judges have security of tenure and income and a full-time workload assigned to them, while arbitrators are free agents, without tenure, who must attract the cases that they decide.⁶⁹⁰ Arbitrators normally will not be aware of a dispute until and unless they are approached to adjudicate it.⁶⁹¹ Moreover, arbitrators' work product is, for the most part, only seen by the parties, their counsel and in-house lawyers at the arbitral institution. (When awards are published, the arbitrators' names are sometimes listed, even when the parties' identities are redacted.⁶⁹²) The result is a market for arbitration services that is far from transparent.

Consequently, competition between arbitrators must occur in alternative venues that allow them to demonstrate their expertise and build a reputation within the ICA community. Junior counsel and academics who hope to 'graduate' to being arbitrators may seek out in-house positions at arbitral institutions,⁶⁹³ work toward partnerships in major law firms,⁶⁹⁴ serve as officers of arbitral institutions, take academic positions at universities (even if they work primarily within law firms or as barristers),⁶⁹⁵ give presentations at academic conferences, publish academic papers and teach at training events for practitioners. Maintaining a presence at conferences is considered particularly *de rigeur*.⁶⁹⁶

As Dezalay and Garth put it, the elite arbitrators maintain their dominance in part by 'defining themselves through writing, conferences, and meetings of the community of experts in international commercial arbitration'.⁶⁹⁷ There are now hundreds of treatises and

⁶⁹⁰ Historically, English judges received no fixed salary but instead kept the court fees as their compensation. At least one judge believed this to be the cause of English courts' so-called hostility to arbitration: '... there was a great competition to get as much as possible of litigation into Westminster Hall for the division of spoil. [Judges] had a great jealousy of arbitrations whereby Westminster Hall was robbed of those cases Therefore, they said that the courts ought not to be ousted of their jurisdiction.' *Scott v Avery* (1856), 5 HL Cas 811.

⁶⁹¹ It is, of course, possible for arbitrators to hear about a dispute through the ICA 'grapevine' or from their professional activities. In such cases, they are able to (and sometimes do) lobby the parties' counsel to be appointed; however, such blatant marketing is likely to be frowned upon.

⁶⁹² Rogers 2006, 1323 fn 64.

⁶⁹³ Dezalay & Garth 1995, 38, calling working for an institution 'the quick route' to arbitration expertise.

⁶⁹⁴ See Alford 2003, 88, noting that '... the Anglo-American juggernaut we know as the modern international law firm is the defining feature affecting the industry today.'

⁶⁹⁵ Professorships are especially prized. Toby Landau, an English barrister and Visiting Professor at King's College, University of London, noted that '[i]n my particular field, the title of professor may be of greater value than that of QC'. Swallow 2004.

⁶⁹⁶ Garth 1997.

⁶⁹⁷ Dezalay & Garth 1995, 31 fn 9.

guidebooks on such topics as the drafting of arbitration agreements, the selection of arbitrators, and effective advocacy in arbitration. Such resources 'are principally the work of the top international arbitration specialists, who use these publications as a form of elite advertising'.⁶⁹⁸

In addition to serving as venues for advertising, academic and professional journals and symposia are effective means for disseminating both standard practices and innovations. For example, Jones cites the annual symposia organised by the LCIA for providing an effective forum in which participants and observers can 'pick up, in a relatively short space of time, a range of current ideas and trends which would otherwise be quite unavailable'.⁶⁹⁹ This phenomenon highlights an essential feature of competition: that it acts as a harmonising (or at least homogenising) force. Those seeking to break into the ranks of arbitrators are constrained to emulate the résumés, practices and perspectives of the elite, thus reinforcing existing values and standards.

Indeed, it is arguable that the primary beneficiaries of arbitral competition (and of the expansion of the field in the last few decades) have been the small cadre of elite arbitrators. Summarising the interviews they conducted with numerous practitioners, Dezalay and Garth relate that '[T]he same, relatively few, names of arbitrators were repeated over and over on both sides of the Atlantic.'⁷⁰⁰ Indeed, a 'leading arbitrator of the new generation' told Dezalay and Garth that, 'There are, I suppose, forty to fifty people in Western Europe who could claim that they make their living doing this.'⁷⁰¹

Since the 1990s, when Dezalay and Garth conducted their research, the field has expanded. However, a small corps continues to dominate the field. Writing in 2004, Fellas noted that 'Some arbitrators are in such demand that they are booked well over 18 months ahead.'⁷⁰² The packed schedules of the leading arbitrators are enough of an issue that 'availability' now counts as one of the most important factors in parties' choice of an arbitrator.⁷⁰³ Webster expresses a common perception: 'A chairman who cannot meet the parties' reasonable expectations as to dates for hearings is probably also going to have

⁶⁹⁸ Rogers 2006, 1321.

⁶⁹⁹ Jones 2006, 282.

⁷⁰⁰ Dezalay & Garth 1996, 8.

⁷⁰¹ Ibid, 50.

⁷⁰² Fellas 2004, 80-81.

⁷⁰³ W&C/QMUL 2010, 25. Availability 'was emphasised by a number of interviewees as an extremely important factor and an issue of increasing concern'. Ibid.

problems taking the time to read submissions prior to the hearings and to review the documents and submissions in preparation for deliberations.'⁷⁰⁴

One aspect of the closed nature of the community of successful arbitrators is the number and extent of direct personal links between prominent arbitrators of different generations. Notes Garth:

... clubs are built on the basis of personal relations, not just abstract resumes.... This personal dimension gives considerable importance to meetings, such as conferences, where individuals can both assess the market value of resumes and build relationships of trust and respect. It is also not surprising that many who are brought into international commercial arbitration are in fact disciples of those already in the field.⁷⁰⁵

Many leaders of the current generation of arbitrators were the protégés of well-known members of the previous generation: Albert Jan van den Berg worked under Pieter Sanders, numerous Swiss arbitrators under Pierre Lalive, Yves Derains and Julian Lew under René David, James Carter under Jack Stevenson, David Rivkin under Robert von Mehren. Dezalay and Garth conclude, 'The systems of patronage may no longer be as extreme as the European legal dynasties of the past, but they are artificial recreations of the same phenomenon.'⁷⁰⁶

The dominance of the small number of successful arbitrators and the dynastic connections between arbitrators of different generations have led some to describe ICA as a 'cartel'⁷⁰⁷ or 'mafia'.⁷⁰⁸ Taking issue with such characterizations, Paulsson argues:

... whereas an operating mafia would bar entry to outsiders, the milieu of international arbitration has shown repeatedly its eagerness to welcome new outstanding arbitrators. In fact there is a short supply of people who command the kind of transnational respect which is essential in this context.⁷⁰⁹

Entry into the international arbitration services market is not in fact barred to newcomers, as would be the case with a cartel. However, Paulsson's own emphasis on 'transnational respect' highlights the importance for would-be arbitrators of esteem from the ICA community.

⁷⁰⁴ Webster 2003, 133.

⁷⁰⁵ Garth 1997, 11.

⁷⁰⁶ Dezalay & Garth 1996, 40.

⁷⁰⁷ Rogers 2005, 960.

⁷⁰⁸ Dezalay & Garth 1996, 83.

⁷⁰⁹ Paulsson 1997, 19.

ICA is no longer dominated by quite so small a cadre of 'grand old men'—almost entirely white, male and European—as it was prior to the 1980s.⁷¹⁰ However, it cannot be denied that, as Hacking put it in a response to Paulsson, 'Any grouping of professionals which becomes exclusive will tend to operate (intentionally and unintentionally) against the arrival of new persons into their ranks...'⁷¹¹ Indeed, as a general rule, access to the ranks of international arbitrators continues to be controlled by the dominant arbitrators. They hold positions of authority at arbitral institutions (thereby exerting influence upon who gets appointed as an arbitrator) and, informally, are in a position to recommend particular up-and-comers. This effect is compounded by the fact that past experience as an arbitrator is considered among the most important qualifications for appointment as an arbitrator.⁷¹² Indeed, commercial parties report that the 'ability to select experienced arbitrators' is one of the main reasons they choose arbitration over litigation in the first place,⁷¹³ and cite prior experience as an arbitrator as second only to 'open-mindedness and fairness' in influencing their choice of both sole/presiding arbitrators and party-appointed arbitrators. As a result, 'the market for international arbitrators operates as a relatively closed system that is difficult for newcomers to penetrate.'⁷¹⁴

Despite its privileged position, the current generation of leading arbitrators should not be—and clearly is not—complacent. As Ogus notes, 'The fact that a particular set of [standards] has become ... dominant ... does not necessarily mean that it is, and will remain, the most efficient (in the sense of meeting consumer preferences at lowest cost) of the alternatives available.'⁷¹⁵ Indeed, arbitrators' writings indicate a concern that arbitration must continue to evolve or the field as a whole will wither. Crowter and Tobin's hand-wringing is typical: '... if the conduct of arbitrations is not efficient, even expeditious,

⁷¹⁰ Dezalay & Garth 1996, 10. Despite some increase in diversity, the leading arbitrators continue to be overwhelmingly white and male. The Chambers and Partners 2010 list of the twenty-four 'most in demand arbitrators' includes only one woman (Gabrielle Kaufmann-Kohler) and one non-white (Michael Hwang). <<http://www.chambersandpartners.com/Global/Editorial/36194>> accessed 28 November 2010. Who's Who Legal's 2010 list of twenty 'most highly regarded individuals' in the field includes three women (Judith Gill, Gabrielle Kaufmann-Kohler and Lucy Reed) and no non-white practitioners. <<http://www.whoswholegal.com/news/analysis/article/19496/editorial-commercial-arbitration/>> accessed 28 November 2010.

⁷¹¹ Hacking 1998, 75.

⁷¹² Webster 2003, 129; Redfern & Hunter 2004, 233.

⁷¹³ PwC/QMUL 2008, 5.

⁷¹⁴ Rogers 2005, 967-968.

⁷¹⁵ Ogus 2002, 424.

arbitration may fall into disfavor as the preferred forum for the resolution of international commercial disputes.⁷¹⁶

If there were a perfect market for arbitration services, competitive forces would inevitably lead to improved arbitration services. However, a variety of factors make the current market highly imperfect. Severe 'information asymmetries prevent the market ... from being fully competitive'.⁷¹⁷ The confidential nature of arbitral work means that 'professional credibility and word-of-mouth recommendations ... play a significant role'.⁷¹⁸ 68% of corporate counsel surveyed in 2010 said that they lacked sufficient information to make an informed choice about arbitrators independent of input from external counsel (who are more likely to be familiar with the ICA community), but with such input only 25% feel that they continue to lack adequate information.⁷¹⁹ The survey authors note that, even with the input of counsel, only 67% of respondents felt adequately informed to make a choice of arbitrator, which 'seems rather low considering the importance of making a good appointment'.⁷²⁰

2. Competition between arbitral fora

Competition between arbitral fora is no less fierce or significant than that between individual arbitrators. Arbitral institutions compete with each other for a larger share of the international arbitration market, while states engage in regulatory competition to attract arbitrations to their shores. As one might expect, competition between arbitral institutions, as with competition between individual arbitrators, has engendered convergence in arbitral rules of procedure. However, differences remain between the institutions. In addition, there is now almost complete freedom on the part of the parties to designate any state as the legal seat of the arbitration.⁷²¹ Arbitration lawyers will choose the institution and the state which provide the best likelihood of reaching the desired outcomes at the lowest cost.⁷²²

⁷¹⁶ Crowter & Tobin 2002, 301.

⁷¹⁷ Rogers 2005, 968 (citing Rutledge 2004, 195).

⁷¹⁸ Franck 2006, 516.

⁷¹⁹ W&C/QMUL 2010, 27.

⁷²⁰ Ibid.

⁷²¹ This aspect of party autonomy is guaranteed in all of the major arbitration rules, usually by a provision that if the parties have not chosen the seat of arbitration, then some other procedure will apply for choosing the seat: UNCITRAL Rules art 16(1) (the tribunal may decide); ICDR Rules art 13(1) (the tribunal may decide); ICC Rules art 14(1) (the ICC Court may decide); LCIA Rules art 16.1 (London, unless the LCIA Court decides otherwise).

⁷²² Ogus 2002, 421 (writing that, in this model, lawyers act as 'transaction cost engineers').

Like individual arbitrators, these competing fora are sensitive to any innovations introduced by their competitors. Beneficial innovations quickly spread, leading to a general harmonisation in institutional rules of procedures and national arbitration laws: 'If there are efficiency advantages to particular rules, we might expect a trend toward harmonisation under conditions of market competition. Indeed, long-time observers of the arbitral process have observed greater efficiencies over time.'⁷²³ This process is exemplified by the widespread and accelerating adoption of national arbitration laws based on the UNCITRAL Model Law,⁷²⁴ which was intended to 'contribute[] to the development of harmonious international economic relations' by establishing an arbitration law 'acceptable to States with different legal, social and economic systems'.⁷²⁵

As with individual arbitrators, the growing arbitration market and fiercer competition have redounded largely to the benefit of the handful of dominant institutions: the ICC, LCIA, American Arbitration Association (AAA) and its international disputes division, the International Centre for Dispute Resolution (ICDR), and (for investment treaty arbitrations) ICSID.⁷²⁶ Newer entrants, particularly in Asia have begun to earn a greater market share,⁷²⁷ but remain essentially regional institutions and do not yet seriously challenge the market leaders for the highest-stakes disputes. In a 2008 survey, only three percent of corporations involved in ICA reported having participated in SIAC arbitrations, and that was the highest rate for any Asian arbitral institution.⁷²⁸

⁷²³ Ginsburg 2003, 1344.

⁷²⁴ Legislation based on the UNCITRAL Model Law has now been enacted in 82 jurisdictions (including seven US states and all ten Canadian provinces). It was originally promulgated in 1985. In its first decade, only 11 countries adopted it; in its second decade, there were 50 adoptees; and in the past five years, there have already been 16 adoptees.

<http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> accessed 28 November 2010.

⁷²⁵ These statements are taken from the preambulatory clauses to the UN General Assembly resolution that adopted the original UNCITRAL Model Law. UNGA Res 40/72 (11 December 1985).

⁷²⁶ See Dezalay & Garth 1996, 9. Similarly, London, Geneva and Paris remain the most popular arbitral seats, although Tokyo and Singapore now eclipse New York. W&C/QMUL 2010, 19.

⁷²⁷ In 2008, survey respondents reported 'an increased preference for regional arbitration institutions', in particular (in Asia), the Hong Kong International Arbitration Centre (HKIAC), Singapore International Arbitration Centre (SIAC), and the Chinese International Economic and Trade Arbitration Commission (CIETAC). To take one example, arbitrations filed at the HKIAC nearly doubled from 2003-2007, but those filed at the ICC increased by only three percent over the same time period. PwC/QMUL 2008, 15. A 2010 survey indicated that the market share of regional institutions, especially Asian ones, has continued to increase, although corporations continue to be concerned that institutions 'have 'proven themselves' or possess a solid 'track record'. W&C/QMUL 2010, 22.

⁷²⁸ PwC/QMUL 2008, 15. In 2010, 2% of survey respondents reported that, in the previous five years, they had been involved in more arbitrations administered by SIAC than by any other institution, again more than any other institution not located in Europe or the United States.

Historically, the ICC held a 'position of quasi-monopoly' on the highest-stakes cases; it is no longer pre-eminent, but remains the 'central institution'.⁷²⁹ While more arbitrations are now filed at the AAA/ICDR than any other arbitral institution, a 2008 survey of corporations involved in international arbitrations indicated that forty-five percent of corporations had been involved in ICC arbitrations; the AAA/ICDR was second, with only sixteen percent of corporations reporting having been involved in arbitrations under its auspices.⁷³⁰ Although the presence in the United States of many large multinational corporations would suggest that the AAA would be popular with parties of any nationality, the AAA's share of cases where neither party is American remains modest.⁷³¹ Helmer suggests that 'The really big cases get to the AAA only when the American party's economic power is overwhelming'.⁷³²

There are three domains of competition between arbitral institutions. First, institutions seek to attract prominent arbitrators to serve on their boards of directors (which go by a variety of names) and to appear on their lists of arbitrators.⁷³³ However, since arbitrators may appear on the lists more than one institution, and the most in-demand arbitrators appear on many institutional lists, competition in this area is not intense.

Attracting notable arbitrators matters most for new or regional arbitral institutions seeking to build a global clientele. For example, the Dubai International Arbitration Centre (DIAC) states in its website that it 'regularly updates its lists of highly-skilled national and international arbitrators experienced in different fields of trade and business'.⁷³⁴ Other more-recently-established institutions with primarily regional reputations, like the Australian Centre for International Commercial Arbitration (ACICA), the CIETAC and the SIAC, also have such panels, but two of the best-established institutions, the ICC and LCIA, just provide access to databases of available arbitrators.⁷³⁵

⁷²⁹ Dezalay & Garth 1996, 45. 56% of survey respondents reported having been involved in an ICC arbitration from 2005-2010, more than any other institution. 50% cited the ICC as their preferred institution. W&C/QMUL 2010, 23. The ICC's continued prominence is explicable in part because of its history. As Dezalay and Garth note, 'history is a key legitimator in the legal field'. Dezalay & Garth 1996, 45 (citing Max Weber).

⁷³⁰ PwC/QMUL 2008, 15.

⁷³¹ Craig, Park & Paulsson 2001, 3.

⁷³² Helmer 2003, 42.

⁷³³ These panels and lists vary in their characteristics. Some institutions maintain exclusive panels, in the sense of fixed lists of arbitrators from which appointments must be made. Others have panels from which the institution will draw when called upon to make an appointment, while some institutions maintain just 'sources of information' on available arbitrators and their relevant experience. Jones 2006, 285.

⁷³⁴ <<http://www.diac.ae/ideas/services/diac/advantages/>> accessed 28 November 2010.

⁷³⁵ Jones 2006, 285.

The second potential arena of competition is fees. Arbitral institutions charge a fee for administering arbitrations, generally set at a percentage of the amount in controversy, and may also mandate a fee schedule for arbitrators. Institutions can compete on both. The overall costs of institutional administration, along with such matters as whether fees are due up-front or at the end of arbitrations, are cited by consumers of arbitration services as important factors in their choice of institution.⁷³⁶

Several arbitral institutions, especially the less-well-established ones, advertise their 'very competitive rates'.⁷³⁷ For example, for a dispute with USD\$1,000,000 in controversy and three arbitrators, the ICC charges \$19,500 in administrative expenses (not counting a registration fee) and allows its arbitrators to charge between \$13,470 and \$60,500 for their fees.⁷³⁸ Meanwhile, the DIAC charges around \$2700 (AED10,000) and sets arbitrators' fees at around \$4,000-\$17,500 (AED14,500-63,500),⁷³⁹ and the ACICA charges around \$9,200 (AUD\$10,300) in administrative fees.⁷⁴⁰ Institutions sometimes lower their fees in absolute numbers, as the ICC has done repeatedly.⁷⁴¹

Institutions can also compete for arbitrators' favour by reducing or removing restrictions on the fees arbitrators may charge. For example, the ACICA Arbitration Rules state only that arbitrators should be compensated according to an hourly rate agreed to by the parties or, failing such agreement, determined by ACICA, and that this rate should be commensurate with the nature of the dispute, the amount in dispute and the standing and experience of the arbitrator.⁷⁴² Some arbitral institutions impose fee arrangements that many arbitrators will not accept, effectively limiting the range of arbitrators available to the parties,⁷⁴³ but on the other hand, higher fee schedules may drive away disputing parties.⁷⁴⁴

Third, and most importantly, arbitral institutions compete based on the efficiency and effectiveness of the services they provide and the procedural rules they impose on parties who contract for arbitration under their auspices. Arbitral rules were cited as the third-most

⁷³⁶ W&C/QMUL 2010, 22.

⁷³⁷ The DIAC. <<http://www.diac.ae/ideas/services/diac/advantages/>> accessed 28 November 2010.

⁷³⁸ <http://www.iccwbo.org/court/arbitration/index.html?id=4093#article_4_3> accessed 28 November 2010.

⁷³⁹ <http://www.diac.ae/ideas/resource/doc/en/TableOfFeesnCosts_updated.pdf> accessed 28 November 2010.

⁷⁴⁰ <http://www.acica.org.au/downloads/ACICA_Arbitration_Rules.pdf> accessed 28 November 2010.

⁷⁴¹ Dezalay & Garth 1996, 44. The SIAC advertised in 2003 that it was reducing the fee it charged for appointing arbitrators. <http://www.siac.org.sg/cms/index.php?option=com_content&view=article&id=87:siac-cuts-appointment-fee&catid=43:archive-2003&Itemid=96> accessed 28 November 2010.

⁷⁴² ACICA Arbitration Rules art 40.

⁷⁴³ Webster 2003, 123.

⁷⁴⁴ Methods of remunerating arbitrators and any restrictions on the fees arbitrators may charge were cited as factors influencing parties' choice of an institution. W&C/QMUL 2010, 22.

important reason why parties choose a particular institution, while such factors as the efficiency which institutions' secretariats manage disputes (including how pro-active they are), their expertise in managing particular types of disputes and their ability to administer arbitrations worldwide were also cited as influential.⁷⁴⁵

While differences continue to exist between the rules of various arbitral institutions, they tend to take the same approach on the important issues. These rules may be amended in an attempt to reflect business preferences.⁷⁴⁶ Successful innovations tend to be copied, so 'competition among arbitration institutions ... has moved their respective technical details closer to conformity'.⁷⁴⁷

There are some notable exceptions. For example, the ICC maintains a 'Court of International Arbitration' composed of notable arbitrators nominated by each country whose national chamber of commerce is affiliated with the ICC. The members of the Court substantively review each award drafted by tribunals organised by ICC. This practice is unique; other institutions do not formally supervise their tribunals' awards. The measure of 'quality control' provided by the ICC's Court of International Arbitration is credited as one of the reasons for the ICC's continued success.⁷⁴⁸ One commentator even asserted that the scrutiny of the award performed by the ICC Court 'may explain the infrequency with which national courts have set aside ICC awards'.⁷⁴⁹

Other institutions have adopted unusual rules designed to attract a particular type of party. For example, some regional institutions seek out a niche by giving the domestic party a linguistic advantage. The Rules of the Hungarian Chamber of Commerce provide in Article 8(5) that international arbitrations (*i.e.*, those where the two parties come from different countries) must be conducted in Hungarian, while the rules of the Polish Chamber of Commerce and the DIAC include a presumption that international arbitrations will be conducted and the awards rendered in Polish and Arabic, respectively.⁷⁵⁰

Like the arbitral institutions, states also compete to attract international arbitrations to their jurisdictions. For example, the Law Society of England and Wales published a brochure to promote England and Wales as 'the jurisdiction of choice' for both litigation and

⁷⁴⁵ Ibid.

⁷⁴⁶ Wood 2004, 402 (noting that the ICC Rules are periodically updated to reflect the current 'business climate').

⁷⁴⁷ Malloy 2002, 45.

⁷⁴⁸ See, *e.g.*, Weisman 2007, 75; Bishop 2003, 34

⁷⁴⁹ Coe 1997, 209.

⁷⁵⁰ See Webster 2003, 123-124.

arbitration.⁷⁵¹ Nor are these efforts limited to public relations campaigns. In 2010, some German courts began permitting English-language proceedings. In support of the plan, one German lawyer argued, 'The focus on the German language has been perceived as a disadvantage for German courts in regards to being a centre for commercial litigation.... [T]his is a way for German courts to be more competitive and attractive.'⁷⁵²

States have also established or amended their national arbitration laws in order to make them more 'friendly' to international arbitration, in particular by removing restrictions on arbitration procedures or by narrowing the grounds on which awards may be challenged.⁷⁵³ As Kerr puts it, countries have engaged in 'open rivalry' to provide attractive venues for ICA.⁷⁵⁴ This process is exemplified by the 1979 and 1996 revisions to the English Arbitration Act, the 'main object' of which was 'to attract arbitration to London'.⁷⁵⁵ After the 1979 Act was passed, there ensued a 'scramble among western European nations' to compete for that business.⁷⁵⁶

The 'common feature' of the new and newly-amended arbitration laws of the last twenty years is that they expand the scope of party autonomy (in matters such as choosing the governing substantive and procedural rules of law) and the scope of arbitral powers (in matters such as competence-competence⁷⁵⁷ and the issuance of interim orders), while restricting the role of national courts.⁷⁵⁸ The primary systemic effect of this regulatory competition has been to detach ICA 'from the scrutiny and regulation of the national court systems'.⁷⁵⁹ For example, in its marketing materials, the HKIAC describes the Hong Kong

⁷⁵¹ <http://www.lawsociety.org.uk/documents/downloads/jurisdiction_of_choice_brochure.pdf> accessed 28 November 2010.

⁷⁵² A Collins 2010, 15.

⁷⁵³ This phenomenon has been recognised by the courts. For example, in *West Tankers Inc v RAS Riunione Adriatica di Sicurtà SpA (The Front Comor)* [2007] 1 All ER (Comm) 794 [18] (HL), Lord Hoffman noted that 'arbitration cannot be self-sustaining. It needs the support of the courts; but ... it is important for the commercial interests of the European Community that it should give such support.... an important aspect of the autonomy of the parties is the right to choose the governing law and seat of the arbitration according to what they consider will best serve their interests.'

⁷⁵⁴ Kerr 1985, 7.

⁷⁵⁵ Park 1983, 38 (referring to the 1979 Act). See also Lord & Salzedo 1996, ix ('One of the aims of the 1996 Act is to enhance England's competitive position as an international arbitration center....'; Mustill 1989, 53 ('One must take note of the efforts made by individual nations to make their arbitration laws ... more attractive.'). This effort appears to have been successful. From 2005 to 2010, London was the world's most popular arbitral seat. W&C/QMUL 2010, 17.

⁷⁵⁶ Park 1989, 680.

⁷⁵⁷ Competence-competence refers to the right of tribunals to determine whether they possess jurisdiction. Courts retain the right to take a 'second look' at the tribunal's jurisdiction after an award has been issued and either to set aside that award or refuse it recognition or enforcement on the ground that the tribunal did not possess jurisdiction.

⁷⁵⁸ Bernardini 'Role' 2004, 115.

⁷⁵⁹ Dezalay & Garth 1996, 7 (citation omitted).

Arbitration Ordinance as 'internationally recognised as one of the best pieces of arbitration legislation in the world, combining the maximum of independence from the court system with a strong regime of court support in areas where this is required'.⁷⁶⁰

Courts have unsurprisingly been reluctant to surrender substantive and procedural control of arbitrations taking place within their jurisdiction. However, such reluctance was overcome due largely to market forces. As Leahy and Bianchi point out, the use of arbitration in international commercial disputes is self-reinforcing:

As the use of international arbitrations grows in commercial contexts, many governments and business entities in non-Western and developing states are realizing that they must 'opt in' to the Western system of arbitration in order to maintain and grow business relationships with Western partners.⁷⁶¹

As Ginsburg notes, in many countries, the number of international arbitrations held hardly justifies the legislative effort to draft and approve a new arbitration law designed to make the jurisdiction a more attractive *situs*.⁷⁶² However, the benefits of adopting an arbitration law that conforms to the international state-of-the-art go beyond attracting arbitrations. For example, it can symbolise a state's friendliness to international commerce. More directly, if a country adopts an arbitration law based on the UNCITRAL Model Law, lawyers trained in that country will be better able to compete for business overseas and to negotiate arbitration clauses with foreign investors.⁷⁶³

States sometimes use blunter tools to attract arbitrations. For example, in 2008, Singapore enacted a five-year tax break on income of Singaporean practitioners related to international arbitrations when the hearings are held in Singapore. This effectively reduced the cost of holding hearings in Singapore. Singapore also removed a requirement that foreign professionals obtain a work pass to participate in arbitrations and mediations there.⁷⁶⁴

States can also compete to attract arbitrations through their substantive laws and their court systems. Parties who choose a particular state's substantive law to govern their dispute

⁷⁶⁰ <http://www.hkiac.org/show_content.php?sec=1> accessed 28 November 2010.

⁷⁶¹ Leahy & Bianchi 2000, 58. They speculate that the next step in this regulatory competition may be for countries to modify their rules setting security requirements. Ibid, 47; see also Rogers 2002, 349-50 ('Any nation interested in participating in the global economy must adjust its laws to accommodate the demands of international arbitration.').

⁷⁶² Ginsburg 2003, 1343.

⁷⁶³ Ibid.

⁷⁶⁴ See the SIAC press release: <<http://www.siac.org.sg/cms/pdf/20080411-WP.pdf>> accessed 28 November 2010.

are likely to choose that state as the *situs* of the arbitration.⁷⁶⁵ After all, the arbitration law of the arbitral *situs* will govern the arbitration, and the courts of that jurisdiction will have the power to set aside an eventual award. Attracting arbitrations to its jurisdiction will bring revenue to the state and will make it more likely that parties will hire as advocates and arbitrators lawyers from that state (who, after all, are the most likely to be expert in that state's law).

A country with a competent and impartial judiciary and a well-developed body of domestic commercial law will be preferred as an arbitral venue over one with rudimentary laws and incompetent or corrupt judges. The 'formal legal infrastructure' of a state (including such factors as the 'arbitration-friendliness' of the state's arbitration laws, its courts' track record of enforcing arbitration agreements and awards and the neutrality and professionalism of its judiciary) was cited by corporate counsel as the most important influence on parties' choice of a seat of arbitration.⁷⁶⁶ For example, parties in the shipping and insurance industries continue to choose English law, even where there is no English party and despite the fact that England is no longer economically dominant in either industry. The primary explanations are that, in these two particular areas, the English law is more finely developed and the English bar and courts more expert than those of other countries.

A well-developed set of laws and a high-quality judiciary may not be enough to attract arbitral business. American commercial and arbitration laws are well-developed, and the judiciary (in the federal courts at least, which are the ones foreign parties are likely to encounter) highly professional. However, many non-US lawyers are put off by the complexity of US federal and state laws (and the corresponding mass of precedents), 'which seem extremely tricky, and even bizarre, to foreign parties and lawyers trained in different legal traditions'.⁷⁶⁷ For this reason, Helmer asserts (without statistical support) that American law and American courts are not chosen as frequently as English law and courts in situations where neither party is American or English.⁷⁶⁸

Finally, some countries present advantages or disadvantages unrelated to their legal systems. Switzerland and Sweden are preferred for their political neutrality. Thus, the Stockholm Chamber of Commerce built up a reputation in the 1970s and 1980s as a neutral

⁷⁶⁵ Corporate counsel reported that the law governing the substance of the dispute was the second most important influence (after the quality of the state's legal infrastructure) on their choice of the seat of arbitration. W&C/QMUL 2010, 18.

⁷⁶⁶ Ibid, 18.

⁷⁶⁷ Helmer 2003, 42.

⁷⁶⁸ Ibid.

site for arbitrations between western and Soviet bloc corporations.⁷⁶⁹ Despite the reservations that many foreign parties have about the US courts and US legal system, some parties choose to arbitrate in the US because the respondent has significant assets there.⁷⁷⁰

3. Competition with other forms of dispute resolution

The pervasiveness of competition in the international arbitral system does not mean that competition is all-encompassing; there are many areas in which the interests of different arbitrators and different arbitral institutions converge. First, arbitrators and arbitral institutions tend to support globalisation and free trade.⁷⁷¹ Self-interest partly accounts for this phenomenon—more cross-border transactions will mean more international arbitrations—but arbitrators tend to be committed free-traders.⁷⁷²

Second, arbitrators recognise that they are dependent upon cooperation from national courts; without courts willing to enforce arbitration agreements and arbitral awards, 'the effectiveness of the entire arbitral process (and its attractiveness to international business) will be undermined'.⁷⁷³ Until recently, courts limited the scope of arbitral authority and reserved the right to supervise arbitral decision-making.⁷⁷⁴ Arbitrators and arbitral institutions have successfully lobbied national legislatures, executives and courts to enact laws supporting international arbitration.⁷⁷⁵

Third, arbitrators and arbitral institutions actively cooperate to promote arbitration as the preferred method for resolving international commercial disputes. Disputes can be resolved in a variety of fora and by a variety of methods; ICA competes with other forms of dispute resolution, such as mediation and litigation in national courts.

As a result, extolling the virtues of ICA (especially its superiority over litigation) is part of the business of an arbitrator. It is also something of an obsession among many arbitrators, who seldom miss an opportunity to proclaim arbitration's superiority. For such arbitration apologists, arbitration is 'a valuable commodity as yet too little known but capable

⁷⁶⁹ Born 2009, 165-166.

⁷⁷⁰ Alford, 86.

⁷⁷¹ Trakman 2006, 29; Thirgood 2004, 344.

⁷⁷² Such an ideological position is itself attributable in part to arbitrators' identification with business interests and their internationalist values. See below, Chapter Seven, Sections B.1 and D.1.

⁷⁷³ Thirgood 2004, 346.

⁷⁷⁴ See below, Chapter Seven, Section D.1.

⁷⁷⁵ Thirgood 2004, 344.

of being proved superior to its competitors',⁷⁷⁶ while courts are 'unaccustomed to international commercial transactions and ... [their] laws and practices are not adequate to deal with them.'⁷⁷⁷ Effective promoters of ICA are lauded by their fellow arbitrators. For example, in their introduction to a *liber amicorum* for Martin Domke, Minoli, Pearson and Sanders praise Domke for having been a 'shrewd ... salesman' for arbitration during his extensive travels: 'Always the gospel of Arbitration has been preached *con brio* and tirelessly.'⁷⁷⁸

Arbitration treatises and student textbooks typically include, in their first chapters, lists of the advantages of arbitration.⁷⁷⁹ Moreover, arbitration scholars continue to publish arguments for arbitration's importance and prescriptions for how to ensure that arbitration remains, as in the title of one such article, the 'preferred option for international dispute resolution'.⁷⁸⁰

Too often, academic commentary on ICA takes the form of cheerleading; as Rogers notes, most commentators in domestic contexts are 'sceptics who focus on the ... power differentials that characterise most disputes', but 'international commercial arbitration scholars have traditionally been insiders.... When they criticize the system and call for improvement, their tone is most often that of loyal opposition from within, not that of external detractor.'⁷⁸¹ (Investment treaty arbitration, on the other hand, has attracted some consistent lines of criticism, in particular that both arbitral tribunals the system of Bilateral Investment Treaties itself systematically favour corporations over developing states⁷⁸² and that inconsistent awards regarding inadequately-defined substantive rights threaten the legitimacy of the system.⁷⁸³)

Not surprisingly, arbitrators tend to take wide views of arbitral jurisdiction and the arbitrability of disputes. Doctrines such as interpretation *in favorem validatis*, widely applied

⁷⁷⁶ Minoli et al 1967, vii. This statement may have been made more than forty years ago, but the sentiment persists.

⁷⁷⁷ Redfern & Hunter 2004, 31.

⁷⁷⁸ Minoli et al 1967, vii.

⁷⁷⁹ For this kind of list, see, e.g., Born 2009, 70-89; Redfern & Hunter 2004, 26-54; Lew et al 2003, 4-8.

⁷⁸⁰ Crowter & Tobin 2002. Arbitrators tend to overestimate the share of international commercial disputes that go to arbitration. See below, fns 993-995 and accompanying text.

⁷⁸¹ Rogers 2006, 1324 (citations omitted), noting that arbitration has only 'recently ... attracted some skeptics, who are calling for ... reforms.' However, even these critics remain few in number and 'their proposals have demonstrated an appreciable sense of reserve.' Ibid, 1325. Dezalay 2007, 163, makes a similar point: '... in the world of arbitration, academics and practitioners frequently work together as arbitrators and advocates and there is no activist community to speak of.'

⁷⁸² See, e.g., Sornarajah 2006; Chimni 2004.

⁷⁸³ See, e.g., Frank 2005; Afilalo 2005.

by arbitrators, tilt jurisdictional disputes toward a finding that jurisdiction exists.⁷⁸⁴ The tribunal's decision in consolidated ICC Cases Nos. 6515 and 6516 is typical. The arbitration agreement read as follows:

Any eventual dispute between the Parties arising herefrom should be ironed out by the Parties undertaking to make all necessary efforts for settling them amicably. However, if a dispute finally had to be litigated, it would be by Arbitration in Athens, in accordance with the provisions of the International Chamber of Commerce.⁷⁸⁵

The tribunal found this clause to be 'defective under a number of respects'—the indefiniteness of the statement that the parties 'should' attempt to 'iron out' the dispute, the reference to 'provisions' of the ICC as opposed to its rules of procedure, the reference to 'litigation' of the dispute. However, it held that 'none of these defects ... is of such gravity as to vitiate the clauses'.⁷⁸⁶

In a similar vein, an empirical study of ICC awards by then ICC Secretary-General Schwartz revealed what he called a 'liberal' view of arbitrability. Schwartz reviewed over 500 ICC awards rendered over five years and found not a single award in which the tribunal held that the dispute referred to it was unarbitrable.⁷⁸⁷ As Thirgood wryly comments on these findings, 'It is clearly in the ICC's interests to create as many new opportunities for arbitration as possible (provided that in doing so it does not jeopardise the enforceability of its awards or its good reputation).'⁷⁸⁸

Arbitral institutions actively encourage this trend. For example, when the ICC revised its rules in 1998, ICC tribunals' jurisdiction was expanded to include 'disputes not of an international character'.⁷⁸⁹ Derains and Schwartz—both former Secretaries-General of the ICC Court of International Arbitration—write that the purpose of this revision was to allow

⁷⁸⁴ There is no single doctrine of interpretation in favour of validity, but rather an attitude that is exhibited in a variety of circumstances where the arbitral tribunal's jurisdiction is contested. For example, where it is alleged that a valid arbitration agreement exists but the dispute is outside the scope of that agreement, there is 'a strong tendency to favour a broad interpretation of arbitration clauses'. Lew et al 2003, 151-52.

⁷⁸⁵ (1999) XXIVa Ybk Comm Arb 80 [1].

⁷⁸⁶ Ibid, [54].

⁷⁸⁷ Schwartz 1994, 19. Courts may or may not have agreed that these 500 disputes were arbitrable; however, without access to the awards on which Schwartz based his study, it is impossible to determine this.

⁷⁸⁸ Thirgood 2004, 351. The limitation of the enforceability of ensuing awards remains important. As Mistelis notes, one could argue that tribunals have no duty to respect national standards of arbitrability. Nevertheless, a tribunal 'should on its own initiative deny jurisdiction if the dispute is inarbitrable on the basis of the facts submitted by the parties.' Mistelis 2009 [1 - 18].

⁷⁸⁹ Art 1.

an ICC tribunal to extend its jurisdiction to cases 'where the international character of the dispute may be in doubt'.⁷⁹⁰

The competition between arbitrators and courts is largely one-sided. Judges and national legislators derive no personal benefits from attracting more lawsuits to their courts; they even encourage parties to go to arbitration. Courts tend to see arbitration as, at minimum, a means of easing their crowded dockets.⁷⁹¹ As Ridgway notes, increasing international trade will generate an increasing number of cases, which may overwhelm already-overworked national judicial systems.⁷⁹² Perhaps in response to this development, states 'have overcome their historical mistrust of arbitration ... to consider that it represents an important factor of stability and development in transnational economic relations.'⁷⁹³ The role of national courts has therefore 'evolved from the supervision and control of the arbitrator's activity to the more fruitful one of co-operation with a view to more efficient conduct of the proceedings'.⁷⁹⁴

Despite the cooperative attitude of most national courts, arbitrators must overcome the fact that litigation remains the default position and also the inherent authority that judges enjoy. Not surprisingly, 'The international arbitration community is deeply concerned with its real and perceived legitimacy.'⁷⁹⁵ Indeed, ICA as a field must continually justify its legitimacy as a forum for the resolution of international commercial disputes: 'Large portions of international arbitration procedure can be explained as attempts to maximize the legitimacy of a process detached from the normal sources of authority.'⁷⁹⁶

Primarily, this means promoting arbitration as sophisticated enough to serve the multifarious needs and interests of international commerce and reliable enough to trust with the resolution of major disputes. The sophistication is provided largely by ICA's academic sheen. As Dezalay and Garth describe it, 'The academic theorization of arbitration ... gave the field ... a sophisticated legal expertise suitable for high-level practitioners. This

⁷⁹⁰ Derains & Schwartz 1998, 22.

⁷⁹¹ For example, Bales and Eviston note, in the context of civil litigation in the US, 'without pre-dispute arbitration, court dockets would be overloaded with claims'. Bales & Eviston 2010, 11.

⁷⁹² Ridgway 1999, 52. For budgetary reasons, states are generally reluctant to increase the number of judges, even as the population and the number of claims filed increase.

⁷⁹³ Bernardini 'Role' 2004, 118-119 (citations omitted).

⁷⁹⁴ Ibid, 115.

⁷⁹⁵ Rogers 2006, 1335.

⁷⁹⁶ Park 2003, 1257-1258.

academic pedigree has helped promote the acceptance and recognition of arbitration throughout much of the world.⁷⁹⁷

Reliability concerns are somewhat more intractable; indeed, they may well be endemic to arbitration. In 1938, before the modern era of international arbitration, Judge Learned Hand memorably wrote that 'arbitration sometimes involves perils that surpass those of the sea.'⁷⁹⁸ In 1965, when ICA was just beginning to coalesce as a distinct field of law, Martin Domke called 'predictability of result' the 'principal challenge' facing arbitration.⁷⁹⁹ As discussed above, the internecine nature of the arbitration community continues to raise concerns about conflicts of interest. Moreover, informal procedures can lead to denials of due process, cross-cultural misunderstandings can lead to serious miscommunications, and unsupervised and unaccountable arbitrators can render superficial or clearly erroneous awards.

The last concern is the most serious. Given arbitrators' lack of any inherent authority over the parties, 'the success ... of arbitration as a means of resolving disputes depend[s] upon the quality of ... the skills, training and experience of those involved.'⁸⁰⁰ Consequently, faulty or inadequate awards not only 'destroy any trust parties can have in a particular panel, but ... also destroy the parties' trust in arbitration.'⁸⁰¹ As Ridgway notes, trust is critical in ICA, which depends for its effectiveness on a high rate of voluntary compliance.⁸⁰²

As a result of these concerns, arbitrators and arbitral institutions have promoted more detailed rules on conflicts of interest and arbitral ethics,⁸⁰³ drafted clearer and more harmonised rules of procedure,⁸⁰⁴ increased transparency in such matters as the selection and

⁷⁹⁷ Dezalay & Garth 1996, 42.

⁷⁹⁸ *Canadian Gulf Line v Continental Grain Co*, 98 F.2d 711, 714 (2d Cir. 1938).

⁷⁹⁹ Domke 1965, 14.

⁸⁰⁰ Jones 2006, 276.

⁸⁰¹ T Giovannini 2003, 351.

⁸⁰² Ridgway 1999, 50. The ICC has estimated that over 90 percent of its awards are complied with voluntarily. Pierre Lalive 1984, 319. However, Drahozal notes that an empirical basis for that estimate is not provided, and it appears to be based entirely on anecdotal reports of members of the ICC Court. Drahozal 'Private Ordering' 2009, 1040 fn 41. Survey data indicates that the rate of voluntary compliance is indeed high, although not as high as the ICC asserts. 84% of corporations regularly involved in international arbitration reported that the opposing party had honoured an award in more than three quarters of the disputes in which the respondent was involved. PwC/QMUL 2008, 8. However, these figures are difficult to verify, as only about half of the arbitral institutions have any system in place for monitoring arbitrations after the award is rendered. Ibid, 16. Similar findings from other surveys are summarized in Drahozal 'Private Ordering' 2009, 1040.

⁸⁰³ See generally Rogers 2006.

⁸⁰⁴ Jolivet 2006, 270. In particular, attention is paid to streamlining rules of procedure to encourage arbitrations to finish faster and with less cost. Crowter & Tobin 2002, 301.

challenge of arbitrators,⁸⁰⁵ required reasoned awards,⁸⁰⁶ pushed for the publication of more awards⁸⁰⁷ and established training and certification programmes for would-be arbitrators.⁸⁰⁸

⁸⁰⁵ For example, the LCIA now publishes its decisions on challenges to arbitrators, despite the fact that its rules do not require publication. See 11(2) LCIA News 1 (June 2006).

⁸⁰⁶ Rogers 2006, 1316-17. The increase in detailed reasoning in arbitral awards is illustrated by the fact that, on average, published arbitral awards have increased dramatically in length over time. Rogers canvassed the ICC awards published in the Yearbook of Commercial Arbitration and noted that the average length of ICC awards in the volumes for 1986 and 1987 were 5.7 pages and 8.4 pages, respectively, while those for 2003 and 2004 were 16.5 and 20 pages. Ibid, 1317 fn 64. See also Park 2002, 823 (concluding that 'The marketplace has pushed international arbitration toward reasoned awards.').

⁸⁰⁷ Rogers 2006, 1323 fn 64.

⁸⁰⁸ Grizel 2006, 167.

CHAPTER SEVEN: NORMS ARISING FROM THE VALUES SHARED BY INTERNATIONAL COMMERCIAL ARBITRATORS

Consulting the entrails of a disembowelled chicken might perhaps be off limits. Negative attitudes about augury aside, however, very few constraints limit the manner in which arbitrators go about their jobs.⁸⁰⁹

In a system where there are few constraints on arbitrators' power to adjudicate the merits of disputes, social norms are particularly important in guiding and legitimising arbitral decision-making.⁸¹⁰ Shared norms promote harmonisation of decision-making in a system that otherwise has little to encourage internal consistency. Thus, to protect the legitimacy of the ICA system as a whole, arbitrators have an interest in displaying (or at least declaring) their adherence to the prevailing norms.

Most studies of norms in arbitration focus on their impact on arbitral procedure⁸¹¹ or on the role of the arbitrator in managing arbitral proceedings.⁸¹² Little work has been done on the impact of ICA norms on substantive rules or decisions on the merits.⁸¹³ It is not surprising that studies of norms in arbitration have focused on procedures; after all, correspondences between procedures and norms are easy to draw: if arbitral tribunals value neutrality, they will adopt procedural rules such as those ensuring the independence of arbitrators and requiring that both parties have the opportunity to plead their case. However, this thesis proposes that arbitrators' substantive determinations are also shaped by a desire to achieve particular normative goals.

This chapter considers four social norms that constitute elements of an incipient international arbitration culture: party autonomy, the service of business, neutrality and internationalism.

⁸⁰⁹ Park 2002, 281.

⁸¹⁰ Ibid, 288.

⁸¹¹ See, e.g., Berger 2006 (considering evidentiary privileges); Kaufmann-Kohler 2003; Karamanian 2003 and Elsing & Townsend 2002 (considering common law and civil law influences on the conduct of hearings); Rogers 2006 (arguing that three 'normative goals' undergird all arbitral procedures, namely 'neutrality, effectiveness and party autonomy'); Jolivet 2006 (considering the proper scope of confidentiality in arbitration); Fellas 2004 and Rau & Sherman 1995 (considering fairness and efficiency in arbitral procedures).

⁸¹² See, e.g., Webster 2003 and Böckstiegel 1997 (considering the balance between party and arbitrator control of the proceedings); Rogers 2002, Carter 2000 and Lowenfeld 1995 (considering conflicts of interest for arbitrators); De Vara 2004 and Bühring-Uhle et al 2003 (considering the role of the arbitrator in mediating disputes or encouraging settlements).

⁸¹³ But see Carbonneau 2004.

A. PARTY AUTONOMY

Party autonomy is the factual, legal and ideological core of international arbitration. In their academic writings and awards, arbitrators frequently praise the soundness of this principle and affirm its importance. Party autonomy is 'fundamental'⁸¹⁴ and 'archetypical'.⁸¹⁵ In cases of doubt, it is the 'guiding principle'⁸¹⁶ and 'general rule' in arbitration.⁸¹⁷ It 'prevails almost universally'⁸¹⁸ and reigns 'supreme' among the principles of private law to which ICA is subject.⁸¹⁹ Pamboukis even describes ICA as 'the jurisdictional expression of increasing individual freedom'.⁸²⁰

At the most basic level, party autonomy is simply a fact of international arbitration, a characteristic of the system. Unlike national courts, which exist as permanent organs of the state, arbitral tribunals exist only when and to the extent that parties cause them to exist. For an arbitration to occur and for a tribunal to have any authority, the parties must have freely and mutually chosen both the arbitral forum and the arbitrators.⁸²¹ As one tribunal put it:

It is a fundamental principle that any arbitration must be founded on the consent of all the parties thereto and the consent must be recognized as such by law. Especially in an international arbitration ... the consent of each party must be unambiguously demonstrable if any resulting Award is to be safely enforceable.⁸²²

Accordingly, Redfern and Hunter refer to party autonomy as the 'foundation stone' of arbitration generally, and of international arbitration in particular.⁸²³

As a legal principle, party autonomy extends beyond the jurisdiction of the tribunal to pervade every stage of an arbitration, from the power of the tribunal itself, to the choice of applicable procedural and substantive rules, to the composition of the tribunal, to the conduct of the proceedings, and finally to the form of the award. In other words, in nearly every aspect of the arbitration, the parties can decide for themselves and the tribunal will follow any agreement made by the parties.

⁸¹⁴ Böckstiegel 1997, 25.

⁸¹⁵ Blanke 2006, 335-336.

⁸¹⁶ Redfern & Hunter 2004, 315.

⁸¹⁷ Kaushal 2006, 183.

⁸¹⁸ ICC Case No. 7920 of 1993 (1998) XXIII Ybk Comm Arb 80 [1].

⁸¹⁹ Van Harten & Loughlin 2006, 140.

⁸²⁰ Pamboukis 2009 [7-9].

⁸²¹ See above, Chapter Six, Section A.

⁸²² ICC Case No. 7453 of 1994 (1997) XXII Ybk Comm Arb 107 [10].

⁸²³ Redfern & Hunter 2004, 135.

Finally, party autonomy has become a norm. It is now so well- and widely-entrenched that it is difficult to remember that current notions of party autonomy emerged only recently.⁸²⁴ The relevance of party autonomy to all stages of arbitration law and practice is neither necessary nor accidental. Rather, it has come about because of a concerted and prolonged effort by proponents of arbitration to enshrine party autonomy within the treaties, national arbitration laws, rules of procedure, national court judgments and international arbitral awards that collectively constitute the body of international arbitration law. Party autonomy has become so pervasive because arbitrators have dedicated themselves to expanding its scope.

The evolution of arbitration law toward virtually complete party autonomy is well-documented—in particular by the same arbitrators who have promoted this trend—and need not be recapitulated in detail here.⁸²⁵ The importance of party autonomy as a norm is evidenced by the fact that states and arbitral tribunals have progressively given way in favour of the parties' choice.⁸²⁶ In other words, they have voluntarily diminished their own powers over the arbitral process so that party autonomy could be expanded. Two examples will illustrate this phenomenon: the increasing ability of the parties to choose to avoid national courts and the increasing ability of the parties to determine the conduct of arbitral proceedings.

1. The parties' freedom to avoid national courts

When parties choose arbitration, their 'ultimate desired legal consequence' is to avoid national court systems (except for the enforcement of an eventual award).⁸²⁷ If the parties had not wanted to avoid court resolution of their dispute, they would not have chosen arbitration in the first place.⁸²⁸ On the other hand, states have significant interests in supervising arbitrations: when a state is the site of an arbitration or when enforcement of an award is sought against a national of the state or against assets located within it. However,

⁸²⁴ As recently as 1968, English courts took the position that a choice of England as the *situs* of arbitration constituted a choice of English law as the substantive law governing the contract. *Tzortzis & Sykias v Monarch Lines* [1968] 1 Lloyd's Rep 337 (CA).

⁸²⁵ See, e.g., Lew et al 2003, 16-29; Chatterjee 2003; Böckstiegel 1997.

⁸²⁶ Grizel 2006, 167.

⁸²⁷ Kerr 1985, 1-2.

⁸²⁸ Arbitrators' advocacy for wide party autonomy to avoid national courts is related to the service of business norm, discussed below in Chapter Seven, Section B. Writes Shilston, '... the widespread desire of arbitration producers is to disengage arbitration to the maximum from state litigation systems in the best interests of servicing international commerce.' Shilston 1987, 51.

the clear trend has been one in which parties' autonomy to choose final resolution of their disputes by arbitration has displaced states' authority to see that their laws are enforced.

Nearly every country now explicitly provides for a right to choose arbitration and for enforcement of that choice. The New York Convention, to which 143 states, including nearly every major trading nation, are parties,⁸²⁹ requires national courts to enforce valid arbitration agreements (*i.e.*, to dismiss court actions concerning contracts containing arbitration clauses) and requires courts to enforce procedurally valid arbitral awards, even if those awards misapply the governing substantive law.

The exclusion of substantive review of awards by national courts is a primary purpose of the New York Convention,⁸³⁰ and substantive review by the courts is considered 'contrary to the spirit' of international commercial arbitration.⁸³¹ After all, if arbitral awards can be reviewed on their merits by national courts, then the parties' goal of avoiding court resolution of their disputes is frustrated.⁸³² As Craig points out, what a court might describe as an 'error of law' is, at heart, 'a claim that the arbitrators did not reach the result a court would have'.⁸³³

Countries have long differed on the propriety of judicial control over the decisions of arbitrators on the merits, with the common law states generally being more willing than the civil law states to impose such supervision.⁸³⁴ However, as with other aspects of arbitration law, previously robust regimes of substantive judicial review have retreated over the last few decades. Courts 'have made fidelity to the parties' arbitral preferences a cardinal principle of arbitration law'.⁸³⁵ The modern, 'light-handed attitude'⁸³⁶ is exemplified by the UNCITRAL Model Law, which contains 'no provision ... for any form of appeal [to the courts] from an arbitral award, on the law or on the facts, or for any judicial review of the award'.⁸³⁷

⁸²⁹ <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> accessed 28 November 2010. The only economically important jurisdiction not a party to the New York Convention is Taiwan, which withdrew from the Convention when it lost control of the 'China seat' in the United Nations.

⁸³⁰ McConnaughay 1999, 468-469.

⁸³¹ Grizel 2006, 166. See also Rigaux 1982, 274 (asserting that international arbitration would be 'denatured' and would 'lose its essential value' if arbitrations can be followed as a matter of course by court review (author's translation)).

⁸³² This rationale was a motivating factor in the drafting of the Model Law, the provisions of which preclude courts from reconsidering the merits of disputes decided by arbitration. Model Law Explanatory Note [14].

⁸³³ Craig 1988, 213.

⁸³⁴ See, *e.g.*, the comparative analysis of different national approaches to competence-competence in Born 2009, 877-965. This phenomenon is nicely illustrated by the historical disparities between the approaches taken by Canada's common law and civil law jurisdictions. Bachand 2009.

⁸³⁵ Bermann 2009, 1014.

⁸³⁶ Newman 2009, 1230.

⁸³⁷ Redfern & Hunter 2004, 500.

Some states continue to make provision for substantive review of arbitral awards. In the United States, courts have vacated awards where the tribunal 'manifestly disregards' the law.⁸³⁸ However, this doctrine—always a narrow exception—appears now to have been entirely abrogated. In *Hall St. Associates v Mattel Inc.*,⁸³⁹ the US Supreme Court, resolving a split between different the federal circuit courts,⁸⁴⁰ held that judicial review of an arbitral award under the US Federal Arbitration Act is limited to the grounds specifically enumerated in the statute.⁸⁴¹ As a consequence of this decision, all 'non-statutory' grounds of judicial review are inoperative, including manifest disregard of the law.⁸⁴² Smit concludes that the manifest disregard of the law doctrine 'is probably dead'.⁸⁴³

English law has long been inimical to the notion that arbitral awards are unappealable to the courts. The earlier (1889-1950) versions of the Arbitration Act freely permitted parties to petition the courts to review the determinations of arbitral tribunals on points of substantive law.⁸⁴⁴ Indeed, in the Court of Appeal, Lord Denning reasoned that agreements made to arbitrate disputes in England were made under the assumption that points of law could be referred to the courts.⁸⁴⁵ Many English lawyers and judges passionately defended this position and, more generally, assailed the notion of arbitration entirely detached from the courts. Sir Michael Kerr, for example, noted that, 'In England, we often speak in laudatory terms about a partnership between the courts and arbitrations under our system.'⁸⁴⁶

However, in 1979⁸⁴⁷ and then more thoroughly in 1996, England largely reversed its previous position. Under the 1996 Arbitration Act, arbitral awards containing errors of law are, in the normal course, 'unassailable'.⁸⁴⁸ Section 69 of the Act does preserve a right to petition a court to review the substantive determinations of an arbitral tribunal. However, parties may contract out section 69,⁸⁴⁹ and the provision contained in all standard form

⁸³⁸ *Wilko v Swann*, 346 U.S. 427, 436-437 (1953) (articulating the 'manifest disregard' test in dictum followed by subsequent courts), overruled on other grounds, *Rodriguez de Quijas v Shearson/American Express, Inc.*, 490 U.S. 477 (1989). See generally Rubins 2001.

⁸³⁹ 128 S. Ct. 1396 (2008).

⁸⁴⁰ Reuben 2009, 1105.

⁸⁴¹ *Hall St.*, 128 S. Ct. 1396, 1400 ('The question here is whether statutory grounds for prompt vacatur and modification may be supplemented by contract. We hold that the statutory grounds are exclusive.').

⁸⁴² Reuben 2009, 1106.

⁸⁴³ Smit 2009, 999.

⁸⁴⁴ Park described pre-1979 English law on judicial supervision of arbitrations as 'the apogee of intervention'. Park 1980, 91.

⁸⁴⁵ *Halfdan Greig & Co v Sterling Coal & Nav Corp (The Lysland)* [1973] 1 QB 843 (CA).

⁸⁴⁶ Kerr 1985, 2.

⁸⁴⁷ 'Exclusion agreements' contracting out of some aspects of judicial review of arbitral awards were first permitted by the 1979 Act. See generally Park 1980.

⁸⁴⁸ Sheppard 2005, 66 (commenting on the House of Lords' decision in the *Lesotho Highlands* case).

⁸⁴⁹ S 69(1).

arbitration agreements to the effect that an eventual award will be final and binding has been held to constitute a valid waiver of the right of review.⁸⁵⁰ Most institutional rules of procedure provide that arbitrations organised by that institution are final, so whenever parties contract for institutional arbitration, they thereby contract out of section 69.⁸⁵¹

In the unlikely event that the parties have not expressly or impliedly contracted out of section 69, English courts must give leave to apply for judicial review,⁸⁵² which they will do only when two requirements are met: first, the issue involves interpretation of English law;⁸⁵³ second, either the tribunal's decision is 'obviously wrong' or the issue is one of 'general public importance and the decision of the tribunal is at least open to serious doubt'.⁸⁵⁴

This shift in English law came in response to the widespread criticism from arbitration practitioners that the English system of judicial supervision was inappropriate.⁸⁵⁵ Lord Hacking, one of the early parliamentary sponsors of the Arbitration Act 1979, related that 'a distinguished partner of a distinguished Wall Street law firm ... [considered it] to be a matter of professional negligence to allow an English arbitration clause in any contracts.'⁸⁵⁶

The only remaining significant limitation on the parties' freedom to choose arbitration (and thereby to exclude national courts) is that the subject matter of the dispute must be arbitrable under national law (effectively, under the national law of the *situs* and of any countries where enforcement of the award is sought). Under article II(1) of the New York Convention, courts may decline to enforce an arbitration agreement if, according to the court's national law, it does not concern 'a subject matter capable of settlement by arbitration'. Typically, an unarbitrable subject matter is one that the state considers to be inappropriate for private adjudication because it affects the rights or interests of the general public.⁸⁵⁷ Examples include the validity of patents and trademarks.⁸⁵⁸

⁸⁵⁰ *Sanghi Polyesters Ltd v The International Investor (KCFC)* [2001] 1 Lloyd's Rep 480.

⁸⁵¹ *Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 AC 221 (HL) (referring to the ICC Rules).

⁸⁵² S 69(2)(b).

⁸⁵³ Ss 69(1) and 82(1).

⁸⁵⁴ S 69(3)(c).

⁸⁵⁵ See Schmithoff 1977.

⁸⁵⁶ Hacking 1979, 1.

⁸⁵⁷ Mistelis 2009 [1 – 6]. This kind of arbitrability is sometimes referred to as 'objective' arbitrability, as opposed to 'subjective arbitrability', which is concerned with the legal capacity of parties to submit disputes to arbitration. Ibid [1 – 13].

⁸⁵⁸ See generally Mantakou 2009.

Arbitrability doctrine limits both the power of arbitrators and the autonomy of parties.⁸⁵⁹ Here, too, however, party autonomy is greater than in the past; several subjects once considered unarbitrable are now arbitrable. As Lew relates, the decreasing relevance of arbitrability doctrine is a significant development: 'Most jurisdictions now accept that where parties have agreed that their disputes should be resolved by arbitration there is no good legal or policy reason to reserve any of these issues for the courts.'⁸⁶⁰

The most prominent example of this trend is antitrust/competition claims,⁸⁶¹ but disputes over securities transactions also fit the trend. In the US, disputes arising under the federal Securities Act had been unarbitrable. However, the US Supreme Court overturned this doctrine in its 1974 decision in *Scherk v Alberto-Culver*, and did so in near-hyperbolic language that indicates the extent to which courts have relinquished their traditional power to regulate arbitration agreements. The court wrote that a 'parochial refusal by the courts of one country to enforce an international arbitration agreement' would not just 'frustrate' the purposes of such an agreement,⁸⁶² but would also 'imperil the willingness and ability of businessmen to enter into international commercial agreements'.⁸⁶³ The trend toward recognising more subject matters of disputes as arbitrable has continued; in 2009, the US Supreme Court upheld the subject matter arbitrability of employment discrimination claims where the relevant collective bargaining agreement contains an arbitration clause.⁸⁶⁴

Arbitrability also plays a role at the enforcement stage. Under article V(2)(a) of the New York Convention, an arbitral award may be set aside or refused recognition and enforcement if it concerns an unarbitrable subject. In the *Mitsubishi* case, which is mostly remembered for the US Supreme Court's permitting arbitration of antitrust claims, the court noted that US national courts would have another opportunity at the enforcement stage to ensure that America's 'legitimate interest in the enforcement of antitrust laws has been addressed'.⁸⁶⁵ A similar evolution has occurred in the EU, culminating in the ECJ's decision in the *Eco-Swiss* case, which held definitively that competition claims are arbitrable.⁸⁶⁶

⁸⁵⁹ Pamboukis 2009 [7 – 4].

⁸⁶⁰ Lew 2006, 193.

⁸⁶¹ For a list of court decisions in a variety of countries reversing previous doctrines to permit arbitration of contracts implicating antitrust issues, see Redfern & Hunter 2004, 165-168.

⁸⁶² 417 U.S. 506, 516 (1974).

⁸⁶³ Ibid, 517.

⁸⁶⁴ *Penn Plaza v Pyett*, 129 S. Ct. 1456 (2009).

⁸⁶⁵ *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*, 473 U.S. 614, 628 (1985).

⁸⁶⁶ Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055. Lew describes as 'remarkable' the ECJ's conclusion that competition issues are arbitrable, especially since competition law is something of a 'holy cow' for the EU. Lew 2006, 193.

None of the above is to say that parties may avoid entirely the application of national laws. As long as arbitral tribunals must rely on national courts to enforce their awards, those courts will insist on enforcing certain mandatory laws—laws that relate to the fundamental public policy of the state. Arbitrators accept the right of courts to set aside awards on the narrow ground of violation of fundamental public policy as the price of court enforcement of the vast majority of awards.⁸⁶⁷ Under the New York Convention, article V(2)(b), national courts may set aside an award or refuse to enforce it if enforcing the award would be contrary to national public policy. This principle is in turn expressed in the various national arbitration laws. For example, the UNCITRAL Model Law provides in article 34(2)(b)(ii) that courts may set aside an award on the ground that it is contrary to the public policy of the *situs*, and in article 36(1)(b)(ii) that courts may refuse an award recognition or enforcement for the same reason. More specifically, the English Arbitration Act 1996, section 1(b), provides that the procedure of an arbitration, regardless of the parties' agreement, is subject to such safeguards as are necessary in the public interest.

Analogously, many national arbitration laws specify that tribunals are bound by mandatory laws. For example, the Arbitration Act 1996 provides in section 4(1) that a set of mandatory provisions, listed in Schedule 1 to the Act, have effect notwithstanding any contrary agreement of the parties. However, when an arbitration takes place in a country whose arbitration law does not contain such a list (including jurisdictions which have adopted the UNCITRAL Model Law), arbitrators must still respect mandatory laws of the *situs*. A core duty of the arbitral tribunal, expressed in every set of arbitral rules of procedure, is to deliver an enforceable award. Awards contrary to mandatory provisions of a country's law will be set aside or refused enforcement by courts of that country on grounds of violation of public policy.

2. The parties' freedom to choose the procedures of their arbitration

One of the reasons parties choose arbitration over litigation is a desire to avoid '...strict adherence to the procedural rules applicable in the national courts of the country in which they take place, or indeed any particular set rules other than those expressly agreed

⁸⁶⁷ McConnaughay 1999, 454.

to.⁸⁶⁸ Today, party autonomy is the 'guiding principle in determining the procedure to be followed in an international commercial arbitration'.⁸⁶⁹

In practice, this means that national arbitration laws and arbitral rules of procedure permit the parties to agree on 'all aspects of an international arbitration procedure, subject only to certain limitations of mandatory law'.⁸⁷⁰ Parties may even choose a procedure that may appear to be unfair, except that parties may not agree to give up basic due process protections.⁸⁷¹

In practice, parties usually agree on the arbitral procedure either by selecting an institution to administer the arbitration (in which case the institution's rules of procedure apply) or, if the parties choose *ad hoc* arbitration, by selecting an existing set of rules to govern the proceedings (often the UNICTRAL Rules of Arbitration). All modern institutional rules follow the general model that, for every aspect of procedure that is not prescribed by the rules, the parties may agree and, if they do not, the arbitrators will decide. To a greater or lesser degree, they also permit the parties to derogate from the rules. The LCIA Rules exemplify such permissiveness; article 6 provides that 'The parties may agree on the arbitral procedures and are encouraged to do so.'

As with substantive review of arbitral awards by national courts, the current state of affairs regarding procedure is a recent development. Compared with arbitration laws and rules of procedure enacted prior to the 1980s, modern rules generally contain few non-derogable procedural rules and provide that the arbitrators may decide on the procedure only if and in such areas as the parties do not agree.⁸⁷² This last point is the most important, as the increase in party autonomy over procedural matters has come directly at the expense of the power of the arbitrators to control the proceedings, especially with respect to the conduct of the hearing. While arbitral rules of procedure 'once left vast discretion to the arbitrator' on such matters as the manner of the presentation of evidence, form of submissions and time limits, 'modern rules have ... shifted more control to the parties.'⁸⁷³ Since institutional rules of procedure are drafted by committees of leading arbitrators, it is reasonable to conclude that arbitrators have consciously ceded power to the parties. Moreover, arbitrators are explicit about their desire to expand party autonomy over procedure. For example Wang Sheng

⁸⁶⁸ Borris 1999, 2-3.

⁸⁶⁹ Redfern & Hunter 2004, 315.

⁸⁷⁰ Böckstiegel 1997, 25.

⁸⁷¹ Born 2009, 1749; Fouchard Gaillard & Goldman 1999, [1701]-[1702].

⁸⁷² Borris 1999, 3.

⁸⁷³ Rogers 2002, 353.

Chang and Cao Lijun, two of the architects of the most recent (2005) version of the CIETAC Arbitration rules, entitled their article publicising the rules 'Toward a higher degree of party autonomy and transparency'.⁸⁷⁴

3. Party autonomy as a social norm

Party autonomy acts primarily as a constraint on the power of arbitrators. When the parties do not exercise their autonomy, for example to choose the applicable substantive or procedural rules, arbitrators may make these choices themselves. Arbitrators do sometimes impose their procedural preferences on the parties; however, such occurrences are rare and, when they do occur, are criticised. For example, Ridgway describes a case in which the arbitrators imposed a hearing schedule on the parties as an example of the tribunal 'riding roughshod'⁸⁷⁵ and Böckstiegel characterises such situations as 'horror stories'.⁸⁷⁶

As a result of rules that prioritise party autonomy, such horror stories have become rare: 'Limitations on party autonomy have been reduced more and more during recent decades.'⁸⁷⁷ Indeed, arbitrators' efforts to enshrine party autonomy, in particular with respect to the parties' choice of the substantive law, have been so successful that Böckstiegel could conclude in 1997 that 'the wide acceptance of party autonomy in national laws throughout the world might arguably be considered as leading to party autonomy being today a general principle of law.'⁸⁷⁸ The *Institut de droit international* has also characterised party autonomy as one of 'the fundamental principles of private international law'.⁸⁷⁹

Practical reasons exist for preferring broad party autonomy. For example, party autonomy over the arbitral process counterbalances the 'vast' power arbitrators possess in the form of an unappealable final award,⁸⁸⁰ and party agreement on choice of law and the conduct of the proceedings improves buy-in to the arbitral process and therefore acceptance of an adverse outcome.⁸⁸¹ However, if practical concerns were paramount, we would see debates on the optimum level of party autonomy for one rule or another. Instead, arbitrators

⁸⁷⁴ Wang & Cao 2005, stating that the changes made to the rules were 'designed to respect party autonomy at a higher level in the arbitral process'. Ibid, 117.

⁸⁷⁵ Ridgway 1999, 50-51.

⁸⁷⁶ Ibid.

⁸⁷⁷ Böckstiegel 1997, 25.

⁸⁷⁸ Ibid.

⁸⁷⁹ *Institut de droit international*, 'The Autonomy of the Parties in International Contracts Between Private Persons or Entities' (Basel Session 1991). <http://www.idi-iil.org/idiE/resolutionsE/1991_bal_02_en.PDF> accessed 28 November 2010. The resolution expressly reserves the question of whether parties are free to choose transnational rules of law.

⁸⁸⁰ Rogers 2002, 411.

⁸⁸¹ Borris 1999, 4.

tend to agree universally that party autonomy should be as expansive as possible. This consensus is best explained by the proposition that party autonomy is a norm of arbitration.

Arbitrators see party autonomy as a—perhaps *the*—core desire of commercial parties in international arbitration. Böckstiegel writes:

... party autonomy is fundamental to the functioning and development of private economy systems at the national level, as well as of international trade and investment. The business community has a strong interest in shaping its relationships to its need and advantage and in selecting its own systems of dispute settlement.⁸⁸²

Arbitrators tend to see the gradual expansion of party autonomy as a function of the 'recognition' by legislatures and judges that the interests of the international community are served by a robust doctrine of party autonomy.⁸⁸³ Accordingly, writings by arbitrators tend to contrast their own 'enlightened' respect for party autonomy with the 'parochialism' of national courts.⁸⁸⁴ For example, Georges Delaume characterises the expansion of legal support for party autonomy as an unambiguous victory of arbitration over national courts and a cornerstone of arbitration's ability to adapt to the needs of international commerce:

In recent years [party autonomy] ... has conquered new grounds heretofore denied to it Modern statutes and treaty provisions, together with enlightened judicial decisions, increasingly and relentlessly have given new dimensions to party autonomy in an effort to cope with the needs of transnational commerce and eradicate from national systems a former parochialism out of context with the necessities of contemporary economic and commercial relations.⁸⁸⁵

Similarly, Donahey explains the increasing popularity of arbitration as a function of arbitrators' deference to the parties' preferences: '...party autonomy gives the parties the flexibility necessary to structure the procedure in a way best suited to their needs. It is this flexibility that has led to the success of commercial arbitration and made it the preferred means of resolving international commercial disputes.'⁸⁸⁶

⁸⁸² Böckstiegel 1997, 25.

⁸⁸³ Ibid.

⁸⁸⁴ See, e.g., Newman 2009, 1239 ('International arbitration is but one example of a larger movement to promote reforms facilitating international commerce and cooperation, and the avoidance of parochial discrimination by the State.');

⁸⁸⁵ Delaume 1988, 282.

⁸⁸⁶ Donahey 1992, 42.

The trends in the arbitral awards described in Case Study 2 can be attributed largely to tribunals' respect for party autonomy. A broad allegiance to party autonomy encourages tribunals to consider whatever evidence the parties seek to introduce (a characteristic of the civil law) and to refrain from searching beyond that evidence (a characteristic of the common law). The awards surveyed in Case Study 2 are not in themselves evidence that arbitrators prefer subjective interpretation over objective interpretation. However, they do indicate that arbitrators prefer to let the parties decide for themselves what facts ought to be introduced in order to interpret the contract.

When given the opportunity, parties are likely to introduce whatever evidence they see as helpful to their cause, including extrinsic evidence of their subjective intentions. Moreover, as discussed above, objective interpretation cannot really proceed once evidence of the parties actual intentions is in the record; judges are human, and cannot help but be influenced by such subjective evidence if it is introduced.⁸⁸⁷ Thus, when tribunals allow the parties to develop the evidentiary record, subjective interpretation follows as a near-inevitable consequence. The trend in the published awards toward subjective interpretation is thus explicable in terms of a norm: party autonomy.

Arbitrators' acceptance of near-total party autonomy trumps both their personal interests and their view of the interests of the parties. For example, the longer the proceedings take, the more expensive they are for the parties and (when arbitrators are paid by lump sum) the less profitable they are for the arbitrator. However, arbitrators are frequently admonished to allow the parties to direct the proceedings even if this leads to what the arbitrator perceives to be a waste of time.⁸⁸⁸ Implicit in such admonitions is the notion that the interests of the arbitral system are congruent with the wishes of the parties.

4. Party interests and systemic interests

In deciding individual disputes, judges must pay attention to systemic interests, such as the development of legal doctrine, the concerns of users of the dispute resolution system generally and the overall functioning of the legal system. On the other hand, arbitrators' deference to party autonomy leads them to identify with the parties' interests, rather than with the system's. One consequence of arbitrators' identification with the parties' interests is a diminished sense of obligation to follow the law.

⁸⁸⁷ See above, fn 323-324 and accompanying text.

⁸⁸⁸ See, e.g., Fellas 2004, 80; Park 1988, 629.

Judges have an institutional duty to the legal system as a whole: to apply the law and to ensure that the rules they lay down are of general applicability. This duty is usually implicit but is sometimes spelled out explicitly. For example, under the Rome I Regulation on the law applicable to contractual obligations, judges in EU national courts must consider 'the proper functioning of the internal market' when they apply the Regulation's conflict of laws rules.⁸⁸⁹

By contrast, arbitrators are not required to consider the proper functioning of a market or of the legal system generally. They are obliged to obey the law, but if arbitrators take into account other circumstances, such as commercial interests or equitable concerns, there is nothing (within limits) that can stop them. For this reason, commentators have suggested that arbitrators' duty is to obey not only the law, but also the interests of the parties and the requirements of justice.⁸⁹⁰ Of course, equitable rules exist in national legal systems as well, and judges often tailor their stated interpretations of the law to the equities of a particular dispute. Yet a difference in mentality is nevertheless discernable.⁸⁹¹ As Mayer puts it: 'A judge's mission and obligations ... consist in ... defining the respective rights of the parties as they result from the applicable law. [The parties] do not expect him to upset the established order so as to impose, in breach of the law, what he subjectively considers as fair.'⁸⁹² By contrast, writes Mayer, the international arbitrator owes no strict 'duty of obedience' to the law.⁸⁹³ Then-Associate Justice Rehnquist of the US Supreme Court argued that this is all to the good: a 'less frequently realised advantage of arbitration ... is that its process usually need not produce a body of decisional law which will guide lawyers and clients as to what their future conduct ought to be.'⁸⁹⁴

(i) *Arbitral 'lawlessness'*

The phenomenon of arbitrators paying more attention to the equities of a dispute than to the law gives rise to what is often called the lawlessness of arbitration. While opinion is divided on the extent to which arbitral lawlessness actually exists and on whether it ought to

⁸⁸⁹ Rome I Regulation, Recital 6.

⁸⁹⁰ Jones 2006, 281; Carlston 1967, 48.

⁸⁹¹ Cotterrell 1997, 162.

⁸⁹² Mayer 2001, 239.

⁸⁹³ Ibid, 235-236 (referring to the 'ancient conception' of arbitration as entailing 'equity being mixed with law', even in cases not involving amiable composition). Hermann makes a similar point: '...the settlement of international commercial disputes is always more of a problem of equity than of law'. Hermann 1983, 200.

⁸⁹⁴ Rehnquist 1977, 5.

exist,⁸⁹⁵ many arbitrators consider lawlessness to be one of arbitration's most important positive characteristics: 'A principal virtue of international commercial arbitration is its lawlessness, its ability because of its unrestrained flexibility to accommodate the enormous procedural, presentational, and decisional standard differences that typically exist among parties to multinational transactions.'⁸⁹⁶ Similarly, Reuben argues that:

... the notion of substantive 'correctness' or 'accuracy' historically has had little place in arbitration precisely because arbitration calls for the exercise of worldly judgment that is informed by a variety of considerations that may not lend themselves to an objective notion of correctness or accuracy, such as knowledge of economic considerations in the securities industry or professional standards and practices in the construction industry.⁸⁹⁷

Of course, not all arbitrators support such an open-ended characterisation of the arbitral mandate. Indeed, given arbitrators' respect for party autonomy, one would expect that if the parties choose a particular national law, tribunals will adhere closely to that law. The case studies bear out this intuition. For example, although Case Study 2 indicated that on the whole, arbitrators prefer to consider extrinsic evidence of the parties' intent (a doctrine at odds with the common law exclusionary rules), in only one case governed by the law of a common law jurisdiction did the tribunal admit extrinsic evidence that a common law court would have excluded. (The tribunal eventually discounted the extrinsic evidence.)⁸⁹⁸

Arbitrators might naturally prefer to adjudicate under *lex mercatoria* because it grants them almost unfettered discretion to implement the rules that they favour. But parties would be wary of such loss of control, and party autonomy governs. Dezalay and Garth note that the Anglo-American practitioners they interviewed were 'nearly unanimous in their denunciation of a doctrinal construction that, according to them, allows academics to avoid the rigorous analysis of the facts, the formal law, and even the terms of the contract.'⁸⁹⁹ In general, arbitrators, counsel, and commentators with common law backgrounds have been sceptical of the *lex mercatoria*, amiable composition, and other doctrines that increase the

⁸⁹⁵ For example, in one case, the tribunal wrote that it 'cannot accept the suggestion made by the claimant to evaluate the lawfulness of the claims in the present case without reference to any national system of law'. ICC Case No. 7263 of 1994 (1997) XXII Ybk Comm Arb 92 [8].

⁸⁹⁶ McConaughay 1999, 522.

⁸⁹⁷ Reuben 2009, 1129.

⁸⁹⁸ ICC Case No. 4555 of 1985. See above, Chapter Four, Section B.4.

⁸⁹⁹ Dezalay & Garth 1996, 41.

scope of arbitrators' discretion.⁹⁰⁰ Commercial parties seem to share the same scepticism; they rarely make a choice of the *lex mercatoria*.⁹⁰¹

Nevertheless, some arbitrators assert that lack of rigour in arbitral decision-making is a response to the parties' preferences. For example, McConnaughay argues that 'elastic rules of decision' and 'the absence of reasoned opinions' are of great value to commercial parties from non-Western legal traditions, particularly from East Asia.⁹⁰² Ridgway summarises the argument that commercial parties as a whole prefer decisions that are not overly 'legal':

Some commentators contend that parties opt for arbitration—whether domestic or international—specifically because they want 'rough justice', a decision in equity. Indeed, some commentators argue that one inherent advantage of international arbitration ... is the freedom it gives an arbitrator to do justice even where strict application of the law might require another result.⁹⁰³

The available data on party preferences contradict this assertion. In ICC Case No. 7181 of 1992, the parties agreed on a procedure to determine the amount damages but the tribunal nevertheless decided to calculate the damages 'equitably'. In that case, the parties disagreed on the amount of damages recoverable but jointly submitted that the tribunal should appoint an expert to determine the damages. The tribunal declined. It reasoned that, since the damages depended on an assessment of the parties' behaviour and on certain factual determinations, 'an expert appraisal could not give the Arbitral Tribunal precise elements of valuation of these factors. In the absence of such precise elements, the Arbitral Tribunal prefers ... to determine, without further delay, the amount of damages *ex aequo et bono*.'⁹⁰⁴

In ICC Case No. 11849 of 2003, the parties disagreed as to the applicable rate of interest on any damages awarded. The contract was governed by the CISG, which contains no provisions relating to the rate of interest. The parties each argued for the application their own states' laws to set the interest rate. However, the tribunal rejected both arguments, on

⁹⁰⁰ See, e.g., Mustill 1988, 86 (describing the *lex mercatoria* as something that the common lawyer is 'tempted to regard as a non-subject, having no contact with reality save through the medium of a handful of awards which could well have been rationalised more convincingly in terms of established legal principles'); Rubino-Sammartano 1992, 5 (asserting that 'The difficulty which some common law jurisdictions meet when they face a request to decide *ex bono et aequo* ... is well known.').

⁹⁰¹ See above, fn 87-93 and accompanying text.

⁹⁰² McConnaughay 1999, 502. McConnaughay, an American lawyer and academic, practiced in Tokyo and Hong Kong for around ten years.

⁹⁰³ Ridgway 1999, 52.

⁹⁰⁴ ICC Case No. 7181 of 1992 (1996) XXI Ybk Comm Arb 99 [60].

the basis that 'In international arbitration, arbitrators have the broadest powers to determine interest on the basis of the most appropriate rate, without resorting to any rule of conflict.'⁹⁰⁵

Another aspect of arbitral lawlessness is arbitrators' reliance on 'good faith' as a purported general principle of international commercial law, even when applying the substantive law of a country that contains no general requirement of good faith.⁹⁰⁶ For example, in an *ad hoc* award from 1982, the tribunal held that a party's argument:

... contradicts both the general principle of good faith and the fundamental principle *pacta sunt servanda*, both principles forming the basis of all contractual relations, particularly in international affairs, and which are specifically enshrined in international commercial usages and international law.⁹⁰⁷

Arbitrators with common law backgrounds have made similar assertions. For example, DiMatteo writes that 'The meta-principles of good faith, fairness in the exchange, and the duty to inform are implied into contract by most arbitral regimes.'⁹⁰⁸

ICA is not, of course, an entirely lawless forum, nor are arbitral awards devoid of reference to legal authority.⁹⁰⁹ In truth, lawless arbitration would be contrary to the wishes of the parties; if parties want to have their dispute arbitrated by non-lawyers exercising 'commercial judgment' instead of 'legal analysis', it is within their power to convene an appropriate tribunal. However, the vast majority of parties appoint as their arbitrators qualified lawyers with expertise in arbitration law.⁹¹⁰ An award that runs contrary to the parties' agreement, for example by deciding under amiable composition without the authorisation of the parties, is subject to annulment or refusal of enforcement.⁹¹¹

It is often stated that the leading arbitrators of this era are better-versed in arbitration law than their forbears, and that their awards are more likely to be grounded in legal principles.⁹¹² Indeed, many regard lawlessness as a hallmark of an earlier era, when arbitrators were known more for their personal wisdom and gravitas than for their legal

⁹⁰⁵ ICC Case No. 11849 of 2003 (2006) XXXI Ybk Comm Arb 148 [81].

⁹⁰⁶ See, e.g., ICC Case No. 6197 of 1995 (1998) XXIII Ybk Comm Arb 13 [42]; ICC Case No. 3267 of 1979 (1982) VII Ybk Comm Arb 96, 100; Hamburg Friendly Arbitration Award of January 15, 1976 (1978) III Ybk Comm Arb 212, 213; ICC Case No. 1784 of 1975 (1977) II Ybk Comm Arb 150.

⁹⁰⁷ *Ad hoc* award of April, 1982 (1983) VIII Ybk Comm Arb 94, 116 (citing ICC Case No. 1939 of 1971 [1973] Rev arb 145); ICC Case No. 1526 of 1968 [1974] JDI 919.

⁹⁰⁸ DiMatteo 1997, 83.

⁹⁰⁹ The exception is disputes decided by amiable composition. See above, Chapter Two, Section C.

⁹¹⁰ Franck 2006, 503 (citations omitted).

⁹¹¹ Berger 1999, 55.

⁹¹² Dezalay & Garth 1996, 36 (calling today's leading arbitrators 'technically better equipped in procedure and substance'). See also Faulconbridge & Muzio 2009, 1349-52 (crediting the involvement of global law firms with the increase in professionalism among arbitrators and counsel).

expertise. Today, the argument goes, parties do not want 'the open-textured discretion of international arbitration's past';⁹¹³ instead, 'businesses use international arbitration to provide a neutral, adjudicative dispute resolution process where arbitrators independently apply the law to facts, and this in turn promotes the legitimacy of international arbitration.'⁹¹⁴ Where once 'grand old men' dominated the field, today it is the multinational law firms, 'with their tight organizational structure, integrated services, global network of offices, and team mentality'.⁹¹⁵ As Dezalay and Garth relate, members of the new generation 'assert, even citing Max Weber in one instance, that the time has come for the "routinisation of charisma" essential to the transition from the stage of artisans to that of mass production.'⁹¹⁶

A growing literature exists documenting the 'judicialisation' or 'professionalisation' of ICA, a trend associated with this generational turnover.⁹¹⁷ Some contend that the process has gone too far, so that arbitration is no longer cheaper, faster and fairer than litigation.⁹¹⁸ Many of these critics associate greater legalism and procedural complexity with an Americanisation of ICA.⁹¹⁹

The generational shift should not be taken for more than it is. While modern arbitrators are technocratic compared with the previous generation, the relationship between arbitrator and disputing party is such that arbitral decision-making remains more open to the influence of subjective and contextual factors than judicial decision-making. Dezalay and Garth themselves conclude that 'that this project of routinization—even judicialization—of arbitration ... cannot be completely accomplished. Despite the changes, there remains a vital element of personal relations in this field.'⁹²⁰

⁹¹³ Franck 2006, 504.

⁹¹⁴ Ibid.

⁹¹⁵ Alford 2003, 88. Of course, not all arbitrators or arbitration practitioners are associated with multinational firms. However, of the seventy-eight individuals included in the Chambers and Partners 2009 list of the most in-demand global arbitration practitioners, fifty-seven practice from multinational law firms. Of the remaining twenty-one, six practice from English barristers' chambers and nine practice from boutique arbitration firms. Only six are listed as solo practitioners or with primarily academic affiliations. Of the fifteen boutique firm lawyers and solo practitioners, six previously practiced at major national or multinational law firms. Thus, of the seventy-eight leading arbitration partners listed by Chambers and Partners, sixty-three (81%) currently practice or previously practiced at a multinational law firm.

<<http://www.chambersandpartners.com/Editorial.aspx?ssid=30607>> accessed 28 November 2010.

⁹¹⁶ Dezalay & Garth 1996, 37 (quoting an interviewee).

⁹¹⁷ See, e.g., Schneider 2006 (describing increased judicialisation in international dispute resolution generally); Hansen 2003 (referring to judicialisation of investment treaty arbitration under the North American Free Trade Agreement); the various contributions to Lillich & Brower 1994 (describing two trends in ICA that fall under the rubric of 'judicialisation': increased judicial intervention in the arbitration process and greater procedural intricacy and formality in arbitration procedures).

⁹¹⁸ See, e.g., Stipanowich 2010; Seidenberg 2010.

⁹¹⁹ See, e.g., Martinez-Fraga 2009; Helmer 2003; Alford 2003; Reed & Sutcliffe 2001.

⁹²⁰ Dezalay & Garth 1996, 46.

The generation of the grand old men developed a lawless system of arbitration in response to a perceived desire by commercial actors for informal and equitable decision-making.⁹²¹ The legal specialists of the current generation of arbitrators have reacted to parties' concerns about the arbitrariness of arbitral decision-making by writing awards arrived at by tight legal reasoning. Both the prior charismatic arbitration and the current technocratic arbitration have been shaped by arbitrators' desire to serve what they believe to be the wishes of the parties.

(ii) *Confidentiality*

Another way in which arbitrators defer to party interests is their preservation of confidentiality in the face of increasing criticism. Few national arbitration laws mention confidentiality, but it is indisputably a core principle of arbitration: 'Most scholars and practitioners agree that a presumption of confidentiality—whether implied or explicit—exists between the parties to an international commercial arbitration.'⁹²² More specifically, the confidentiality of arbitral hearings is guaranteed by all the major institutional arbitration rules.⁹²³ The final award, similarly, is private. The ICDR Rules are typical; they provide that an award may be made public 'only with the consent of all parties or as required by law'.⁹²⁴ Even when there is no specific confidentiality provision in the arbitration agreement or the applicable rules, 50% of parties surveyed nevertheless consider arbitrations to be confidential.⁹²⁵

If enforcement of an award is sought in a national court, the existence (but not the text) of the award will necessarily become public.⁹²⁶ If an arbitration does give rise to an action in court, the text of the award or evidence disclosed during the arbitration may become publicly available: '... parties' expectations about the privacy and confidentiality of their arbitral proceedings are often disappointed, or even negated by the courts.'⁹²⁷ English courts have expressly held that arbitration agreements contain an implied condition of confidentiality

⁹²¹ See, e.g., ICC Case No. 10329 of 2000 (2004) XXIX Ybk Comm Arb 108 [29] (citing 'the need to secure transactions for the safe functioning of the trade against too stringent formalities').

⁹²² Brown 2001, 970-71.

⁹²³ See, e.g., ICC Rules art 21(3); UNCITRAL Rules art 25.4.

⁹²⁴ Art 27. Some recently-enacted institutional rules explicitly state that, unless a party objects, the institution may publish the award in redacted form if it is of academic interest. See, e.g., the Rules of Arbitration of the Chamber of Arbitration of Milan, art 8(2), official English translation available online: <http://www.camera-arbitrale.it/Documenti/cam_arbitration-rules_2010.pdf> accessed 28 November 2010.

⁹²⁵ W&C/QMUL 2010, 29.

⁹²⁶ However, studies indicate that a majority of awards are voluntarily complied with. See above, fn 799 and accompanying text.

⁹²⁷ Brown 2001, 975.

extending to all documents produced in an arbitration proceeding.⁹²⁸ However, the Australian High Court (among others) has held that the confidentiality principle does not necessarily extend to prevent the disclosure of documents or other evidence presented in an arbitration.⁹²⁹ In the *Bulbank* case, the Swedish Appeals Court took the position, characteristic of the modern trend, that confidentiality, including of arbitration documents, is an implied characteristic of all arbitrations, but that it is not absolute.⁹³⁰

That confidentiality continues to be the general rule in ICA is surprising, given that arbitrators are concerned with the legitimacy of ICA and that transparency is a core characteristic of any legitimate system of adjudication. National legal systems that issue secret court decisions are rightly criticised for such a practice. Indeed, arbitrators generally agree that increased (even default) publication of awards would be beneficial to arbitration.

Numerous potential benefits of publication have been described in the academic literature. Publication of arbitral awards would contribute to the development of international commercial law generally by establishing a body of persuasive precedents.⁹³¹ This could in turn improve the efficiency of the arbitration system as a whole, since confidentiality precludes the accretive 'case-by-case lawmaking such as has been claimed to lead to the efficiency of the common law'.⁹³² Publication of awards could also increase the predictability of arbitral proceedings,⁹³³ aid in the training of current and future arbitrators,⁹³⁴ and enhance the quality of arbitral awards, both by exerting pressure on arbitrators to articulate their reasoning clearly⁹³⁵ and by providing more of a basis on which to judge the qualifications of potential arbitrators.⁹³⁶

Arbitrators also have a personal interest in increased publication of awards. They would be able to advertise the quality of their work product. They would be more able to influence subsequent tribunals. And they might also gain more confidence in their own decisions if they were subject to public scrutiny.

⁹²⁸ *Hassneh Insurance Co of Israel and Others v Stuart J Mew* [1993] 2 Lloyd's Rep 243 (QB)

⁹²⁹ *Esso Australia Resources Ltd and Others v Plowman (Minister for Energy and Materials) and Others*, 128 A.L.R. 391 (1995). For an American case reaching a similar conclusion on this point, see *United States v Panhandle Eastern Corp*, 118 F.R.D. 346, 349–350 (D. Del. 1988).

⁹³⁰ See Swedish Appeals Court Report 1999.

⁹³¹ Daly 2007, 125 fn 221. It would also help to legitimate the *lex mercatoria* by making it more certain and accessible, an avowed goal of some arbitrators. Park 1989, 673–674.

⁹³² Ginsburg, 1344.

⁹³³ Brown 2001, 1014.

⁹³⁴ *Ibid*, 1019.

⁹³⁵ Kaczmarek 2000, 314.

⁹³⁶ Smit 1986, 31–32.

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⁹³⁵ Kaczmarek 2000, 314.

⁹³⁶ Smit 1986, 31-32.

Finally, complex international transactions often produce multiple disputes involving several parties who are connected by separate contracts; consequently, multiple arbitrations might arise out of the same circumstances and, if each is kept confidential, may be resolved in inconsistent ways.⁹³⁷ To be sure, inconsistent judgments do not occur often, but 'when they do occur they raise doubts about arbitration's reliability and the authority of arbitral awards.'⁹³⁸ There is at least one major example of inconsistent awards, the *CME* and *Lauder* arbitrations.⁹³⁹

To deal with this problem, at least one court has advocated the consolidation of arbitration proceedings in cases where the disputes arise out of the same facts, involve the same disputed issues of law, and where there is a danger of inconsistent findings.⁹⁴⁰ However, such an outcome is only possible where a party to one of the arbitrations knows about the other arbitration(s)—something made difficult by confidentiality rules.

Similar systemic benefits cannot be claimed in defence of confidentiality. As Lo argues, the only principled, normative reason to enforce confidentiality is the protection of trade secrets and other undisclosed information of economic value.⁹⁴¹ However, such information could easily be kept private even if the bulk of the arbitral proceedings and the award were made public. Despite the clear theoretical and practical case for curtailing confidentiality, it remains well-entrenched in arbitral rules of procedure. Indeed, 'there is a general assumption that arbitration is a private process that is presumptively confidential.'⁹⁴²

Confidentiality is justified primarily on grounds of party autonomy: commercial arbitrations are the products of private agreements between contracting parties. Even if publication of awards would improve the quality of arbitral justice, ICA is in the end a private system; parties should be able to choose confidentiality over effectiveness if they so desire.⁹⁴³ (This is in contrast to investment arbitrations, which implicate 'clear and strong

⁹³⁷ Brown 2001, 1017 (citations omitted). Confidentiality also permits parties to adduce different—even inconsistent—evidence in different proceedings without fear of consequence.

⁹³⁸ Brekoulakis 2009, 1176-1177 (citations omitted).

⁹³⁹ *CME Czech Republic v Czech Republic* (Svea Ct of Appeals 2003) (2003) 15(5) World Trade and Arb Materials 171; *R S Lauder v Czech Republic*, Final Award of 2002 (2002) 14(3) World Trade and Arb Materials 35; *CME Czech Republic BV v Czech Republic*, Partial Award of 2001, (2002) 14(3) World Trade and Arb Materials 109.

⁹⁴⁰ *Cable Belt Conveyors, Inc v Alumina Partners of Jamaica*, 669 F. Supp. 577 (S.D.N.Y. 1987), aff'd 857 F.2d 1461 (2d Cir. 1987).

⁹⁴¹ Lo 2008, 245-246. Many justifications of the confidentiality presumption mention the protection of trade secrets and similar information. See, e.g., Menkel-Meadow 2002, 962.

⁹⁴² Smit 2000, 573-574 (noting a few significant exceptions to the general rule of confidentiality).

⁹⁴³ Brown 2001, 1019. After all, Brown notes, in ICA, the parties rather than the taxpayers pay for the use of the adjudication system.

public interests',⁹⁴⁴ the case for limiting confidentiality is therefore stronger in investment than in commercial arbitrations.⁹⁴⁵)

However, confidentiality cannot be justified solely on the basis of party autonomy. No arbitration is truly the concern of the parties alone. The types of complex cross-border transactions resolved in ICA frequently impact third parties, such as shareholders, creditors, or debtors of a party; they may also implicate public interests.⁹⁴⁶ Even if a given dispute is truly of concern to no one other than the parties, their interests would not outweigh the systemic benefits of publication of awards outlined above.

Thus, increased transparency would benefit the arbitrators, the arbitral institutions, and even the consumers of international arbitration services as a group. The only explanation for the perpetuation of confidentiality is that parties to arbitrations continue to demand it and that individual arbitrators and arbitral institutions continue to accede to the parties' desires.⁹⁴⁷ According to a former ICC Secretary-General:

... users of international commercial arbitration ... place the highest value upon confidentiality as a fundamental characteristic of international commercial arbitration. When enquiring as to the features of international commercial arbitration ... confidentiality of the proceedings and the fact that these proceedings and the resulting award would not enter into the public domain was almost invariably mentioned.⁹⁴⁸

Although parties do not seem to consider confidentiality to be the essential reason for recourse to arbitration, 62% of respondents to one survey described confidentiality as 'very important' to them, and a further 24% described it as 'quite important'.⁹⁴⁹ The parties' desire to preserve confidentiality is understandable. If the existence of a dispute is secret, or even just the resulting award, then customers of the losing party will never have the opportunity to

⁹⁴⁴ Bjorklund 2009, 1287.

⁹⁴⁵ Delaney & Magraw 2008, 756 ('In some cases, it is the mere presence of the State or a State entity that gives rise to the need for transparency. In other cases, it is the subject-matter, the issues at stake, the political situation in the host State, or the amount of potential financial liability that gives rise to questions of public interest or public concern and, thus, the need for transparency.').

⁹⁴⁶ As the Australian High Court found in the *Esso/BHP v Plowman* case.

⁹⁴⁷ Rogers notes that increases in transparency in ICA that have occurred are 'under-appreciated' because the parties 'are regarded as the principal obstacle against transparency for the benefit of the general public'. Rogers 2006, 1309.

⁹⁴⁸ Bond 1995. It should be noted that, while there is general agreement that confidentiality is a factor motivating parties' choice of arbitration, there is conflicting empirical evidence as to the weight parties place on it. See W&C/QMUL 2010, 29; Pryles 2004, 415; Naimark & Keer 2002, 203-208.

⁹⁴⁹ W&C/QMUL 2010, 29. However, only 35% of survey respondents stated that they would cease to use arbitration if it ceased to offer the potential for confidentiality. A similar number (38%) stated that they would continue to use arbitration. Ibid, 30.

worry about a producer's reliability, nor will stock analysts have the opportunity to raise concerns over a company's litigation liabilities. Professional reputations can be maintained and money need not be spent on public relations damage control. More broadly, commercial entities prefer to control the disclosure of any information about their businesses.⁹⁵⁰

If either of the parties does want to publicise an award, it can be leaked, usually without consequence.⁹⁵¹ On the other hand, arbitrators who breach confidentiality may be subject to termination of their contracts or even personal liability.⁹⁵² Thus, it is clear that confidentiality acts primarily to bind *arbitrators and arbitral institutions*, at the behest and for the benefit of the *parties*. Arbitrators and arbitral institutions often see it as their duty to maintain confidentiality even when an arbitral decision has given rise to state court proceedings.⁹⁵³ As such, the principle of confidentiality in ICA provides further evidence that arbitrators view service to the parties as their primary duty: another norm of ICA.

B. THE SERVICE OF BUSINESS

Judges are state officials, officers of the court. In most civil law countries, they spend their careers as members of the broader civil service. In common law countries, practicing lawyers appointed to the bench are expected to set aside their previous affiliations and serve the public interest. Their duty is to the law itself; court justice is public justice.

Arbitrators are private individuals. They provide a service—resolution of disputes—and are compensated for that service by their clients—the disputing parties. As Gélinas puts it, 'international arbitration exists to serve the needs of international business.'⁹⁵⁴ Lord Mustill takes the argument a step further: 'Commercial arbitration exists for one purpose only: to serve the commercial man. If it fails in this, it is unworthy of serious study.'⁹⁵⁵ The same goes for arbitrators on an individual level: 'The idea that ... the arbitrator is bound to respect the parties' will in exercising his or her role and, more generally, in discharging his or her duties, has prevailed for a long time. That the arbitrator is the servant of the parties is ... a

⁹⁵⁰ Menkel-Meadow 2002, 962.

⁹⁵¹ The only remedies now generally available when a party breaches confidentiality are monetary damages and injunctions against further disclosures. Obtaining even these unsatisfying remedies can be difficult in practice. Brown 2001, 1016.

⁹⁵² Fouchard, Gaillard & Goldman 1999, 617.

⁹⁵³ Jolivet 2006, 269 (asserting that arbitrators and arbitral institutions should 'ensure that all possible efforts are made to maintain the confidentiality of the arbitral proceedings').

⁹⁵⁴ Gélinas 2000, 117.

⁹⁵⁵ Mustill 1988, 86. See also Fortier 2001, 121 (characterising Mustill's statement as 'the essential creed of the commercial arbitrator').

widespread view.⁹⁵⁶ Arbitration is characterised by two related but separate social norms that relate to the service of business: an ideal of client service and an orientation toward the interests of the international commercial system.

1. Arbitration as a service industry

At its heart, arbitration is a service industry. The relationship between the arbitrators and the parties is one characterised by collegiality, informality and an identification by the arbitrators with the mutual interests of the parties. Arbitrators therefore work to ensure that the parties see the arbitration process as serving their interests: 'Unlike judges, arbitrators must inevitably treat the parties and their lawyers as having something of the aura of a clientele, whose goodwill, understanding and respect for the tribunal's authority must be cultivated and preserved.'⁹⁵⁷ This attitude can be seen in the active manner with which arbitrators manage the proceedings and in the attention arbitrators pay to reducing the costs of arbitration.

Arbitrators frequently take an active role in managing the proceedings. Cremades describes the ideal method as 'interactive' adjudication: 'rather than invoking prerogatives which may be challenged or provoke negative reactions, the arbitrator should from the very beginning of the proceeding make an effort to establish a fruitful line of communication with the disputing parties and their counsel.'⁹⁵⁸ Cremades describes such a method as being distinct from both the inquisitorial and the adversarial method.⁹⁵⁹ Arbitral rules of procedure have evolved to support this kind of proactive role,⁹⁶⁰ which appears to be preferred by parties.⁹⁶¹

The international arbitral norm of serving the interests of business is also evident in the way that arbitrators approach the expense of the arbitration process. One of the purported virtues of arbitration is that it is faster and cheaper than litigation. Whether this is in fact true is debated,⁹⁶² but many criticisms of the cost of ICA inappropriately compare it with the cost

⁹⁵⁶ Bernardini 'Role' 2004, 114.

⁹⁵⁷ Kerr 1997, 124.

⁹⁵⁸ Bernardini 'Role' 2004, 116-117 (citing Cremades 1999, 157). Jones makes a similar point, stressing that the 'consensual, if not cooperative, nature of arbitration requires a distinct and unique approach to traditional litigious skills and practices, despite having much in common with them.' Jones 2006, 275-76.

⁹⁵⁹ Ibid.

⁹⁶⁰ Bernardini 'Role' 2004, 115.

⁹⁶¹ W&C/QMUL 2010, 25. 'Excessive flexibility or failure to control the process' was cited by survey respondents as the second-most-significant reason (after 'bad decision or outcome') why parties were disappointed by an arbitrator. Ibid, 26.

⁹⁶² Pearson 1967, 210-211; Fellas 2004, 79.

of domestic litigation. In the context of international disputes, if the parties go to litigation, at least one of them will be forced to proceed in a foreign court, employ additional foreign lawyers unfamiliar with its business (who will require more time to prepare) and translate all of the relevant documents into the language of the court (a time-consuming and expensive process).⁹⁶³ Whatever the reason, commercial parties generally perceive arbitration to be a cost-effective option.⁹⁶⁴

More so than judges, arbitrators are likely to weigh the costs and benefits of additional procedures and, potentially, to sacrifice meticulous exploration of a dispute for the sake of efficiency.⁹⁶⁵ Borris writes:

While fairness is the most important aspect, the second test to which procedural rules should be subject is 'efficiency'. In international commercial arbitration, more than in other types of litigation, the parties are commercial companies and business people for whom one of the reasons for choosing arbitration is the desire for a quick decision.⁹⁶⁶

Griffin describes the practice of international arbitral tribunals as: 'to seek a workable compromise between the various evidence-gathering techniques, in order to achieve efficient administration of justice without rendering the process over burdensome.'⁹⁶⁷ Redfern and Hunter describe a trend toward shorter live hearings and greater reliance on documentary evidence, characterising this 'as a necessary step in the interests of economy of time and costs in cases that often involve arbitrators, lawyers, experts, company executives and other arbitrators, operating away from their home base'.⁹⁶⁸ The ICC convened a task force to identify the techniques that most effectively reduce time and costs in arbitration.⁹⁶⁹

Karl-Heinz Böckstiegel has been particularly praised for his efficient management of arbitrations.⁹⁷⁰ The so-called Böckstiegel Method involves assigning a total amount of hearing time to each party, then strictly enforcing the total but allowing the parties to decide

⁹⁶³ Redfern & Hunter 2004, 26.

⁹⁶⁴ See Naimark & Keer 2002. However, survey data indicate that the commercial parties who describe themselves as 'dissatisfied' with their experiences with international arbitrations do so in part because of 'increased costs of arbitration and delays to proceedings'. PwC/QMUL 2008, 5. Delays in the process or in the issuance of the award were described as sources of disappointment in particular arbitrators. W&C/QMUL 2010, 26.

⁹⁶⁵ See Kaufmann-Kohler 2004.

⁹⁶⁶ Borris 1999, 5.

⁹⁶⁷ Griffin 2000, 19. For a similar statement, emphasising that efficiency must be balanced with fairness, see Bernardini 'Role' 2004, 121.

⁹⁶⁸ Redfern & Hunter 2004, 380.

⁹⁶⁹ The task force's report was published as ICC Commission 2007.

⁹⁷⁰ Especially in Paulsson 2001.

how to allocate that time among opening and closing statements and examination of witnesses.⁹⁷¹ Such a method may work against the interests of a given party in a given dispute, but the Böckstiegel Method is praised because reduces costs and is therefore in the interests of commercial parties generally.

Most institutional rules do not require arbitrators to adopt efficient procedures in areas where they have discretion. For example, the AAA/ICDR Rules state only that 'Subject to these rules, the tribunal may conduct the arbitration in whatever manner it considers appropriate.'⁹⁷² However, the LCIA Rules impose a general duty on the part of arbitrators to adopt suitable procedures, 'avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute'.⁹⁷³

The drive for efficiency also affects other aspects of arbitration. Many arbitrators consider it their duty to move the parties toward settlement.⁹⁷⁴ In one survey, '...a large majority of respondents (86%) thought that facilitating a consensual solution is one of the functions of the arbitral process.'⁹⁷⁵ In another, several respondents indicated they were more likely to settle disputes in arbitration than those before a national court.⁹⁷⁶ By contrast, while judges do encourage settlements and issue orders intended to expedite matters in front of them, their concern is as much with waste of the court's time as it is with waste of the parties' money.⁹⁷⁷ Thus, for example, the Civil Procedure Rules (CPR) of England and Wales require judges actively to manage cases, including helping the parties to settle⁹⁷⁸ or encouraging them to use an alternative dispute resolution procedure.⁹⁷⁹ However, in considering what courses of action to take, judges are to keep in mind an overriding objective of the CPR, that cases should be allotted 'an appropriate share of the court's resources, while taking into account the need to allot resources to other cases'.⁹⁸⁰

⁹⁷¹ Ibid, 608.

⁹⁷² Art 16(1).

⁹⁷³ Art 14.1(ii). See Crowter & Tobin 2002, 304 (praising the LCIA Rules for placing upon tribunals an affirmative duty to adopt efficient procedures).

⁹⁷⁴ See generally M Collins 2003.

⁹⁷⁵ Bühring-Uhle et al 2003, 82.

⁹⁷⁶ PwC/QMUL 2008, 6. However, this effect cannot be entirely put down to encouragement by the arbitrators; 43% of settlements occurred before the first hearing. Ibid, 7.

⁹⁷⁷ Of course, judges encourage settlements for reasons other than merely to clear their dockets. Here, too, culture may play a role; for example, Japanese judges, like Japanese arbitrators, are known to take an active role in encouraging settlements. Cole 2007, 32.

⁹⁷⁸ S 1.4(f).

⁹⁷⁹ S 1.4(e).

⁹⁸⁰ S 1.1(e).

The tendency of tribunals to admit extrinsic evidence of the parties' intentions when interpreting contracts⁹⁸¹ can also be explained by tribunals' desire to serve the interests of the parties before them and of business generally. Although considering a wide range of extrinsic evidence may lengthen proceedings, there are compensations. Eschewing the complex common law procedural rules decreases the number and complexity of motions and submissions to be prepared by counsel and thus shortens the proceedings and reduces the cost. Moreover, objective interpretation and the exclusionary rules, whatever their merits, often confuse litigants and lead to results that appear unfair:

The by-product of almost every parol evidence dispute is a client who is angry either because he has not been given his day in court or because the opposing party has been permitted to prove an oral agreement that the client claims was not made and which his attorney assured him could not be proven.⁹⁸²

Arbitrators also serve the interests of the parties in the way they exercise their power to choose directly the substantive law applicable to the dispute (absent a choice by the parties).⁹⁸³ In practice, choosing the applicable law via *voie directe* most often 'consists in finding a significant connecting factor between the contract and the law which the arbitrator decides to apply'.⁹⁸⁴ Accordingly, choice of law under *voie directe* frequently yields the same law that application of a country's choice of law rules would provide. However, *voie directe* has also been employed in a manner designed to give voice to party autonomy in cases where the parties have not agreed on an applicable law. A 1984 ICC award provides an example. There, the contract did not specify the governing law, and the law of Switzerland and of another country were the only laws connected to the contract. The tribunal directly applied Swiss law, on the ground that:

...the law of country X might partially or totally affect the validity of the agreement.

It is then reasonable to assume that from two possible laws, the parties would choose the law which would uphold the validity of the agreement....

⁹⁸¹ See Case Study 2, Chapter Four, Section B.3-B.4.

⁹⁸² Sweet 1968, 1046.

⁹⁸³ See Chapter Two, section A.

⁹⁸⁴ Derains 1996, 521.

In these circumstances, the arbitrators definitely decided to choose Swiss law as the applicable law, assuming that this choice corresponds to what the parties had in mind.⁹⁸⁵

In other words, when arbitrators have the power to determine choice of law, as in *voie directe*, they may rely on the parties' intentions at the time they made their contract; the arbitrator accedes to the parties' wishes.

Arbitrators' use of their *voie directe* power to give voice to the parties' unexpressed but presumed intentions also helps to improve the efficiency of the choice of law process. It is often observed that, traditionally, the choice of law process has been marred by complexity and uncertainty,⁹⁸⁶ although the increasing resort to presumptions about the parties' intent makes choice of law in some national courts more predictable than it has been in the past.⁹⁸⁷ Such uncertainty imposes systemic costs. 'Uncertainty at the time of contracting means that the parties cannot easily determine the standard of conduct to which they should conform or how to price contract rights and duties.... Uncertainty about choice of law at the time of litigation can increase both the costs and frequency of litigation.'⁹⁸⁸ In general, managing risk associated with the application of an unforeseen substantive law is of interest to parties in international commerce. In particular, Ribstein has identified a number of reasons why parties might want to specify a particular governing law in their contract: to avoid mandatory rules in the national law that would otherwise be held to be the proper law of the contract, to avoid the uncertainty of the choice of law process and to protect against post-contractual opportunism by a party seeking to change the law (as in a contract with a foreign sovereign).⁹⁸⁹ Arbitrators, by the way they use their power to make a *voie directe*, help to reduce the costs associated with the application of a law unforeseen by the parties at the time they concluded their contract.

2. The 'specific needs' of international commerce

In a much-quoted passage, White J of the US Supreme Court wrote that arbitrators should not be held to standards of 'judicial decorum' because arbitrators' effectiveness

⁹⁸⁵ ICC Case No. 4145 of 1984 (1987) XII Ybk Comm Arb 97. See also ICC Case No. 7154 of 1993 [1994] JDI 1059, where the tribunal reached a similar result for the same reason.

⁹⁸⁶ Berger 1999, 10 (citing various German-language sources characterising choice of law in courts as 'a jump in the dark').

⁹⁸⁷ Especially in those jurisdictions covered by the Rome I Regulation.

⁹⁸⁸ Ribstein 1993, 254.

⁹⁸⁹ Ibid, 247-255.

depends on them being 'men of affairs, not apart from the marketplace.'⁹⁹⁰ It is no accident that most of the world's international arbitral institutions (and nearly all of those located in civil law jurisdictions) are attached to chambers of commerce. Such institutions benefit from 'a double sponsorship—that of the world of business, since the parent organization remains a major business group, and that of the world of learned jurists'⁹⁹¹ Arbitrators have come to see themselves as actors not just in an international legal system, but in international commerce as well.

Many arbitrators maintain that developing a robust system of private international dispute resolution was a precondition to the emergence of the modern era of globalised commerce. Briner, a former President of the Iran-United States Claims Tribunal, writes:

[A]rbitration accompanied the growth of international commerce. It saw its role as offering the tools best suited to international business to resolve disputes whenever they arose. The major institutions especially see their role in facilitating the growth of international business by offering the necessary tools to resolve the disputes arising in international business.⁹⁹²

As Lew puts it, arbitration has 'survived the test of time ... because it has served the users well. It has met the needs of those business entities which have considered national courts to be unsuited to their needs.'⁹⁹³ Dezalay and Garth argue that, since a commercial system cannot function without an effective, predictable and legitimate dispute resolution system, arbitration is itself a commercial institution:

The workings of international commercial arbitration have a considerable impact on the security of business investments and on the transaction costs of resolving transnational disputes. International commercial arbitration, therefore, should be seen as a key institution in the structuring of international markets.⁹⁹⁴

⁹⁹⁰ *Commonwealth Coatings Corp v Cont'l Cas Corp*, 393 U.S. 145, 150 (1968), reh'g denied, 393 U.S. 1112 (1969).

⁹⁹¹ Dezalay & Garth 1996, 45 (referring specifically to the ICC).

⁹⁹² Briner 2000, 444.

⁹⁹³ Lew 2006, 180.

⁹⁹⁴ Dezalay & Garth 1996, 7. See also Drahozal 2000, 107, calling international lawyers 'transaction cost engineers' (citing RJ Gilson, 'Value Creation by Business Lawyers: Legal Skills and Asset Pricing' (1984) Yale L J 239, 253-56).

Trakman comes to a similar conclusion: 'Despite the fragmentation of global trade along bilateral and regional lines, international commercial arbitration has remained a vital, yet adaptable, constant in the world trade equation.'⁹⁹⁵

Arbitrators have taken the small step from seeing themselves as an integral part of a system to seeing themselves as indispensable to the system's functioning. For example, international arbitrators tend to overestimate the share of international commercial disputes that are resolved by arbitration. Berger asserts that 'About ninety percent of international economic contracts contain an arbitration clause.'⁹⁹⁶ However, as Born notes, the 90% figure 'lacks empirical support and is almost certainly substantially inflated: in reality, significant numbers of international commercial transactions—certainly much more than 10% of all contracts—contain either forum selection clauses or no dispute resolution provision at all.'⁹⁹⁷ In a 2010 survey, 50% of multinational companies that had a dispute resolution policy in place reported that their policies either required arbitration or preferred it to state court litigation.⁹⁹⁸ In addition, as discussed in Chapter Six, proponents of ICA are apt to engage in a kind of arbitral apologetics, proclaiming arbitration's virtues in every possible forum.⁹⁹⁹ Such writings are, to an extent, mere marketing: if fewer parties choose arbitration, then arbitrators as a group will lose business. Judges, on the other hand, have no personal stake in the number of cases brought to court.¹⁰⁰⁰

Dismissing arbitral apologetics as no more than self-promotion is unfair. Many arbitrators believe passionately in the essential role of arbitration within international business and, in particular, in arbitration's superiority over litigation for the resolution of international commercial disputes. Arguments for arbitration's indispensability often take the form of a list of the general deficiencies of litigation, such as its purported slowness and

⁹⁹⁵ Trakman 2006, 29.

⁹⁹⁶ Berger 1993, 8 fn 62. A similar claim is made in A van den Berg, *Arbitragerecht* (WEJ Tjeenk Willink, Zwolle 1988) 134.

⁹⁹⁷ Born 2009, 70. Born allows that in cross-border commercial (as opposed to financial) transactions, the parties are 'more likely than not' to include an arbitration clause in their contracts. This figure 'permits one to fairly say that international arbitration is the preferred means for contractual dispute resolution, but more ambitious statistical claims are unsustainable.' Ibid.

⁹⁹⁸ W&C/QMUL 2010, 6.

⁹⁹⁹ See above, fns 773-777 and accompanying text.

¹⁰⁰⁰ That said, judges have raised concerns regarding the migration of commercial cases out of the courts and into arbitration. In particular, some have worried that the diminishing number of commercial disputes that go to trial (either because the parties settle or because they resort to alternative dispute resolution) means that commercial law is not developing properly or evolving to reflect changing commercial circumstances. See, e.g., Haarhuis & Niemeijer 2006 (concerning the Netherlands); Galanter 2004 (concerning the US). However, the expression of such concerns supports the underlying contention that judges' primary concerns are systemic, while arbitrators' primary concerns are with the parties.

expense in comparison with arbitration. However, arbitrators are most likely to cite the 'inability' of litigation to respond to the 'specific needs' of international commercial dispute resolution.¹⁰⁰¹

Such factors as informality of procedure and cost-effectiveness are the most visible ways in which ICA responds to the needs of business, but arguably more important is the commercial mentality that arbitrators bring to their decision-making. As business norms and practices evolve, arbitrators endeavour to keep up. Dezalay and Garth write that '...the increasing importance of particularism in law, especially in commercial law, comes from pressure exercised by merchants to have their legal affairs treated by specialized experts.'¹⁰⁰² By contrast, arbitral commentators assert, the legal principles applied by courts have always lagged behind evolving commercial usages:

In the Middle Ages, the regular courts were interested primarily in property disputes and breaches of the King's peace. The 'gap' between accepted trade practices and the Common Law, which was devoid of mercantile custom, made those courts inappropriate. Judges who were ignorant of commercial norms compounded the problem.¹⁰⁰³

Arbitrators continue to point out various ways in which national laws are inadequate to the task of regulating modern international commerce. For example, in ICC Case No. 9427 of 1998, the dispute concerned an on-demand guarantee. The governing law, that of a Baltic state, had no provisions dealing specifically with on-demand guarantees. The tribunal 'decided to apply such legal principles relating to on-demand guarantees which are generally applied in international banking practice'.¹⁰⁰⁴ Thus, faced with a gap in the applicable national law, the tribunal applied general principles directly, although neither party had pled their application.

Arbitrators also distinguish themselves from national court judges by touting their own commercial expertise. Although there exist courts with special expertise in commercial disputes (most notably the Commercial Court in London and Delaware's Chancery Court),¹⁰⁰⁵ most national courts are of general jurisdiction. Judges therefore hear all types of cases and are unlikely to have special expertise in commercial matters. International

¹⁰⁰¹ Petsche 2005, 10.

¹⁰⁰² Dezalay & Garth 1996, 117 (citation omitted).

¹⁰⁰³ For example, bills of exchange, which came into common use by the mid-sixteenth century, were not recognized in law until the late seventeenth century. Yarn 2004, 970 (citation omitted).

¹⁰⁰⁴ ICC Case No. 9427 of 1998 (2002) XXVII Ybk Comm Arb 153 [7].

¹⁰⁰⁵ On such specialist courts and their relationship with ICA, see Drahozal 'Business Courts' 2009.

arbitrators, on the other hand, tend to adjudicate only commercial and investment disputes, and may develop specialties in particular commercial sectors, such as construction or oil and gas. By choosing arbitration, parties can choose adjudicators who are expert not only in the applicable law but also in relevant commercial norms and practices.¹⁰⁰⁶

The use of transnational contract law is related to arbitrators' efforts to distinguish themselves from judges on the basis of specialised expertise. Since the CISG, the UNIDROIT Principles, the PECL and *lex mercatoria* are inapplicable (or simply not raised) in national court proceedings, judges are unlikely to gain expertise with them. Transnational contract law therefore functions as a *droit savant*—a specialised field of knowledge understood only by specialists.¹⁰⁰⁷

More generally, attention to the 'specific needs' of international business gives rise to a commercial mentality that exists alongside a legal mentality in the minds of arbitrators. Hermann typically declares that 'It is fundamental to arbitration that it should solve disputes according to commercial practice and common sense, arriving at a result considered fair in a particular business community.'¹⁰⁰⁸ More broadly, Collins contrasts what he sees as the 'commercial reasoning' employed by arbitrators with the 'private law reasoning' employed by courts:

Private law reasoning is relatively closed to the competing normative considerations governing contractual behaviour outside the discrete communications system provided by the formal contract itself. As a result, it cannot translate the expectations grounded in business relations and conventions of dealing easily into its default standards for regulation. Commercial arbitration appears to be favoured precisely because it can provide ... reasoning which marries adjudicated outcome with business expectations more closely.¹⁰⁰⁹

The primary manifestation of this purported commercial mentality is the primacy given in arbitral awards to arguments based on trade usages and commercial reasonableness. As Schmitthoff notes, 'The interaction between international commercial usage and

¹⁰⁰⁶ Smit 1986, 15 (citations omitted); see also Kitagawa 1967, 133 (arguing that there are very few judges 'competent to manage foreign transactions').

¹⁰⁰⁷ Dezalay & Garth 1996, 91.

¹⁰⁰⁸ Hermann 1983, 221.

¹⁰⁰⁹ H Collins 1999, 187.

international arbitration is very close.’¹⁰¹⁰ Cremades makes a similar observation: ‘International arbitrators have always been closer, and thus more familiar with, the usages and practices of international commercial trade than local judges.’¹⁰¹¹ Arbitrators thus oblige what they see as the preference of businesses to be judged according to the standards of their industries, and not according to *a priori* rules of general contract law imposed upon them by the legal system.

Trade usages can be successfully pleaded in court if the party relying on the usage proves both that the usage is regularly observed in the industry in question and that the opposing party was aware of the usage.¹⁰¹² In contrast, arbitral tribunals often apply trade usages when the parties have not pled them, and may find that a trade usage governs even absent evidence that the parties were aware of it.¹⁰¹³ For example, in ICC Case No. 7661 of 1995, the tribunal argued that it was ‘unlikely that a seller would accept a lower price to account for an event, known or unknown, that may never happen’. Consequently, the tribunal found that the contract did not include a guarantee against certain unforeseen financial contingencies.¹⁰¹⁴ In ICC Case No. 9443 of 1998, the tribunal considered a contractual obligation that, on its plain language, was perpetually renewable unless both parties expressly repudiated it. The tribunal interpreted the term differently, on the ground that ‘such an obligation is irreconcilable with general principles of international commerce: It is unimaginable that two corporations will be obliged to cooperate eternally without one or the other being able to put a stop to the cooperation.’¹⁰¹⁵

¹⁰¹⁰ Schmitthoff 1985, 23.

¹⁰¹¹ Cremades 1999, 167.

¹⁰¹² For a usage to be incorporated into a contract under English law, there must be evidence that the parties implicitly intended to be bound by the usage; this requires evidence that both parties were actually aware of the usage and that the usage is consistent with the express terms of the contract. Cheshire, Fifoot & Furmston 2001, 146-147.

¹⁰¹³ Under the major international contract law instruments, parties are deemed to be aware of relevant trade usages and must take active steps to inform themselves. With respect to the CISG, see Schmidt-Kessel Art 9 2010, 191 (Under CISG art 9(2), if it can be shown that a relevant usage is ‘objectively known’, then a ‘lack of due care’ is imputed to a party that claims ignorance of the usage.). With respect to general principles, the online CENTRAL compilation of *lex mercatoria* rules, Principle I.2.2, adopts a similar position. <<http://www.trans-lex.org/output.php?docid=903000>> accessed 28 November 2010. This reversal of the standard posture in domestic legal systems indicates the greater deference to trade usages in international than in national commercial laws.

¹⁰¹⁴ ICC Case No. 7661 of 1995 (1997) XXII Ybk Comm Arb 149 [17]. While this can be seen as simply an application of common sense, and not a specific trade usage, it remains that such arguments are made from the point of view of practice rather than law. Another example of interpretation of a party’s intent based on commercial reasonableness is ICC Cases Nos. 6515 and 6516 of 1994 (1999) XXIVa Ybk Comm Arb 80 [15].

¹⁰¹⁵ ICC Case No. 9443 of 1998 [2002] JDI 1106. (‘*Un tel engagement serait également inconciliable avec les principes généraux du commerce international. Il est par exemple inimaginable que deux sociétés puissent s’obliger à coopérer éternellement sans que l’une ou l’autre puisse mettre fin à la coopération.*’)

Parties' attempts to exclude the application of trade usages may not deter tribunals. For example, in ICC Case No. 8873 of 1997, the contract contained an express term stating that it was governed entirely by Spanish law, to the exclusion of all other laws.¹⁰¹⁶ Nevertheless, the tribunal found that it had also to consider 'international commercial usages', which for the tribunal meant a consideration of the *lex mercatoria*.¹⁰¹⁷ In the tribunal's conception, the *lex mercatoria* is not a 'law', but rather must always apply to international disputes because it embodies international trade usages.

There are even cases where arbitral tribunals disregarded express contractual or statutory terms in light of trade usages. Such cases are explicable on the basis that the norm in favour of trade usages is consistent with party autonomy; tribunals appear to assume that, regardless of their express agreement, parties also intend to be bound by applicable trade usages. For example, ICC Case No. 3820 of 1981 involved a sale of food products in instalments. Payment was to be by documentary credit, which provided that the seller could draw down the credit, 'provided goods have been received by opener'. The buyer refused the goods and argued that this meant that it had not received the goods, so the preconditions for payment had not been met. The Dutch sole arbitrator wrote that documentary credits must be interpreted 'not ... in accordance with specific national laws ... but in accordance with the practices that apply on this subject in international trade'. He held that, contrary to its express terms, the letter of credit must be read to include situations where 'the opener could have received the goods if he had wanted to'.¹⁰¹⁸

Institutional rules of arbitration and national arbitration laws reflect arbitrators' desire to ensure that applicable trade usages be enforced. Article 17(2) of the ICC Rules requires that, 'In all cases the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages.' This is so regardless of the applicable law.¹⁰¹⁹ A survey of ICC awards indicates that ICC tribunals regularly cite rule 17(2).¹⁰²⁰

¹⁰¹⁶ ICC Case No. 8873 of 1997 [1998] JDI 1017 ('*Ce Contrat sera entièrement régi par le droit espagnol, à l'exclusion de tout autre droit.*')

¹⁰¹⁷ Ibid ('... on devra prendre en considération également, dans le contexte de la loi nationale choisie par les parties, les usages de commerce international').

¹⁰¹⁸ ICC Case No. 3820 of 1981 (1982) VII Ybk Comm Arb 134, 136. See also ICC Case No. 7063 of 1993 (1997) XXII Ybk Comm Arb 87 (awarding interest at the prevailing rate of inflation despite acknowledging that an applicable provision of Saudi law prohibited an award of interest); ICC Case No. 3316 of 1979 (1982) VII Ybk Comm Arb 106 (holding that, in a documentary credit, 'unconditional' should not be interpreted literally, since in banking practice it is often used as a synonym for 'irrevocable').

¹⁰¹⁹ Craig, Park & Paulsson 2001, 331.

¹⁰²⁰ See, e.g., ICC Case No. 6527 of 1991 (1993) XVIII Ybk Comm Arb 44; ICC Case No. 5713 of 1989 (1990) XV Ybk Comm Arb 70; ICC Case No. 5314 of 1988 (1995) XX Ybk Comm Arb 35; ICC Case No. 5485 of 18

The ICC rule is not an isolated example. In a 2000 survey of arbitral institutions, Drahozal found that thirty-two of the forty-four largest commercial arbitration institutions require arbitrators to take trade usages into account.¹⁰²¹ As for national arbitration laws, prior to 1985, references to trade usages were rare.¹⁰²² Since 1985, however, the situation has changed dramatically; most statutes enacted or amended after that date contain provisions requiring arbitrators to take trade usages into account.¹⁰²³ This trend is likely to continue because businesses are served by processes that judge their behaviour according to the standards particular to their industries.

The *lex mercatoria* can be seen as a manifestation of arbitrators' preference for trade usages, and of their belief that the parties also prefer to be governed by trade usages. One conception of the *lex mercatoria* is as the set of trade usages specifically 'adapted to the conditions of international commerce'.¹⁰²⁴ In ICC Case No. 8365 of 1996, the respondent contested the applicability of *lex mercatoria* on the ground that it is not a complete system of law, that it can only serve to fill gaps in and help interpret the applicable national law, and that the enforceability of an award founded on *lex mercatoria* was therefore doubtful.¹⁰²⁵ Nevertheless, in the absence of a choice of law by the parties, the tribunal decided to be governed by 'the terms of the contract and trade usages ... and by international arbitral precedent,' which the tribunal characterised as 'largely applying ... general principles of law, trade usages and international customary law, or *lex mercatoria*'.¹⁰²⁶ Indeed, proponents of the *lex mercatoria* argue, the universalised, formalised language of the *lex mercatoria* gives a patina of law to what are essentially trade usages, enhancing their legitimacy as a basis for arbitral decision making.¹⁰²⁷

Aug 1987 (1989) XIV Ybk Comm Arb 156; ICC Case No. 4237 of 1984 (1985) X Ybk Comm Arb 52; ICC Case No. 3540 of 1980 (1982) VII Ybk Comm Arb 124; ICC Case No. 3493 of 1983 (1984) IX Ybk Comm Arb 111; ICC Case No. 3380 of 1980 (1982) VII Ybk Comm Arb 116; ICC Case No. 2930 of 1982(1984) IX Ybk Comm Arb 105.

¹⁰²¹ Drahozal 2000, 112.

¹⁰²² Ibid, 118.

¹⁰²³ English translations of these statutes are collected in International Handbook 2010. This trend is traceable in part to the enactment since 1985 of approximately 70 statutes based on the UNCITRAL Model Law, which includes a provision to this effect, art 28(4).

¹⁰²⁴ ICC Case No. 8385 of 1995 [1997] JDI 1061 (author's translation). Petsche 2005, 15; see also Flood 1996, 170; Rogers 2002, 351-52. For a similar characterisation of the medieval *lex mercatoria*, see Berman & Kaufman 1978, 225.

¹⁰²⁵ Award in ICC Case No. 8365 of 1996 [1997] JDI 1078.

¹⁰²⁶ Ibid, 1079 (author's translation).

¹⁰²⁷ Cf Flood 1996, 170.

C. NEUTRALITY

The neutrality of the adjudicator is an essential aspect of any legitimate system of adjudication, but a neutral judge is not the same thing as a neutral forum. In the context of international commerce, national court systems are institutionally incapable of being entirely neutral as between the parties. ICA, on the other hand, is institutionally neutral. Arbitrations do not take place in the home court of either party.¹⁰²⁸ Neither party is more familiar with the procedures than the other; neither is put at a linguistic disadvantage; neither takes the risk that the judge will be a xenophobe or that the laws will be biased against foreign parties.¹⁰²⁹ Resolution of international commercial disputes by arbitration means that neither party is a 'foreign' party.¹⁰³⁰ Commentators assert that the neutrality of the arbitral forum is one of the most important reasons why parties choose arbitration over litigation,¹⁰³¹ an assertion that is supported by surveys.¹⁰³² Park argues that without the existence of the neutral forum provided by arbitration, modern cross-border commerce would be much diminished:

The special *raison d'être* of international arbitration means that the parties often place a premium on freedom from the type of judicial scrutiny that would impinge on procedural neutrality.... the prospect of foreign court intervention will chill cross-border economic cooperation....¹⁰³³

Even when outright xenophobia is not implicated, parties often face difficulties when litigating in foreign courts, a phenomenon that has been acknowledged by national court judges. In *Fiona Trust v Privalov*, Lord Hoffman noted that parties choose arbitration 'on the grounds of ... neutrality, expertise and privacy.... they ... do not want to take risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.'¹⁰³⁴ The fact that arbitrators are not officials of the states in which the proceedings take place is particularly important when state entities are parties to the disputes.

1. Neutrality as a social norm

Arbitration's reputation for neutrality is perhaps surprising. While the arbitral forum is neutral, the institutional structure of arbitration is such that individual arbitrators ought to

¹⁰²⁸ Franck 2006, 501.

¹⁰²⁹ See Park 2003, 1256 ('Absent reliable arbitration, judicial proceedings might go forward in a foreign language and perhaps before a xenophobic judge in a country lacking a tradition of judicial independence.')

¹⁰³⁰ Franck 2006, 501 (referring to arbitration as a 'geographical half-way house').

¹⁰³¹ Redfern & Hunter 2004, 26; see also Fellas 2004, 79-80.

¹⁰³² Drahozal & Ware 2010, 452

¹⁰³³ Park 2003, 1257.

¹⁰³⁴ *Fiona Trust & Holding Corp v Privalov* [2008] 1 Lloyd's Rep 254, 256 (HL).

be *less* neutral than national court judges. Neutrality requires independence and impartiality: that the adjudicator be neither objectively beholden to a party nor subjectively biased.¹⁰³⁵ Compared with national court judges, arbitrators are both more beholden to parties (because they depend on the parties for appointments) and more likely to have previously expressed opinions on factual or legal issues related to a dispute they are adjudicating (because they tend to publish in academic and trade journals).

Since it lacks the institutional force of state power and its own internal enforcement system, arbitration depends on its perceived legitimacy.¹⁰³⁶ Yet, given the close and fluid professional relationships between arbitrators and counsel, one might be justified in concluding that bias and personal conflicts of interest are endemic to arbitration. A strong norm constraining arbitral behaviour is therefore necessary not only for ICA to maintain neutrality, but also to continue to market its neutrality as a selling point.

Most importantly, neutrality represents an important norm that constrains arbitrators' behaviour.¹⁰³⁷ As Dezalay and Garth relate, arbitrators promote a 'cult of disinterestedness'.¹⁰³⁸ Indeed, the arbitral literature is filled with praise for the exemplary neutrality of arbitrators and admonishments for arbitrators to maintain that neutrality.¹⁰³⁹ In particular, arbitrators are admonished to maintain what Park calls 'cultural neutrality', meaning that, if the parties' nationalities were reversed, the result would not change.¹⁰⁴⁰ For this reason, it has become standard for the presiding arbitrator to be a 'prestigious foreigner', not only devoid of 'the interest or affiliations that would disqualify him in domestic arbitration, but also selected from a region and culture different from that of the parties involved.'¹⁰⁴¹ This is so regardless of whether the presiding arbitrator is chosen by the two party-appointed arbitrators or by the convening arbitral institution.

Of course, the fact that the potential chair's nationality is considered an 'important factor' contradicts the assertions of many arbitrators that they can transcend their national

¹⁰³⁵ On the distinction between independence and impartiality, see Redfern & Hunter 2004, 238-239.

¹⁰³⁶ Park 2009, ix ('If an evil gremlin sought to bring international arbitration into disrepute ... [o]ne course would be to allow service by biased arbitrators, thus tarnishing the neutrality of the arbitral process.').

¹⁰³⁷ Bernardini 'Role' 2004, 117.

¹⁰³⁸ Dezalay & Garth 1996, 58.

¹⁰³⁹ See, e.g., Franck 2006, 506-07 ('Although all humans are inevitably influenced by their experiences, in international arbitration, parties ask arbitrators to put aside biases in order to fairly and impartially exercise their independent judgment and apply their expertise to the facts on the record to render a decision based upon the law.');

¹⁰⁴⁰ Redfern & Hunter 2004, 233 ('... most experienced international arbitrators are adept at maintaining awareness of their own inbuilt preconceptions and ... cultural prejudice.').

¹⁰⁴⁰ Park 1995, 103.

¹⁰⁴¹ Wilkey 1999, 80.

backgrounds: 'When examining both procedural matters and the merits of the case, a chairman will have a natural tendency to refer to his national origins, however much they may be diluted and even modified by his or her international practice.'¹⁰⁴²

The practice of appointing presiding arbitrators from a 'third country' accounts for the large number of arbitrators who come from small countries with reputations for neutrality (in particular Switzerland and Sweden). In one case, when the tribunal considered whether a contractual clause referring to the non-existent 'International Chamber of Commerce of Geneva' constituted a valid arbitration agreement, it reasoned that 'The defendant affirms that the "neutral aspect" of Switzerland was a determining factor for its decision. Hence, only a Swiss institution can be seized.'¹⁰⁴³

Practical considerations also constrain arbitrators from acting in a partial manner and constrain counsel from appointing partial arbitrators. For both sole/presiding arbitrators and party-appointed arbitrators, 'open-mindedness and fairness' was cited as the most important factor in parties' decisions on whom to appoint.¹⁰⁴⁴ Moreover, party-appointed arbitrators who advocate too obviously for the parties that appointed them will quickly lose any influence over the other members of the tribunal. An arbitrator who has a reputation for partiality will, therefore, receive few appointments.¹⁰⁴⁵ In this way, the competitive market for arbitral services disciplines individual arbitrators to avoid overt partisanship.

2. Neutrality in procedure and substance

Arbitral neutrality plays out in both the procedural and substantive spheres. Arbitrators and arbitral institutions strive to make their procedural rules neutral as between the parties. After all, the parties may have chosen arbitration specifically to avoid national court procedures that would otherwise apply. A common example is the hostility with which many parties regard American-style document discovery.¹⁰⁴⁶ International arbitral rules of

¹⁰⁴² Webster 2003, 133.

¹⁰⁴³ ICC Case No. 7920 of 1993 (1998) XXIII Ybk Comm Arb 80 [11]. The Swiss reputation for neutrality is not absolute. Lowenfeld recalled an arbitration in which he served as a party-appointed arbitrator and experienced great difficulty in agreeing with the other party-appointed arbitrator on the identity of the presiding arbitrator: 'Another [candidate] was Swiss, in my judgment a very fair and conscientious arbitrator with whom I had worked in several other cases; he, too, was vetoed because "the Swiss are too favourable to multinational corporations".' Lowenfeld 1995, 63.

¹⁰⁴⁴ W&C/QMUL 2010, 25-26.

¹⁰⁴⁵ Webster 2003, 129-130. This is particularly so because other arbitrators usually select the presiding arbitrator, either directly or by deciding who is placed on the lists maintained by the various arbitral institutions. 47% of survey respondents cited 'likelihood arbitrator will be able to influence Chair of tribunal' as a factor in their choice of a party-appointed arbitrator. W&C/QMUL 2010, 26.

¹⁰⁴⁶ See, e.g., Stürner 2001, 15 (characterising US litigation as a 'procedural monster').

procedure are therefore designed to be neutral, in that they resemble an international consensus of how an arbitration ought to proceed.¹⁰⁴⁷ Lew describes only two limitations on the parties' and the tribunal's power to choose the procedures: applicable mandatory laws and the requirement to treat the parties 'fairly and equally'.¹⁰⁴⁸ Failure to observe such fairness and equality may constitute grounds for courts to set aside an award or refuse it recognition or enforcement.¹⁰⁴⁹

Arbitral rules of procedure are written to be neutral, but in deference to party autonomy, they generally permit the parties to contract for non-neutral procedures—so long as both parties have the opportunity to present their own cases and to hear the cases against them. For example, the parties may choose to be governed by rules of procedure that are more familiar to one party than another, or to choose to conduct the arbitration in one party's native language. When the rules do not specify the procedures, and the parties do not make an agreement, arbitrators will often set the procedural rules *ad hoc*, either at the outset of an arbitration or as issues arise. In such cases, 'a review of existing practice shows that such rules are generally pragmatic and seek to accommodate different procedural cultures whenever the actors come from different backgrounds.'¹⁰⁵⁰ Thus, when they have the opportunity to shape procedure, arbitrators act with an eye to protecting neutrality.

Judges must apply the law neutrally as between the parties, but the laws that they apply may not be neutral. After all, a party is disadvantaged by having to work with unfamiliar foreign substantive law in the same way that it is disadvantaged by having to work with unfamiliar foreign procedures.¹⁰⁵¹ For this reason, parties often choose state substantive law based on their familiarity with the law and the law's perceived neutrality.¹⁰⁵²

In ICA, the neutrality norm also affects the substantive laws that arbitrators choose to apply. They not only apply the law neutrally as between the parties, but also choose laws that are neutral as between the parties. In ICA, the choice of substantive law is itself a tool of

¹⁰⁴⁷ See generally Kaufmann-Kohler 2003 (referring to the 'globalisation' of arbitral procedure). For this reason, many arbitral institutions enact separate rules of procedure for domestic and international arbitrations.

¹⁰⁴⁸ Lew 2006, 196.

¹⁰⁴⁹ New York Convention art V(1)(d); UNCITRAL Model Law arts 18, 34(2)(a)(iv). See also Park 2003, 1264.

¹⁰⁵⁰ Kaufmann-Kohler 2003, 1325 (citations omitted).

¹⁰⁵¹ 44% of surveyed parties reported choosing their own national law if they were free to do so. If not, some sought choice of law agreements selecting a law similar to their own, including laws on which their national law was modeled (e.g., Swiss law for Turkish parties) or laws that come from the same broad legal tradition (e.g., American law for Canadian parties). W&C/QMUL 2010, 11-12.

¹⁰⁵² Indeed, this appears to be the most important factor in parties' choice of law. Ibid, 11. When parties choose a law other than their own national law, they most often choose English, Swiss or New York law—all jurisdictions that are noted, among other things, for laws that are neutral with respect to the parties' nationalities and judiciaries that are independent and highly professional. Ibid, 12.

fairness and neutrality between the parties. In ICC Case No. 9771 of 2001, the tribunal reasoned that the mere fact that the parties had chosen to resolve their dispute by international arbitration meant that the parties could not have intended to apply either party's national law:

It seems likely that the parties in this case—had they contemplated the matter—would not have been inclined to accept the case being treated with the application of the substantive law (or in the courts) of the other party's country. This may also be the reason why the parties agreed to have their dispute resolved in arbitration governed by the rules of an international arbitral institution.¹⁰⁵³

Similarly, in ICC Case No. 7710 of 1995, the parties did not make a choice of law and did not confer upon the tribunal amiable composition or *ex aequo et bono* powers. In such a context, reasoned the tribunal, 'one can only conclude that no national law can be judged adequate or suitable to regulate such transactions, without breaking the equilibrium of neutrality between the parties.'¹⁰⁵⁴ Moreover, the mere fact that the parties submitted their dispute to ICC arbitration was 'clear proof ... that the parties preferred to delocalise the dispute resolution system with respect to all of their contracts in conformity with their strong preoccupation with regard to the neutrality of the substantive and procedural law.'¹⁰⁵⁵

In the ICA context, substantive neutrality means that the applicable rules must be derived from neither party's domestic law. The law of a third country could be selected, and sometimes the parties agree among themselves that a third country's law will apply. (For example, English law is popular for charterparty contracts, regardless of the nationality of the parties.) In at least one case, a sole arbitrator considered applying (although he did not ultimately apply) the law of his own domicile as a neutral substantive law.¹⁰⁵⁶

However, choice of a third national law by the tribunal is considered by arbitrators to be an 'undesirable compromise', since instead of unequal familiarity, it usually engenders equal ignorance.¹⁰⁵⁷ Instead, arbitrators tend to prefer to apply international contract law

¹⁰⁵³ ICC Case No. 9771 of 2001 (2004) XXIX Ybk Comm Arb 46 [18].

¹⁰⁵⁴ ICC Case No. 7710 of 1995 [2001] JDI 1148 ('... on ne peut que conclure qu'aucune loi nationale a été jugée adéquate ou adaptée pour régir de telles transactions, sous peine de rompre l'équilibre de neutralité entre les parties.').

¹⁰⁵⁵ Ibid ('... une preuve claire et la confirmation que les parties ont préféré la délocalisation du système de résolution des litiges eu égard à tous les Contrats en conformité avec leurs fortes préoccupations quant à la neutralité du cadre légal matériel et procédural dans leurs relations à long terme concrétisées par les Contrats.').

¹⁰⁵⁶ ICC Case No. 8128 of 1995 [1996] JDI 1024. The parties were Austrian and Swiss and the arbitrator was German; the contract contained no choice of law.

¹⁰⁵⁷ Petsche 2005, 14. Traditionally, many countries' courts refused to apply the law chosen by the parties if that law bore no relationship to the parties or to the transaction. Today, however, parties' right to choose the law of

instruments or *lex mercatoria*. Often, application of general principles of international instruments is justified on the basis of neutrality. For example, in ICC Case No. 10422 of 2001, the tribunal held that ‘... in the absence of an express choice of a third national law, the most appropriate solution in a case where it appears that the parties desire a neutral solution is to apply general principles of international contracts or *lex mercatoria*.’¹⁰⁵⁸

More generally, Petsche argues that arbitrators’ participation in efforts to harmonise or unify the law of sales—either through the promulgation of international contract law instruments or the elaboration of general principles of international private law—is motivated by a desire to achieve neutrality:

If ... the domestic laws of [different states] were identical, it would be irrelevant whether the laws of State A or those of State B apply. The achievement of substantive neutrality therefore requires uniformity of the law. This explains why international law-making efforts in the field of international commerce traditionally focus on the unification of the law.¹⁰⁵⁹

When making a *voie directe*, tribunals may choose to apply rules of law common to the legal systems of the parties’ home states. This is called the ‘*tronc commun*’ doctrine or ‘cumulative application’ of multiple laws.¹⁰⁶⁰ In ICC Case No. 7319 of 1992, the French and Irish parties failed to agree on the governing law. The sole arbitrator refused to apply either French or Irish law on the ground that this would be non-neutral; he also refused to apply general principles on the ground that the parties had not expressly or impliedly chosen them. Instead, he applied both French and Irish law cumulatively.¹⁰⁶¹

Cumulative application of multiple national laws can also be employed in the choice of law process. In ICC Case No. 12193 of 2004, the contract did not contain a choice of law clause. The parties were Lebanese and German and the seat of arbitration was Switzerland. The tribunal found that ‘... the cumulative application of the relevant conflicts rules ... on the one hand, of the parties’ domiciles, and on the other hand, of the seat of arbitration, makes it

a country with no connection to the contract is generally acknowledged. But see Rome I Regulation art 3.3 (‘Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.’).

¹⁰⁵⁸ ICC Case No. 10422 of 2001 [2003] JDI 1142 (‘... à défaut d’indication expresse d’un tiers droit national, la solution la plus appropriée dans le cas où il apparaît que les parties désirent une solution neutre est d’appliquer les règles et principes généraux en matière de contrats internationaux ou *lex mercatoria*.’). See also ICC Case No. 8128 of 1995 [1996] JDI 1024 (applying the CISG on the basis that a ‘neutral law’ is desirable).

¹⁰⁵⁹ Petsche 2005, 14. See, e.g., ICC Case No. 2886 of 1977 [1978] JDI 996.

¹⁰⁶⁰ See generally Ancel 1990.

¹⁰⁶¹ ICC Case No. 7319 of 1992 (1999) XXIV Ybk Comm Arb 141 [14].

possible to verify that these concur on the application of Lebanese law.’¹⁰⁶² Thus, the tribunal avoided the appearance of unfairness by demonstrating that various potential choice of law rules would yield the same result. Such methodology is also said to accord with party autonomy since the home laws of one party would not necessarily be known to—let alone consented to—by the other party; however, both parties ‘can be expected to be conversant with provisions of law common to both of them’.¹⁰⁶³

A slight variation on this circumstance occurs in cases where the home law of one party clearly governs. In such circumstances, tribunals will sometimes note that the result would not have differed if the *other* party’s home law had applied.¹⁰⁶⁴ Such statements are gratuitous but do demonstrate the tribunal’s commitment to substantive neutrality.

D. INTERNATIONALISM

‘Internationalism’ is defined here as a point of view that reflects a dedication to subordinating national perspectives and distinctions in favour of transnational or global ideals. In practical terms, arbitral internationalism manifests itself in a desire among arbitrators to establish for arbitration an international space autonomous from national legal systems and traditions. The phenomenon of globalisation does not reside only in institutions.¹⁰⁶⁵ It is increasingly a mental and cultural phenomenon, a ‘zeitgeist’.¹⁰⁶⁶ ICA is thus part of a broader trend in the professions. Declining legal nationalism and greater acceptance of supranational and transnational decision-making bodies are trends that have been identified by socio-legal scholars.¹⁰⁶⁷ As Arthurs argues, even if institutions like the WTO were to dissolve and transnational trade and immigrant flows to disappear, ‘We would still be deeply implicated in a global system driven not only by trade and economics, but also by

¹⁰⁶² ICC Case No. 12193 of 2004 [2007] JDI 1277 (*‘L’application cumulative des règles de conflit en présence, à savoir, d’une part celles des États dont les parties sont ressortissantes (le Liban et l’Allemagne), et d’autre part, celles du siège de l’arbitrage (la Suisse), permet de vérifier qu’elles convergent vers l’application du droit libanais.’*)

¹⁰⁶³ Ancel 1990, 67.

¹⁰⁶⁴ This phenomenon is discussed further below, in the context of arbitrators’ use of the comparative method. See below, fns 1163–1166.

¹⁰⁶⁵ International arbitral institutions are often themselves exemplars of globalisation. For example, Grigera Naón sees the ICC as exemplifying the multicultural character of international commercial arbitration. Noting the multinational makeup of the ICC Court of Arbitration and of its secretariat, he concludes: ‘All of this emphasises the multicultural traits of the ICC arbitration system and guarantees the evenhanded administration of ICC arbitrations, free from cultural or other bias.’ Grigera Naón 1999, 139.

¹⁰⁶⁶ Flood 1996, 200.

¹⁰⁶⁷ See above, fn 13 and accompanying text.

transnational social, cultural, intellectual and ideological force ... a globalisation of the mind.¹⁰⁶⁸

This phenomenon has been observed in the legal profession; an academic literature has recently developed exploring 'transnational legal practice' and new forms of globalisation-related legal work.¹⁰⁶⁹ Among practitioners, '[t]here is a long tradition in comparative and international law of the cosmopolitan lawyer working at the interface between legal orders.'¹⁰⁷⁰ When business and trade become globalised, 'then there must also be a globalised sector of law'.¹⁰⁷¹ In recent years, the transnational, globalised sector of law has become both more relevant and more self-sufficient.¹⁰⁷² With an increasing number of lawyers working for multinational firms, and an increased ability of lawyers to qualify in multiple countries, the practice of law itself increasingly crosses borders.¹⁰⁷³

Transnational legal practice arguably reaches its apogee in ICA:

... international arbitration is presently undergoing a process of harmonisation in its basic notions ... [It] is uniquely and inevitably undergoing this process because, historically, it is one of the earliest examples of the attempts to adapt independent national legal systems to the relentless progress of international commerce.¹⁰⁷⁴

International arbitrators aspire to globalisation of the mind, and success as an international arbitrator requires mental globalisation. Compared with national court judges, international arbitrators tend to share a perspective increasingly detached from the national legal system and traditions in which they were trained, a preference for transnational sources of law over national ones and a sensitivity to the cultural and practical issues that arise when

¹⁰⁶⁸ Arthurs 1997, 222.

¹⁰⁶⁹ See generally Terry et al 2008 (surveying developments related to the growth of transnational legal practice). For specific examples, see, e.g., Roesler 2010 (examining professional ethical standards in transnational human rights practice); Loza 2009 (describing evolving, transnational standards of professional competence and responsibility); Rogers 2009 (describing attempts by the American Bar Association to regulate cross-border practice by American-qualified lawyers); Terry 2009 (describing similar efforts within the EU); Burkhart 2008 (assessing the particular challenges of transnational real estate practice); Needham 2007 (considering the role of foreign legal consultants in US law firm offices); Silver 2005 (predicting the 'winners' and 'losers' from the globalisation of legal services); Stewart & Conley 2007 (calling for a common international approach to email service of process on foreign parties); von Mehren 2001 (arguing that comparative legal training has a role to play in educating lawyers for transnational practice); Glenn 2000 (describing an increase in judicial cooperation across borders); Abel 1994 (arguing that US legal education has failed to adapt to the demands of transnational legal practice).

¹⁰⁷⁰ Picciotto 1997, 1021.

¹⁰⁷¹ Friedman 2001, 353.

¹⁰⁷² Friedman 1996, 65. See also Silver 2005, 897 (noting that 'evidence of internationalisation is ubiquitous in the legal services market').

¹⁰⁷³ Glenn 2000, 52.

¹⁰⁷⁴ Cremades 1999, 147-148.

dealing across multiple cultures and legal traditions. Arbitral internationalism is visible in various phenomena, of which three examples will be discussed here: the increasing autonomy of arbitration from national laws, the cosmopolitan backgrounds and attitudes of international arbitrators and arbitrators' use of comparative legal methodologies.

1. Internationalism, delocalisation and substantive law

Arbitrators tend to share the goal of creating a coherent, unified global dispute resolution forum that is more than a hodgepodge of national laws, practices and cultures.¹⁰⁷⁵ Both international arbitrators and national courts and legislatures now agree that international commerce requires 'harmonised solutions ... acceptable for parties from around the world'.¹⁰⁷⁶ The purpose of ICA is therefore to 'provide a universal procedure for the settlement of international disputes detached, to the extent possible, from the particularities of national law'.¹⁰⁷⁷ For this reason, international arbitrators tend to conceive of their field as something autonomous, not just an extension of 'domestic knowledge and usages with respect to business justice'.¹⁰⁷⁸ Lew argues that '... international arbitration is, and should be recognised to be, an autonomous process for the determination of all types of international business disputes.... It has its own space independent of all national jurisdictions'.¹⁰⁷⁹

If international arbitration is to be an autonomous forum existing on a separate, international plane, it must be supported by the national systems of enforcement that make arbitration possible. 'An agreement to arbitrate, the rules governing the arbitral process, and the arbitral award itself can be given effect only by reference to some body of law prescribing such effect.'¹⁰⁸⁰ Indeed, the autonomy that ICA already enjoys 'would not have been possible, and remains largely dependent upon, the benevolent eye, and active support, of national courts and legal orders'.¹⁰⁸¹

(i) *A brief history of delocalisation*

The commitment of states to support ICA is embodied in the 1958 New York Convention, which binds its signatories to enforce both arbitration agreements and arbitral

¹⁰⁷⁵ See generally Smit 1986. Cf Carbonneau 2004, 1186 ('Processing international commercial claims through national courts leads to a decentralized system that is Byzantine both in its structure and operation.').

¹⁰⁷⁶ Helmer 2003, 57; see also Grigera Naón 1999, 118.

¹⁰⁷⁷ Craig, Park & Paulsson 2001, 295 (referring to the motivation for some of the 1998 amendments to the ICC Rules).

¹⁰⁷⁸ Dezalay & Garth 1996, 198.

¹⁰⁷⁹ Lew 2006, 181.

¹⁰⁸⁰ Smit 1989, 631.

¹⁰⁸¹ Grigera Naón 1999, 120.

awards.¹⁰⁸² As Lew relates, the New York Convention was ‘the beginning of internationalism in arbitration’.¹⁰⁸³ The previous regulatory regime is exemplified by the 1923 Geneva Protocol on Arbitration Clauses¹⁰⁸⁴ and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards.¹⁰⁸⁵ The Geneva Protocol provides: ‘[t]he arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.’¹⁰⁸⁶ By contrast, the New York Convention expressly enshrines the parties’ intent with respect to procedure above the law of the *situs* (except for mandatory rules).

The primary objective of the New York Convention was ‘to insulate foreign arbitral awards from national judicial review at the award enforcement stage’.¹⁰⁸⁷ It differed from the 1923 Geneva Protocol and the 1927 Geneva Convention by requiring for the first time that the courts of contracting states enforce, with only narrow procedural exceptions, all valid arbitration agreements and foreign arbitral awards.¹⁰⁸⁸ 144 states are now parties to the New York Convention, including all major trading nations.¹⁰⁸⁹ Although the New York Convention has been neither amended nor superseded, the process of detaching ICA from the vagaries of divergent national laws has continued through the adoption of national arbitration laws and rules of procedure that reduce opportunities for court interference with arbitrations. This process is usually called ‘delocalisation’.¹⁰⁹⁰

The term delocalisation was coined to refer to the notion that a dispute need not be governed by the substantive law of the *situs*.¹⁰⁹¹ Since at least the 1980s, ‘delocalisation’ has referred more broadly to the detaching of any aspect of the arbitral proceedings from national laws.¹⁰⁹² Over time, ICA has become progressively more international in character.

¹⁰⁸² Arts II and III, respectively.

¹⁰⁸³ Lew 2006, 189.

¹⁰⁸⁴ Protocol on Arbitration Clauses (signed 24 September 1923) 27 LNTS 157.

¹⁰⁸⁵ Convention on the Execution of Foreign Arbitral Awards (signed 26 September 1927) 92 LNTS 301.

¹⁰⁸⁶ Art 2.

¹⁰⁸⁷ McConnaughay 1999, 468-469.

¹⁰⁸⁸ See the discussion of this evolution in Gaillard 2010, 94-98.

¹⁰⁸⁹ Up-to-date information on the Convention’s status can be found at :

<http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> accessed 28 November 2010.

¹⁰⁹⁰ Also referred to as denationalisation or deteritorialisation.

¹⁰⁹¹ Kaufmann-Kohler has described this as ‘physical delocalisation’, which she points out ‘has already been achieved’. Kaufmann-Kohler 2003, 1318.

¹⁰⁹² Sandrock 2001, 302-303.

At one time, delocalisation 'gave rise to passionate arguments',¹⁰⁹³ especially in developing countries, which suspected that arbitration was simply another means by which multinational corporations based in developed countries could exploit natural resources without fear of legal sanction. Today, many aspects of delocalisation are no longer controversial, such as the parties' freedom to choose a different substantive law than that of the *situs* or to hold hearings in a different place than the *situs*.¹⁰⁹⁴

Courts in some states have gone so far as to recognise in explicit terms the autonomy of the arbitral order from national regimes. In the 2007 *Putrabali* case, the French *Cour de cassation* declared that 'An international arbitral award, which is not anchored in any national legal order, is a decision of international justice'.¹⁰⁹⁵ Similarly, the Swiss Federal Court held in 1994 that Swiss courts, when reviewing arbitral awards in the context of an annulment or enforcement proceeding, should base their decision not on principles of Swiss law, but rather on 'transnational or universal public policy', including general principles of international law that apply 'regardless of the connection between the dispute and a given country'.¹⁰⁹⁶

Despite such developments, arbitrators recognise that, given the necessity of national courts as ICA's enforcement mechanism, total delocalisation is as impossible as it is undesirable. In *Coppée Levalin NV v Ken-Ren Fertilisers and Chemicals*, the House of Lords considered an application for security for costs in an ICC arbitration. Lord Mustill, now best-known as an arbitrator, recognised the conflict between the raw fact of the necessity of court involvement and arbitrators' internationalist desires:

On the one hand the concept of arbitration as a consensual process reinforced by the ideas of transnationalism leans against the involvement of ... a municipal court. On the other side there is the plain fact, palatable or not, that it is only a Court possessing coercive powers which could rescue the arbitration if it is in danger of foundering.¹⁰⁹⁷

¹⁰⁹³ Kaufmann-Kohler 2003, 1320.

¹⁰⁹⁴ Born 2009, 1675.

¹⁰⁹⁵ *PT Putrabali Adyamulia v Rena Holding* (2007) XXXII Ybk Comm Arb 299, 301 (Cour de cassation, 1ère civ., 29 June 2007). This decision built on a previous judgment of the Paris Court of Appeal, where the court referred to the existence of a 'genuinely international and universally applicable public policy' that would allow a tribunal to enforce a remedy excluded by the procedural law chosen by the parties. *Fougerolle v Procofrance* [1990] *Revue critique de droit international privé* 753 (Cour d'appel Paris, 25 May 1990) (author's translation).

¹⁰⁹⁶ *Westland Helicopters Ltd* (Swiss Federal Supreme Court, 19 April 1994) ATF 1290 II 155 (author's translation).

¹⁰⁹⁷ *Coppée Levalin NV v Ken-Ren Fertilisers and Chemicals* [1994] 2 Lloyd's Rep 109 (HL) (speech of Lord Mustill).

At one time, delocalisation 'gave rise to passionate arguments',¹⁰⁹³ especially in developing countries, which suspected that arbitration was simply another means by which multinational corporations based in developed countries could exploit natural resources without fear of legal sanction. Today, many aspects of delocalisation are no longer controversial, such as the parties' freedom to choose a different substantive law than that of the *situs* or to hold hearings in a different place than the *situs*.¹⁰⁹⁴

Courts in some states have gone so far as to recognise in explicit terms the autonomy of the arbitral order from national regimes. In the 2007 *Putrabali* case, the French *Cour de cassation* declared that 'An international arbitral award, which is not anchored in any national legal order, is a decision of international justice'.¹⁰⁹⁵ Similarly, the Swiss Federal Court held in 1994 that Swiss courts, when reviewing arbitral awards in the context of an annulment or enforcement proceeding, should base their decision not on principles of Swiss law, but rather on 'transnational or universal public policy', including general principles of international law that apply 'regardless of the connection between the dispute and a given country'.¹⁰⁹⁶

Despite such developments, arbitrators recognise that, given the necessity of national courts as ICA's enforcement mechanism, total delocalisation is as impossible as it is undesirable. In *Coppée Levalin NV v Ken-Ren Fertilisers and Chemicals*, the House of Lords considered an application for security for costs in an ICC arbitration. Lord Mustill, now best-known as an arbitrator, recognised the conflict between the raw fact of the necessity of court involvement and arbitrators' internationalist desires:

On the one hand the concept of arbitration as a consensual process reinforced by the ideas of transnationalism leans against the involvement of ... a municipal court. On the other side there is the plain fact, palatable or not, that it is only a Court possessing coercive powers which could rescue the arbitration if it is in danger of foundering.¹⁰⁹⁷

¹⁰⁹³ Kaufmann-Kohler 2003, 1320.

¹⁰⁹⁴ Born 2009, 1675.

¹⁰⁹⁵ *PT Putrabali Adyamulia v Rena Holding* (2007) XXXII Ybk Comm Arb 299, 301 (Cour de cassation, 1ère civ., 29 June 2007). This decision built on a previous judgment of the Paris Court of Appeal, where the court referred to the existence of a 'genuinely international and universally applicable public policy' that would allow a tribunal to enforce a remedy excluded by the procedural law chosen by the parties. *Fougerolle v Procofrance* [1990] *Revue critique de droit international privé* 753 (Cour d'appel Paris, 25 May 1990) (author's translation).

¹⁰⁹⁶ *Westland Helicopters Ltd* (Swiss Federal Supreme Court, 19 April 1994) ATF 1290 II 155 (author's translation).

¹⁰⁹⁷ *Coppée Levalin NV v Ken-Ren Fertilisers and Chemicals* [1994] 2 Lloyd's Rep 109 (HL) (speech of Lord Mustill).

Referring to development of codified instruments like the INCOTERMS, Friedman makes a similar point:

All this is supposed to constitute ... autonomous norm creation within the international economy.... But in the end all such customs and practices have to be validated somehow by national courts applying what they consider to be national law or rules that national law recognizes.¹⁰⁹⁸

This theme—a recognition of the necessity of national court involvement but a yearning for truly delocalised arbitration—has run through the international arbitration literature for decades.¹⁰⁹⁹ Lew refers to a-national arbitration as ‘the dream’,¹¹⁰⁰ while Smit calls it ‘the epitome’¹¹⁰¹ of international arbitration. According to Kennedy, delocalisation is ‘the whole point’ of constructing an international arbitral order: ‘If an international commercial transaction can be legally constructed in a regime detached from local legal cultures, in a place without public policy, the risks from prejudiced national public policy, intercultural misunderstandings, national elite rent seeking, or biased judiciaries can be diminished.’¹¹⁰²

One aspect of delocalisation is the development of separate legal regimes to regulate domestic and international arbitrations. Proponents of ICA have convinced many states that international arbitration is a self-contained, supranational system, and therefore that separate statutes should govern domestic and international arbitrations.¹¹⁰³ In the seventy-two jurisdictions (including seven US states) that have adopted legislation based on the UNCITRAL Model Law, international arbitrations are now governed by separate laws.¹¹⁰⁴ In addition, several countries, including France, Belgium and Switzerland, have enacted their own statutes with different provisions for domestic and international arbitrations.¹¹⁰⁵ As might be expected, the provisions that govern international arbitrations provide for greater party autonomy and less court supervision than those that govern domestic arbitrations.¹¹⁰⁶

¹⁰⁹⁸ Friedman 2001, 356-357 (citations omitted).

¹⁰⁹⁹ See, e.g., Pietrowski 2006, 386; Park 2003, 1265; Sandrock 2001, 320; Mayer 1995, 37; Smit 1989, 631; Lalive 1976, 155; Mann 1967, 159.

¹¹⁰⁰ Lew 2006, 179.

¹¹⁰¹ Smit 1989, 629.

¹¹⁰² Kennedy 1997, 624.

¹¹⁰³ Park makes this case in the context of proposing changes to the US Federal Arbitration Act. Park 2003.

¹¹⁰⁴ For a list of jurisdictions that have adopted legislation based on the UNCITRAL Model Law, see <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> accessed 28 November 2010.

¹¹⁰⁵ Park 2003, 1258.

¹¹⁰⁶ Ibid.

The notion that ICA is qualitatively different from domestic litigation and arbitration is not universally shared. Lord Mustill, for one, wrote that he 'never understood why international arbitration should be different in principle from any other kind of arbitration'.¹¹⁰⁷ This is, however, a minority position. Some countries that previously distinguished between domestic and international arbitrations have retreated from this position; these changes are not due to a belief that domestic and international arbitration are equivalent, but rather to concerns that statutes that effectively treat national and foreign parties differently may conflict with international commitments to observe equal treatment.¹¹⁰⁸

(ii) *Delocalisation and choice of law*

The process of delocalisation has been most clearly apparent in the evolution of choice of law rules in ICA. Under the traditional theory, sometimes called the '*lex fori*,' '*siège*,' or 'jurisdictional' doctrine, by selecting a particular country as the site of an arbitration, the parties also impliedly chose that country's law to govern the merits of the dispute—a choice of forum was also a choice of law. This doctrine is now all but abandoned; however, as recently as 1968, English courts took the position that a choice of England as the site of arbitration entailed a choice of English law.¹¹⁰⁹ The *lex fori* doctrine found adherents among arbitral tribunals even into the 1990s.¹¹¹⁰

Even if the *lex fori* doctrine did not apply, tribunals were traditionally bound by the choice of law rules of the *situs* of the arbitration.¹¹¹¹ Today, parties to arbitrations 'enjoy virtually unfettered contractual discretion to designate the law of whatever nation they wish as the law that will govern their transaction' irrespective of the choice of law rules of the *situs* or of any other states with which the arbitration is connected.¹¹¹² Moreover, if the parties do not agree on the applicable law, arbitrators are generally able to choose whatever choice of law rules they consider appropriate or to even avoid the choice of law process entirely and

¹¹⁰⁷ Mustill 1992, 165.

¹¹⁰⁸ Park 2003, 1255 (citation omitted). Park cites as an example the fact that, 'under the now-superseded 1979 English Arbitration Act, pre-dispute waiver of appeal on points of law was not allowed between or among residents and/or citizens of the United Kingdom.... The 1996 Arbitration Act contained similar provisions, which never entered into force due to a perceived conflict with obligations within the European Union.' Ibid, 1255 fn 58.

¹¹⁰⁹ *Tzortzis & Sykias v Monarch Lines* [1968] 1 Lloyd's Rep 337 (CA).

¹¹¹⁰ ICC Case No. 6527 of 1991 (1993) XVIII Ybk Comm Arb 44.

¹¹¹¹ Sandrock 2001, 323.

¹¹¹² McConnaughay 1999, 470.

make a direct choice (*voie directe*) of the substantive law.¹¹¹³ Thus, not only do parties have the right to substantively delocalise their disputes, but delocalisation of the substantive law may also occur at the behest of arbitrators.¹¹¹⁴

Some have argued that the traditional choice of law process itself runs contrary to delocalisation. As de Boer notes, 'In the choice-of-law process, international cases are, in a sense, 'domesticated': they are stripped from their unruly international features and moulded to fit into the concepts and categories of national law.'¹¹¹⁵ The basic presumption of choice of law rules is that different national legal systems are in conflict with each other, which is contrary to the universalising spirit of arbitration.¹¹¹⁶ Thus, if domestic choice of law rules are applied to international conflicts, they lead to the 'nationalisation' of those disputes, something that is anathema to arbitral internationalism.

As a practical matter, proponents of ICA often cite the complexity of modern international transactions to argue that national choice of law regimes are inadequate. Barnes gives the following hypothetical example:

... [a] web site is maintained on a server located in London, a mirror site and server is maintained in Sydney, Australia, and persons from the United States, France, and Germany all transact business on the site. Which nation's law governs in the absence of an agreement? Which nation's laws should regulate affairs conducted on the site? Our legal regimes are currently struggling for answers to these questions....¹¹¹⁷

Even in more straightforward factual situations, avoiding the choice of law process and the possibility that different national laws might apply reduces the uncertainty involved international transacting.¹¹¹⁸ The application of domestic choice of law rules also imposes costs on parties to cross-border transactions in the form of expense, delay and uncertainty.¹¹¹⁹ It is therefore not surprising that international arbitrators frequently use the *voie directe*

¹¹¹³ For example, ICC Rules art 17(1) provides: 'The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.' This notion entered the ICC Rules in their 1975 revision, and was aimed at 'liberating the choice of substantive law from national rules of conflict of laws'. Craig, Park & Paulsson 2001, 321. See above, Chapter Two, Section B.

¹¹¹⁴ Sandrock 2001, 305.

¹¹¹⁵ deBoer 1994, 18.

¹¹¹⁶ Glenn 2001, 997.

¹¹¹⁷ Barnes 2005, 732-733 (quotations omitted).

¹¹¹⁸ David 1967, 60 ('... le contrat international appelle l'application d'un véritable droit international ... non celle d'un droit national, dont le choix sera toujours quelque peu arbitraire, et bien souvent incertain').

¹¹¹⁹ Glenn 2001, 997 (concluding that the ability of ICA to save parties the costs of the choice of law process is a significant factor in the growth of ICA).

power.¹¹²⁰ Permitting the parties to make a choice of law or, absent such a choice, the tribunal to make a *voie directe*, therefore serves a variety of ICA social norms: party autonomy, the service of business and internationalism.

Parties and arbitrators have used their power to choose the governing substantive law to choose transnational rules of law unavailable via traditional choice of law analyses. Delocalisation was therefore a necessary precondition to the development of transnational contract law generally, and in particular the modern *lex mercatoria*.¹¹²¹ Unlike judges working under many national choice of law systems, arbitrators are able to choose both 'laws' and 'rules of law' (general principles of international law and the international contract law instruments) to serve as the substantive law governing a dispute.¹¹²² Modern arbitration laws permit the parties or arbitrators to choose transnational rules of law and give meaning to this freedom by enforcing awards applying transnational rules.¹¹²³ Delocalisation has 'gradually freed [international arbitrators] from their traditional obligation to refer to national laws'.¹¹²⁴

(iii) *Delocalisation and transnational law*

For many arbitrators, the establishment of arbitration as autonomous from both national courts and national laws calls for the establishment of a purely international substantive law. The desire for a substantive law that is both transnational and global manifests itself in the *lex mercatoria*, which 'should be seen as an aspect ... of the autonomy and universality of the international legal field'.¹¹²⁵ As one tribunal noted, general principles 'apply uniformly and are independent of the peculiarities of different national laws'.¹¹²⁶

Many arbitrators argue that the application of transnational law is generally desired by parties engaged in international commerce. To the extent that this is true, arbitral internationalism is a manifestation of respect for party autonomy. Yet the internationalism norm sometimes competes with the norm of party autonomy. Arbitrators sometimes refer to transnational rules of law where the parties have expressed no intention to apply them, or even where the parties have expressly chosen to be governed by national laws. This was evident in Case Study 1, where transnational law was applied in six of the eight cases, even

¹¹²⁰ Craig, Park & Paulsson 2001, 320; Symeonides 2006, 213.

¹¹²¹ Petsche 2005, 15.

¹¹²² See above, Chapter Two, Section B.

¹¹²³ See above, fns 81-86 and accompanying text.

¹¹²⁴ Gélinas 2000, 122 (citation omitted).

¹¹²⁵ Dezalay & Garth 1996, 65.

¹¹²⁶ ICC Case No. 8385 of 1995 [1997] JDI 1061.

over the objection of a party.¹¹²⁷ Conversely, there are no examples in the published awards of a tribunal applying national law when the parties agreed that transnational law would apply.

Where parties in international disputes do not make a choice of law, some tribunals see this as an indication of the parties' preference that general principles be applied. In ICC Case No. 9466 of 1999, the claimant argued that:

the silence of the parties as to the law that should be applied to their contractual relationship may be construed as a significant indication of their will that their relationship be simply governed by the terms of the contract and/or ... by the general principles of international commercial contracts.¹¹²⁸

The tribunal concurred:

This is very likely true, and quite understandable in a situation where we are facing a combination of elements attributable to various different nationalities.... the tribunal is of the opinion that making reference to a specific national law may not be necessary in the present case.¹¹²⁹

Similarly, in ICC Case No. 8501, the parties made no choice of law, although they did refer to the INCOTERMS and the UCP. The tribunal held that such references to such codified international trade usages indicated the parties' will (*'volonté'*) that their dispute ought to be resolved solely according to 'customs and usages of international commerce'.¹¹³⁰ Since the INCOTERMS and UCP did not, in themselves, resolve the dispute, the tribunal applied the CISG. The CISG was not applicable, since the respondent's domicile had not ratified it, but the tribunal nevertheless applied it as an expression of international commercial usages.¹¹³¹

Businesses tend to be suspicious of general principles and rarely call for their application because businesses prize predictability, while general principles are notoriously malleable. The continued interest in transnational commercial law, and the many articles on

¹¹²⁷ See above, Chapter Three, Section C.1.

¹¹²⁸ (2002) XXVII Ybk Comm Arb 170 [3].

¹¹²⁹ Ibid [4]-[5]. But see ICC Case No. 7319 of 1992 (1999) XXIV Ybk Comm Arb 141 [13]. There, the parties made no express or implied choice of law, but the tribunal nevertheless refused to apply general principles, reasoning that '... the failure of the parties to agree on the law governing the agreement cannot, in the sole arbitrator's opinion, be interpreted as an implied reference to some vague international legal or trade principles.' Instead, the tribunal applied the laws of the parties' home states concurrently. On the concurrent or cumulative application of multiple laws, see above, fn 1057-1060 and accompanying text.

¹¹³⁰ ICC Case No. 8501 [2001] JDI 1164.

¹¹³¹ Ibid.

this subject that prominent arbitrators continue to produce, are best explained by arbitrators' ideological attachment to transnational contract law.¹¹³²

In addition, Drahozal argues that writing about transnational law in academic journals and speaking about it at trade conferences allows arbitrators to 'signal' their 'legal internationalism'. He writes, 'Even if parties do not want to have their dispute resolved according to principles of transnational law ... they may still prefer an arbitrator with a transnational outlook and expertise as to a number of legal systems.'¹¹³³ Some arbitrators' eagerness to associate themselves with transnational law may therefore be related to competition between arbitrators.

Arbitral internationalism has also led arbitrators to promote international contract law instruments over national laws. For example, tribunals have applied the CISG and the UNIDROIT Principles in situations where courts would not, including before the CISG or the Principles went into effect¹¹³⁴ and when neither party submitted that it applies.¹¹³⁵

Even when a national law does apply, arbitrators will frequently refer to international contract law instruments as evidence of an international consensus on a point of law,¹¹³⁶ as expressions of applicable trade usages¹¹³⁷ or to 'arrive at an internationally acceptable and economically sensible interpretation of the domestic law'.¹¹³⁸ Witz explains that the greater use of international instruments in ICA occurs 'because international arbitrators are more

¹¹³² On the disconnect between arbitrators' image of the universality of the *lex mercatoria* and the small number of cases in which it is actually applied, see Bernardini 'A- National' 2004, 63.

¹¹³³ Drahozal 2005, 551 (noting that this is particularly the case with respect to sole or presiding arbitrators).

¹¹³⁴ Berger 1998, 140, citing ICC Cases Nos. 5713 of 1989 (1990) XV Ybk Comm Arb 70 and 2438 of 1975 [1976] JDI 969 (both applying the UNIDROIT Principles).

¹¹³⁵ See, e.g., ICC Case No. 11849 of 2003 (2006) XXXI Ybk Comm Arb 148 [9]. This award is discussed at greater length above in Chapter Three, Section C.1. Even if the CISG is applicable in litigation, courts are unlikely to determine *sua sponte* that it applies; one of the parties must argue for the CISG's application. In arbitration, on the other hand, some tribunals determine on their own initiative whether the CISG or one of the other international contract law instruments applies. See, e.g., ICC Case No. 8128 of 1995 [1996] JDI 1024. Schlechtriem also describes a case in which the contract contained an express choice of Russian law. The parties argued for conflicting interpretations of Russian domestic law but the tribunal found that the CISG applied as the Russian law pertaining to international sales contracts. Schlechtriem 2005, 794.

¹¹³⁶ See, e.g., the award extract reported in Bonell 1996, 157: '... general legal rules and principles enjoying wide international consensus ... are primarily reflected by the UNIDROIT Principles'.

¹¹³⁷ See, e.g., ICC Case No. 5713 of 1989 (1990) XV Ybk Comm Arb 70, where the tribunal declared there to be 'no better source' than the CISG from which 'to determine the prevailing trade usages'. On the basis that the CISG expresses prevailing international trade usages, the tribunal applied it even though neither party came from a state party to the CISG.

¹¹³⁸ Berger 1998, 138. See, e.g., the extensive use made of the UNIDROIT Principles in ICC Case No. 8486 of 1996 (1999) XXIVa Ybk Comm Arb 162.

accustomed and more favourably inclined to the application of international standards than are national judges'.¹¹³⁹

Arbitral internationalism is not unlimited. For example, national courts may set aside awards or refuse recognition and enforcement on the ground that arbitrators have violated mandatory provisions of the national law of the arbitral *situs* or of the state where recognition and enforcement is sought.¹¹⁴⁰ Perhaps more importantly, as with nearly everything else in ICA, arbitral preferences motivated by internationalism are subject to party autonomy. In many cases, the parties (or sometimes the arbitrators, if the parties do not agree) will choose a particular national substantive law or procedures based on those of a particular nation's courts. In the end, though, while a given dispute may be resolved in a manner consistent with the rules and methods of a specific national legal system, the approach taken by the majority of international arbitrators is increasingly internationalised.¹¹⁴¹

2. Arbitrators' cosmopolitanism

ICA practitioners are increasingly multilingual, multicultural and multinational. Just as both procedure and substance in ICA have become increasingly delocalised, so too have arbitrators themselves. As characteristics shared by the leading arbitrators, Rogers cites linguistic ability, 'multi-national educations' and 'multi-faceted, multi-cultural legal training'.¹¹⁴² Such attributes reinforce arbitrators' image of neutrality and legitimise them to their international clientele. As Garth puts it, potential arbitrators 'must demonstrate ... an attitude that might be termed "cosmopolitan".... The "legal nationalist" has a very difficult time making it into the international arbitration world.'¹¹⁴³ Cremades, a prominent Spanish arbitrator, argues that professionalism in arbitration is largely defined by the arbitrator's ability to avoid legal nativism and think internationally: '... the truly international arbitrator is one whose ... professionalism leads his decision to be independent from the "bag and baggage" of the system or national systems from which he originates'.¹¹⁴⁴

¹¹³⁹ Curran 1995, 179 (citation omitted).

¹¹⁴⁰ See, e.g., *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 (refusing recognition and enforcement of an ICC award rendered against the government of Pakistan on the ground that, under the national law of France, the *situs*, Pakistan was not a party to the arbitration agreement). One legal basis for such decisions is New York Convention art V(1)(a), which provides that awards may be refused recognition and enforcement if they are invalid under the law of the country where the award was made.

¹¹⁴¹ Cf Grigera Naón 1999, 118-119.

¹¹⁴² Rogers 2005, 958-959.

¹¹⁴³ Garth 1997, 10-11.

¹¹⁴⁴ Cremades 1999, 165.

Two other characteristics shared by international arbitrators are that they tend to speak English plus at least one other language fluently¹¹⁴⁵ and that they have lived in two or more countries. Indeed, such a background is becoming an informal requirement for entering the field. For example, Baker & McKenzie, a large international law firm, boasts that every member of its 'Global Arbitration Team' has 'either studied or worked abroad.... This is essential for understanding the possibilities offered, the forces working and the pitfalls hidden in international arbitration.'¹¹⁴⁶

Such marketing language should not be taken too literally, but it does indicate the premium that the consumers of ICA services place on linguistic abilities and international experience.¹¹⁴⁷ Along these lines, Grigera Naón praises the ICC secretariat for its multiculturalism, which 'guarantees the even-handed administration of ICC arbitrations,'¹¹⁴⁸ while Kennedy observes that ICC lawyers are likely to be introduced according to their linguistic expertise or disciplinary specialty, while UN staff are identified primarily by their nationalities.¹¹⁴⁹

Just as parties are likely to seek out arbitrators with cosmopolitan backgrounds, lawyers with cosmopolitan backgrounds are more likely to be interested in practicing international arbitration law. As Dezalay & Garth note, many of the key solicitors who developed international arbitration in England 'were ... drawn to ICC-style arbitration because of their own cosmopolitan, hybrid backgrounds—for example, they were born or educated abroad, including especially German immigrants; or they had foreign, typically French, spouses.'¹¹⁵⁰ Such self-selection is likely to increase the homogeneity of international arbitrators over time, strengthening the effects of cultural norms.

3. Arbitrators' use of comparative methodology

The internationalism of arbitrators can also be seen in what Berger called their 'natural comparative approach', that is, the tendency of arbitrators to consider the way different legal systems approach an issue before them, even when it is clear that only one

¹¹⁴⁵ One German practitioner affirmed that '... it is already accepted that English is the language of international arbitration'. A Collins 2010, 16.

¹¹⁴⁶ Wittinghofer 2007, 5.

¹¹⁴⁷ It is arguably even more important for counsel than for arbitrators to possess multicultural expertise, since they will need to persuade arbitrators who come from a variety of legal backgrounds. Jones 2006, 279.

¹¹⁴⁸ Grigera Naón 1999, 139.

¹¹⁴⁹ Kennedy 1997, 586-587.

¹¹⁵⁰ Dezalay & Garth 1996, 136.

substantive law governs the resolution of the dispute.¹¹⁵¹ Indeed, the use of comparative law methodology is an often-cited attribute of arbitral decision-making.¹¹⁵² Glenn even argues that ICA constitutes important evidence that 'comparative legal thought is possible at the level of individual dispute resolution in spite of multiplication of sources and major differences in styles and manner of legal thought.'¹¹⁵³

The US Supreme Court has written of the difficulty that courts experience in 'conducting complex exercises in comparative law' in order to determine whether 'the law applied by the alternative forum is as favorable ... as that of the chosen forum'.¹¹⁵⁴ Admittedly, arbitrators do at times make a hash of national laws with which they are unfamiliar.¹¹⁵⁵ In general, however, international arbitrators are more likely than judges to be familiar with the contract law of multiple legal systems. Almost of necessity, successful international arbitrators must possess such knowledge, since every international arbitration involves parties from at least two different legal traditions.¹¹⁵⁶ Arbitrators' cosmopolitan backgrounds enable them to think in terms of multiple legal systems, and their cosmopolitan attitudes encourage them think in such a manner.¹¹⁵⁷ Thus, arbitrators' use of the comparative method is a manifestation of internationalism.

ICA's philosophical development has been influenced by the comparativist tradition in international law, which stresses the commonalities between legal systems and posits that unification of law will best be achieved by focusing on the law that governs private relationships, rather than relationships between states.¹¹⁵⁸ The Hague Peace Conferences of 1899 and 1907, which led to the creation of the Permanent Court of Arbitration and (indirectly) the Permanent Court of International Justice, were peopled by comparativists who believed in international law—public and private—as a universalist project.¹¹⁵⁹ Several prominent arbitrators first gained a reputation as academic comparativists¹¹⁶⁰ and a

¹¹⁵¹ Berger 1998, 130.

¹¹⁵² See, e.g., Sourgens 2007; Stoffel 2001; Rogers 1998; Kennedy 1997; Siqueiros 1993.

¹¹⁵³ Glenn 2001, 984.

¹¹⁵⁴ *Piper Aircraft Co v Reyno*, 454 U.S. 235, 251 (1981).

¹¹⁵⁵ Perhaps most famously in the *Klöckner* arbitration. See above, Chapter Two, Section C.1.

¹¹⁵⁶ The same is true for counsel. Since arbitration allows the parties to 'dictate the laws and rules governing their disputes ... in order to utilize these choices, attorneys must have a basic understanding of foreign procedures.' Secunda 2006, 709-10 (citation omitted) (arguing that courses in arbitration law should instruct students in a variety of *lex arbitri* models from different countries and in the practices of various major arbitral institutions).

¹¹⁵⁷ Pietrowski 2006, 377; Wilkey 1999, 97.

¹¹⁵⁸ Kennedy 1997, 623.

¹¹⁵⁹ Pietrowski 2006, 373 fn 2.

¹¹⁶⁰ Such as Berthold Goldman, one of the fathers of the modern *lex mercatoria* and, more recently, Klaus Peter Berger and George Bermann.

background in comparative law endows a potential arbitrator with the kind of legal cosmopolitanism that is an element of the emerging international arbitration culture.¹¹⁶¹

International arbitrators regularly employ the comparative method in at least three situations that arise with frequency. First, tribunals that refer to general principles of international law will demonstrate the generality of such principles by citing various legal systems in which those principles appear. Indeed, some argue that the *lex mercatoria* is not a corpus of legal principles at all, but rather a 'methodological approach centred on comparative legal analysis'.¹¹⁶² According to Gaillard, the commentator most associated with this theory, transnational law consists of 'deriving the substantive solution to the legal issue at hand ... from a comparative law analysis which will enable the arbitrators to apply the rule which is the most widely accepted'.¹¹⁶³ Transnational rules themselves 'are understood as a methodology drawing from a number of sources pursuant to the comparative law approach'.¹¹⁶⁴

ICC Case No. 7263 of 1994 provides an example of this phenomenon. The claimant was the Ministry of Defence of an unspecified state referred to as Country X. The respondent, a US military contractor, asserted that the claimant lacked authority to initiate the arbitration because the constitution of Country X required approval of the Ministerial Council and notification to parliament prior to the initiation of arbitrations regarding public or government property. The approval had not been sought, nor the notification made. The claimant maintained that the relevant provision of the constitution required approval only of arbitration agreements, not initiation of arbitrations in individual cases. In siding with the respondent, the tribunal held that this interpretation was 'more consistent with ... the general principles governing international arbitration, and with the "trade usages" which the Tribunal is bound to apply pursuant to article 13(5) of the ICC Rules'.¹¹⁶⁵ The universality of this interpretation was 'confirmed' by the fact that 'Rules similar to the relevant article of the Constitution of Country X are not rare in the constitutional and administrative law of various countries'.¹¹⁶⁶

¹¹⁶¹ See the previous section, on arbitrators' cosmopolitanism.

¹¹⁶² Petsche 2005, 59.

¹¹⁶³ Gaillard 2001, 61.

¹¹⁶⁴ Ibid, 68. See also Glenn 2001, 999 (calling general principles of international law a 'form of comparative legal practice').

¹¹⁶⁵ Award in ICC Case No. 7263 of 1994 (1997) XXII Ybk Comm Arb 92 [9]. Note also the reference to trade usages; for this tribunal, even constitutions must be interpreted in accordance with international commercial practice.

¹¹⁶⁶ Ibid [21].

Second, in cases where the parties disagree as to the applicable substantive law, tribunals will consider both laws. For example, ICC Case No. 6850 of 1992 involved German and French parties. Although the tribunal held unanimously that French law governed the dispute, it also wrote that 'we may not ignore the provisions of German law, as the arbitral clause was concluded by officers of a German company'.¹¹⁶⁷ Such references to inapplicable national laws are partly a function of arbitrators' desire to remain neutral; comparative law 'provides the means to do justice to all legal systems involved'.¹¹⁶⁸ In this regard, party-appointed arbitrators often play the role of a 'translator' of national laws and legal cultures, explaining to the rest of the tribunal the perspective of the party who appointed them.¹¹⁶⁹

Even in cases where it is clear that one party's law applies, tribunals sometimes take pains to demonstrate their sensitivity to the different perspectives that parties from different states might bring to a dispute. In ICC Case No. 9302 of 1998, the dispute concerned a distributorship agreement between German and Colombian parties. The contract contained a choice of law clause selecting German law. Although the tribunal applied German law, and only German law, to resolve the dispute, it also noted relevant aspects of Colombian law to demonstrate to the Colombian party that the tribunal understood its perspective:

It appears to the arbitral tribunal there was a genuine bona fide dissent between the parties. This may be due to a different understanding and practice of commercial contracts, the Colombian party emphasizing the formalities and '*Aussenverhältnis*' [external relationship], while the German party attached more importance to the definition of the contract terms in the '*Innenverhältnis*' [internal relationship]. The lack of interest of the Colombian party for specific contract terms can be explained by the fact that Colombian law provides sufficiently detailed rules for agency/distribution relationships on which the agent/distributor relies.¹¹⁷⁰

Third, comparativism is sometimes forced upon tribunals by the parties, as where the parties agree to the cumulative or concurrent application of multiple laws.¹¹⁷¹ In such cases,

¹¹⁶⁷ ICC Case No. 6850 of 1992 (1998) XXIII Ybk Comm Arb 37 [8].

¹¹⁶⁸ Berger 1998, 131.

¹¹⁶⁹ Lowenfeld 1995, 65. When arbitrators help each other to 'bridge any cultural gap to understand the conduct and arguments' of both parties, this contributes not only to a more acceptable award, but also to a higher quality award.' Paulsson 1997, 15.

¹¹⁷⁰ ICC Case No. 9302 of 1998 (2003) XXVIII Ybk Comm Arb 54 [33].

¹¹⁷¹ Some of the best-known examples are cases decided by the Iran-US Claims Tribunal and the *Eurotunnel* arbitration.

the tribunal must determine what legal principles are common to the laws that are being applied concurrently.

Doing justice to the different legal systems involved in a dispute has a practical as well as a principled foundation. As Berger notes, an arbitral award that considers the national laws of both parties, even if only one of those laws governs the dispute, will be more 'palatable' to the losing party, which will in turn encourage voluntary compliance.¹¹⁷² Arbitral internationalism thus improves participants' buy-in to arbitration, promoting compliance and therefore the legitimacy of a system that cannot on its own force the losing party to comply with awards.¹¹⁷³

¹¹⁷² Grigera Naón 1999, 120; Berger 1998, 132.

¹¹⁷³ Lowenfeld argues that one of the roles of party-appointed arbitrators is to 'translate' legal concepts from the home states of the parties that appointed them into terms that the rest of the tribunal can understand. Lowenfeld 1995, 65.

CHAPTER EIGHT: CONCLUSION

... it is easy to put too much weight on harmonization projects, model laws, and the like. They are surely less causal than their advocates think. Convergence and voluntary actions of private parties are no doubt more fundamental in building a global legal order than drafting and enacting.¹¹⁷⁴

Arbitral awards gradually develop a body of case law that must be taken into account, because it reflects economic realities and complies with the needs of international trade, which call for specific rules, also gradually developed, of international arbitration.¹¹⁷⁵

There is already in ICA a harmonised set of generally-accepted default procedures. The same is not true with respect to substantive law. However, the cultural forces within ICA that created the one are now creating the other.

Culture consists of a shared set of norms that produce reflexive behaviour in members of a community. It both shapes and is shaped by interactions between the members of the community. Culture is distinguished from other factors that shape behaviour, such as economic self-interest or the threat of punishment, in that culture affects the mentality of members of the community, so that they reflexively act in accordance with its norms.

Cultures specific to the legal professions of individual states are well-documented. However, many are sceptical that a culture could emerge in the international sphere. There are good reasons for scepticism: international fields such as ICA are composed of academics and practitioners from a variety of national backgrounds; they have been trained in different legal systems, were moulded by different national cultures and speak different languages. Arguably, they share too little to constitute a community coherent enough to possess a culture. Indeed, this thesis makes no claim that a truly universal global legal order is coming to existence. The at-best slow and halting pace of convergence among distinct national legal

¹¹⁷⁴ Friedman 1996, 77.

¹¹⁷⁵ ICC Case No. 4131 of 1982 [1983] JDI 899 (author's translation).

cultures in transnational arenas such as the European Union testifies to the durability of culture and the difficulties inherent in developing a global legal order.¹¹⁷⁶

However, many of the factors that inhibit convergence between national legal cultures are not relevant within international commercial law. Unlike criminal and family law, commercial law does not implicate religious and moral values; unlike constitutional and administrative law, it is not shaped by concepts of the roles and responsibilities of governments. State sovereignty is rarely at stake in commercial disputes.

Moreover, since differences in national substantive laws impose costs on cross-border commercial relationships, the more that existing national substantive laws fail to harmonise with each other, the more incentive there is for arbitrators to develop a new, global legal order that is inherently uniform. The beginnings of that order can be seen in the ICA culture now coalescing. This culture will shape the development of a coherent substantive law that is both autonomous from national substantive laws and specific to ICA.

The modern international arbitral order was born on 10 June 1958, when the New York Convention was opened for signature. States that ratified this convention pledged to enforce international arbitration agreements and foreign arbitral awards. Without this pledge, arbitration could not have become an important venue for the resolution of cross-border commercial disputes.

Perhaps more importantly, the states that ratified the New York Convention also agreed that their courts would scrutinise arbitral awards only on procedural matters. The architects of the ICA system may have believed that they were creating only a distinct procedure for the resolution of international commercial disputes. Certainly, commentators on ICA have focused on its procedural characteristics.

However, when states agreed that their courts would not supervise arbitral tribunals' determinations of substantive law, they acquiesced to the creation of a system of substantive commercial law separate from the law of any state. The literature on uniform laws frequently cautions that, without appellate courts to enforce uniformity of interpretation, judicial interpretations of the same laws will eventually diverge: 'Uniform application of the agreed rules is by no means guaranteed, as in practice, different countries almost inevitably come to

¹¹⁷⁶ See generally Legrand 1996.

put different interpretations upon the same enacted words.’¹¹⁷⁷ One need not believe that ICA constitutes an autonomous legal order to conclude that an autonomous substantive law will evolve in ICA. When courts relinquished the power to overrule international arbitrators’ divergent applications of national laws, it became inevitable that arbitrators and judges would, over time, arrive at different conceptions of what the law should be.

The case studies set out in Part I support this conclusion. They also give some indication of the substantive law rules that arbitrators prefer and that are coming to be standardised in ICA. But the case studies constitute only anecdotal evidence. Without access to a sample of awards that is sufficiently large and sufficiently representative, the researcher cannot with confidence describe the substantive law rules emerging from those awards.

However, the cultural context within which international commercial arbitrators make their decisions can be described, and can itself yield insights about arbitrators’ decision-making. Based on specific social norms, predictions can be made about specific arbitral behaviours. A holistic sense of culture can be used as a ‘reality check’ for those predictions. Analysis of ICA culture and its various social norms not only explains the outcomes described in the case studies, but also provides a template that will help to explain and predict international arbitrators’ decisions on matters of substantive law.

This thesis focuses on the effects of ICA culture on arbitrators’ substantive law determinations, but the same analysis also explains the standardised procedures that have developed in arbitration. Correspondences between those procedures and the social norms of ICA can be seen in the IBA’s Rules on the Taking of Evidence in International Arbitration (‘IBA Rules’).¹¹⁷⁸ The IBA Rules are flexible, leaving significant scope for the parties to structure hearings according to their own agreement (party autonomy and service of business).¹¹⁷⁹ They draw from both common law and civil law sources to create an autonomous set of evidentiary rules that are specific to ICA (neutrality and internationalism).¹¹⁸⁰ They are intended to make the process of taking evidence quick and

¹¹⁷⁷ Munday 1978, 450. Harmonisation advocates often lament that it is ‘insufficient to merely create and enact uniform instruments’. Ferrari 2005, 233. See also Andersen 2005, 162; Ryan 1995, 117; Honnold 1988, 207.

¹¹⁷⁸ See above, fn 389-390 and accompanying text. While debate exists as to whether evidentiary rules are substantive or procedural, in ICA they are treated as procedure.

¹¹⁷⁹ IBA Rules art 1 (‘The Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other...’)

¹¹⁸⁰ For example, the IBA Rules chart a middle path between the restrictive and expansive document production regimes associated, respectively, with the civil and common law systems. Art 3. For example, they permit cross-examination of witnesses (art 8, a common law tradition) but encourage reliance on documentary evidence (art 4, a civil law tradition). See generally Elsing & Townsend 2002.

therefore cheap (service of business).¹¹⁸¹ The Rules apply only when the parties agree to adopt them (party autonomy, constraints on arbitral authority).¹¹⁸² They were drafted by a working party composed of prominent arbitrators and counsel who competed to be selected to this visible and prestigious IBA committee (competition, arbitrators' multiple roles).

Thus, various social norms of ICA intersected to create a set of harmonised, autonomous procedural rules that enjoy general acceptance. The same process can be seen in the development of a body of substantive law that is closely associated with ICA: transnational commercial law.

Arbitrators often justify their preference for transnational law on the basis that, unlike national laws, it is specifically adapted to international commercial disputes. However, the explanations given for what makes national laws unsuitable for the resolution of international disputes are unconvincing. Petsche sums up the arguments made by various arbitrators:

As to the internationality of international commercial transactions, it also generates specific needs. First of all, domestic contracts do not (classically) give rise to a conflict of laws ... [while] in an international contract ... the parties' freedom to select the applicable law is ... of fundamental importance. Moreover, domestic contracts do not generally call for dispute resolution through arbitration.... The internationality of a contract also raises the question of currency of payment.¹¹⁸³

Petsche's first argument—regarding choice of law—says nothing about the advantages of transnational substantive law over domestic substantive law; his second—that domestic contracts do not usually contain arbitration clauses—begs the question of what law arbitrators would apply if the dispute were arbitrated; and his third—the question of currency of payment—has nothing to do with any applicable procedural or substantive law. The commitment that many international arbitrators show to transnational law is therefore best explained not by the arguments that arbitrators themselves have proffered, but instead by arbitrators' normative attachment to transnational law, in particular the ways that it exemplifies internationalism and neutrality.

¹¹⁸¹ The IBA Rules admonish the tribunal to establish, in consultation with the parties, an 'efficient, economical and fair process'. Art 1. They also encourage the wide use of witness statements in order to reduce the need for live witness testimony and thereby shorten hearings. Art 4.

¹¹⁸² Art 1.

¹¹⁸³ Petsche 2005, 17 (citations omitted).

These norms indicate that transnational law is likely to continue to enjoy wide acceptance among international arbitrators. This acceptance might involve arbitrators making a *voie directe* for some body of transnational law instead of a national law (when the parties have not made a choice of law). When parties do choose to be governed by a national law, arbitrators will likely still refer to transnational principles to fill gaps in the applicable national law or to interpret it in accordance with international standards. They may also (rarely) choose transnational law even when the parties agree on a national law.

But these transnational principles are unlikely to take the form of *lex mercatoria*. Contrary to the apparent expectations of many arbitrators, consumers of ICA services—businesses engaged in cross-border commerce—have shown that they do not want their contracts to be governed by ‘*lex mercatoria*’ or ‘general principles’. Only a tiny fraction of choice of law agreements choose these. In particular, it appears that parties reject free-floating transnational principles because of their unpredictability.

Transnational commercial law has evolved in response to this concern. Arbitrators seldom argue any more for the application of *lex mercatoria* or general principles under those labels. However, they do frequently apply codified instruments that embody the same transnational principles, like the PECL, CISG and UNIDROIT Principles.¹¹⁸⁴ The increased predictability that comes with codification seems to have satisfied commercial parties, which prefer the codified to the uncoded versions of transnational rules. In one survey, a majority of corporate counsel reported that they never conclude choice of law agreements that refer to ‘general principles of law, commercial practices or fairness and equity’, but only a minority never refer to codifications like the UNIDROIT Principles or INCOTERMS.¹¹⁸⁵

Accordingly, the number of awards that expressly apply ‘general principles’ or ‘*lex mercatoria*’ is likely to continue to dwindle, but awards applying international contract law instruments are likely to become more numerous. At the same time, arbitrators are likely to continue to justify references to a given instrument on the basis that it expresses general principles or international usages. Since the arbitral institutions share many of the priorities of arbitrators—in particular, competition with other forms of dispute resolution—awards that apply transnational law should continue to account for a disproportionate share of the

¹¹⁸⁴ This can be seen in the way that arbitrators characterise the UNIDROIT Principles as part of, or an expression of, the *lex mercatoria*. See, e.g., Brower & Sharpe 2004, 210 (stating that the UNIDROIT Principles have altered the perception of the *lex mercatoria*, so that they are seen simply as general principles in codified form).

¹¹⁸⁵ W&C/QMUL 2010, 15.

published awards. In turn, published awards that apply international contract law instruments will be more likely to be cited by subsequent tribunals.

Among the international contract law instruments, arbitrators are most likely to prefer the UNIDROIT Principles, which are the most 'universal' of the existing instruments. The CISG, which deals only with sale of goods contracts, is limited in scope, and the PECL, which claim only to be pan-European, are geographically limited. The UNIDROIT Principles therefore best exemplify internationalism. They are also the least likely to require gap-filling, which makes decisions based on them more predictable, and they are easier to update than the CISG, which can only be amended or replaced by a diplomatic convention. One might also expect to see increasing numbers of scholarly publications by arbitrators about the international contract law instruments, as a by-product of arbitrators' internationalism and competition for business.

ICA procedures have harmonised toward a position of greater flexibility. In the areas that the parties can control, they are likely to want flexible rules that give them the maximum possible choice. Deference to party autonomy and a desire to serve their clientele leads arbitrators to defer to the parties' chosen procedures. If the parties do not choose, arbitrators are likely to adopt procedures consistent with ICA norms, such as efficient conduct of hearings and confidentiality of arbitral awards and even the existence of proceedings.

However, where party autonomy cannot be allowed to intrude—application of the substantive law to the facts of the dispute—commercial parties are likely to prefer bright-line, non-discretionary rules that will produce predictable outcomes. If the outcomes in arbitration are predictable, then parties will be able to plan and price their conduct more accurately and, when disputes arise, will be able to settle them more efficiently.

The history of transnational law makes clear that commercial parties have a significant interest in the stability and predictability of substantive law. The entire harmonisation movement is predicated on the need for predictability, which also helps to explain the continued dominance of national laws in choice of law agreements. By the same token, the history of ICA indicates that, contrary to the claims of some international arbitrators, parties do not prefer adjudication according to amiable composition or broad, equity-based rules. In every area of substantive contract law, therefore, ICA culture is likely to push arbitrators to develop and adopt rules of substantive law that leave less and less scope for discretion.

But which rules, specifically, will those be? Extrapolation from the evolving social norms of ICA can provide insights into arbitrators' preferred contract law doctrines, and thus enable predictions about the content of future versions of existing international contract law instruments or of new instruments that may replace or supplement the current ones.

Arbitrators' identification with business attitudes and interests—their 'commercial mentality'—means that trade usages are likely to continue to play a significant role in ICA jurisprudence. Accordingly, contracts will increasingly be interpreted by arbitrators in light of prevailing usages, although deference to party autonomy would suggest that, if express contractual terms exclude the application of usages, arbitrators will respect those terms.

In addition, new sets of codified rules based on international commercial practices, like the INCOTERMS, are likely to be drafted and, if promulgated, will be relied upon by arbitrators even in cases where the parties do not expressly invoke them.¹¹⁸⁶ More broadly, contract law rules derived from commercial practice are likely to be preferred.¹¹⁸⁷ For example, arbitrators are likely to gravitate toward rules based on good faith or fair dealing, defined according to accepted practices in specific industries. Parties will want to be judged according to commercial standards with which they are familiar, so arbitrators are likely to develop default rules that embody those standards.

Arbitrators are likely prefer rules that permit them to base their decisions on the parties' subjective intentions. Deference to party autonomy and a commercial mentality are likely to lead arbitrators away from exclusionary interpretive rules like the parol evidence rule, rules of formal validity and privity rules that render unenforceable obligations owed to third parties. Indeed, the CISG, UNIDROIT Principles and PECL all omit writing requirements, the parol evidence rule and the bar on third party beneficiaries. When the parties do not make a choice of law, arbitrators are unlikely to select laws or rules of law that contain such restrictive rules, and are likely to adopt codified international instruments that eschew them.

¹¹⁸⁶ See Friedman 2001, 356-357. Friedman argues that sets of contractual provisions with quasi-legal power, like the INCOTERMS, do not on their own constitute autonomous norms created within the international economy: 'In the end all such customs and practices have to be validated somehow by national courts applying what they consider to be national law or rules that national law recognizes—or, as is often the case, the law that the parties to a contract may have stipulated.' ICA can also perform the validating function that Friedman here assigns to national courts.

¹¹⁸⁷ This development is akin to what has been called the 'incorporation strategy' pursued by the drafters of the UCC article 2. Bernstein 1999, 710.

In addition, arbitrators are likely to prefer rules that permit parties to engage in a wide range of self-help remedies without prejudicing their rights to sue under the contract. Self-help remedies, such as price reduction and suspension of performance, are simple and intuitive and often are economically efficient. Businesses tend to prefer them, so arbitrators are likely to promote them. Along the same lines, complex or lengthy procedures to terminate contracts, such as the *mise en demeure* and *action en résolution* process in France, are unlikely to find their way into arbitral awards or codifications of transnational law.

In all these areas, arbitrators' decisions are likely to become increasingly consistent with each other because that is what the parties want. In national legal systems, consistency is promoted by hierarchical structures of appellate courts and doctrines of precedent. The ICA system lacks both appeals and *stare decisis*, and arbitral tribunals are created *ad hoc* and dissolve as soon as the dispute is resolved. Nevertheless, arbitrators cite published awards; they write and rely on scholarly commentaries; they disseminate ideas through participation in conferences and working parties that draft codified sets of rules. 'Even in the absence of a formal system of *stare decisis*, and despite the confidential and "private" nature of international arbitration, arbitration proceedings generate procedural rules and practices, and to a lesser extent substantive rules, that serve as precedent for future arbitrations and beyond.'¹¹⁸⁸

Informally, haltingly, incompletely, but inexorably, international arbitrators are establishing a set of contract law principles of global applicability.¹¹⁸⁹ They are doing so without the need for diplomatic conferences or scholarly drafting parties. And they are doing so along patterns that are predictable according to the social norms that make up the incipient culture of international commercial arbitration.

¹¹⁸⁸ Rogers 2005, 999-1000.

¹¹⁸⁹ Cf Friedman 1996, 75 (noting that transnational norms cannot travel or evolve by themselves, but are spread by human agents).

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