COMPLEX ARBITRATION

THE LIMITATIONS OF A NEO-LIBERAL INSTITUTION

DISSERTATION SUBMITTED BY

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of

Sidney Sussex College

IN PARTIAL SATISFACTION OF THE REQUIREMENTS FOR THE

DEGREE OF

DOCTOR OF PHILOSOPHY

OF THE

UNIVERSITY OF CAMBRIDGE

SEPTEMBER 2003
To my mother and my father, my first stroke of luck, who, each in their way, gave me all the love and security that a child could wish for.

&

to my brother, my first companion, who did what he could to hold the fort.
'When an adherent of a systematic faith is brought continuously in touch with influences and exposed to desires inconsistent with that faith, a process of unconscious cerebration may take place, by which a growing store of hostile mental inclinations may accumulate, strongly motivating action and decision, but seldom emerging clearly into consciousness. In the meantime the formulas of the old faith are retained and repeated by force of habit, until one day the realization comes that conduct and sympathies and fundamental desires have become so inconsistent with the logical framework that it must be discarded. Then begins the task of building up and rationalizing a new faith.'

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Complex Arbitration

The Limitations of a Neo-liberal Institution

by

Karim Hafez

This dissertation deals with the situation in which an arbitration user neglects to create a procedural setup in which his related substantive rights and obligations under one or more contracts could be settled consistently—then discovers that the law will not mitigate his improvidence. Much has been written on how it might be possible to ensure inter-award harmony in such circumstances. And common wisdom has it that this is doable either by contract or not at all. This dissertation may have originated in the (now apparently naïve) belief that the thing simply had to be done, regardless of what the parties did or neglected to do. But as study of the subject progressed, the focus of enquiry shifted to a puzzling feature of the literature on the subject. On the one hand, writers agree that the usual position of the arbitration clause among the tail-end boilerplate provisions in a contract very nearly represents its importance to the parties, who, accordingly, rarely give its detail more than cursory attention. On the other hand, writers—sometimes the same ones—after sustained good-faith attempts at finding an extra-contractual solution to the problem of complex arbitrations, declare that respect for private will—the selfsame will they moments earlier had conceded was purely formal—put paid to their efforts. This disjunction between premise and conclusion, between legal logic and social reality, seemed to have gone largely unobserved. No-one, it seems, paused to consider the curious circumstance of a counterfactual proposition—party control of procedural design in arbitration—could preclude solving a problem that all agree calls for a solution. Conceiving of complex arbitration as a practical field of enquiry devoid of theoretical interest has arguably left the anomaly unexamined.

This dissertation presents a threefold argument. First, nothing indeed more than imperfect palliatives is possible before the problem of inter-award conflict. Second, contrary to much writing on the subject, neither formal argument nor technical considerations alone could explain why that is so. Third, to the question what explains arbitration’s inability to secure a social objective like inter-award harmony, this dissertation points to what it claims are arbitration’s neo-liberal commitments.
Three of this dissertation's features invite prefatory comment: its sources; its precedents; and its system of citations.

First, this dissertation relies almost exclusively on French and English-language material, which material had the conclusive advantage of accessibility, physical as well as linguistic. Such Arabic literature on arbitration as I could locate, I have found largely irrelevant to my subject matter. Being yet without German, I have not been able to benefit from Konstadinos Massuras's Kogmatische Strukturen der Mehrparteienschiedsgerichtsbarkeit [Dogmatic Structures of Multiparty Arbitration]. So far as a ten-page concluding summary (which I read, in translation) could indicate a book's content, it would seem that Kogmatische Strukturen focuses primarily on German law, and is content to treat its subject matter from a purely technical and formalistic standpoint.

Second, although it would be difficult to overestimate our analytical differences, I have found Jean-François Bourque's doctoral dissertation, Le Règlement des litiges multipartites dans l'arbitrage commercial international (University of Poitiers, 1989) by far the most useful reference on the subject. Klaus-Dinkar Mapara's doctoral dissertation, Les 'tiers-partenairs' en arbitrage – Essai sur les litiges multi-partites en droit français et en droit allemande (University of Montpellier I, 1987), I have found helpful on some fine points of German law. The only other monographic treatment of complex arbitration of which I know, Isaak Dore's Theory and Practice of Multiparty Commercial Arbitration (1990), investigates its subject matter within the limited, as well as limiting, context of the UNCITRAL Rules. Structured as a running commentary on those rules, Theory and Practice lacks a thesis.

A bibliography-based system of citations has been adopted. Publications are identified by author's name and year of publication. Authors' names are given as they appear in the relevant publication. When the same author has used different name forms in different publications, the fuller name is given throughout. When an author has published several works in the same year, letters are added after the year to distinguish the works. Works commissioned by institutions are ascribed to those institutions. But
when an editor has nevertheless been identified on the title page, the ascription is to the editor.

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

This dissertation is my own work and contains nothing which is the outcome of work done in collaboration with others, except as specified in the text and Acknowledgements.
ACKNOWLEDGEMENTS

It may have become routine to thank one's supervisor, but there is nothing trite about my debt to mine. Professor James Crawford has given me all that a doctoral student could possibly wish for. Every time I thought I knew how far he would go to help, he would do something that proved I had underestimated his commitment. If his critique was sometimes merciless, he was always willing to be convinced. If he was exacting in his standards, he was unfailingly supportive. His practical experience of international dispute settlement is vast. And nothing of what I have just said begins to express my gratitude to him.

Lucky is the doctoral student who gets to work with one eminent scholar: I have had the exceptional good fortune of working with two. Prior to his departure to Oxford, Professor Vaughan Lowe has literally shown me what it is to do research. My obligation to him, pedagogic as well as pastoral, goes beyond anything I could express here.

To Professors Roberto Mangabeira Unger and David Kennedy, I owe a debt of a different kind, though no less heartfelt. During a momentous year at the Harvard Law School, each in his way has introduced me to an analytical style and an approach to legal scholarship quite different from anything I had hitherto experienced. If the number of references to their published work in this dissertation does little justice to their influence on its content, it is because I have so far experienced them more as teachers than as scholars.

I also owe grateful thanks to Dr. Mohamed Aboul-Enein (for access to the resources of the Cairo Regional Centre of International Commercial Arbitration); to Professor Omaia Elwan (for facilitating a research visit to the Institut für Ausländisches und internationales Privat- und Wirtschaftsrecht, Heidelberg); to Dr. Cécile Legros (for the manuscript of her dissertation); to Professor Allain Philip (for electronic copy of his report on complex arbitration to the Institut de droit international); to Walid Hegazy (for access to valuable office space at Harvard); and to Audley Sheppard (for making possible a longish useful stint at the arbitration department of Clifford Chance, London).

Monica Alessi and Bahaa Ali-Eldean know what I owe them.
Research on this dissertation could not have been undertaken without the generous support of several institutions. I am beholden to the Cambridge Overseas Trust, to the Committee of British Vice-chancellors and Principals, to the Master and Fellows of Sidney Sussex College, Cambridge, to the Arab Student Aid International (New Jersey), and to the partners at Shalakany Law Office, Cairo. It all, however, began with a one-year Chevening Scholarship, for which I shall ever remain indebted to the Foreign and Commonwealth Office and to the British Council in Cairo.
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<td>AC</td>
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<td>Italian Arbitration Association</td>
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<td>RSC</td>
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| RUAA         | Revised Uniform Arbitration Act 2000, uniform legislation adopted by the National Conference of Commissioners on Uniform State Laws, in its 109th Annual Conference, held in St. Augustine, Florida, between July 28 and August 4,
2000; available at the official NC website at <http://www.law.upenn.edu/bll/ulc/uarba/arb00ps.htm>

Stockholm Chamber of Commerce
Salvage Rules of the Society of Maritime Arbitrators Inc.,
Arbitration Rules of the Society of Maritime Arbitrators Inc.

Sydney Maritime Arbitration Rules and Terms, 1991

*Tribunal de Grande Instance*

United Nations Commission on International Trade Law
UNCITRAL Notes on Organizing Arbitral Proceedings, adopted in Vienna in 1996

UNCITRAL Arbitration Rules, 1976

WIPO Rules on Organizing Arbitrations, 1994

Westlaw


The Rules of international Arbitration of the permanent Arbitration Court at the Croatian Chamber of Commerce, 1992

*Zivilprozeßordnung*

International Arbitration Rules of the Zurich Chambre of Commerce
I. Inter-Award Conflict: An Overview

This dissertation treats a subject customarily, if inexactl y, called ‘multi-party arbitration.’ The *Oxford English Dictionary* defines ‘multi-party’ as a thing ‘[c]omprising several parties or members of several parties.’ Correspondingly, ‘multi-party arbitration’ denotes arbitral proceedings involving several parties. And indeed the expression is sometimes used in this sense. Compared to two-party proceedings, the key difficulty that such proceedings present lies in securing equal procedural treatment to all involved, e.g., as regards arbitrator choice.

Increasingly, however, the expression ‘multi-party arbitration’ indicates a more general concept and a more stubborn difficulty. The concept is claim-relatedness, the difficulty the risk that related claims might go to different arbitrators, or to the same arbitrators in the context of different proceedings, and hence result in conflicting awards. According to this usage, the problem of multi-party arbitration is that of any arbitration user who neglects to create a procedural setup in which his substantive rights and obligations under one or more related contracts would be settled consistently, and then discovers that the law will not mitigate his improvidence. The classic example is the contractor who neglects to agree with both employer and sub-contractor that disputes affecting all three of them should go, for instance, to three-way arbitration, and following separate arbitrations discovers that he has lost to both on mutually exclusive grounds. Other back-to-back classics include: traders sandwiched between buyers and

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2 See, e.g., Devolvé (1993); Schwartz (1993).


4 For an example of decisional inconsistency that apparently bankrupted (the report is not entirely clear) the party-in-the-middle, see *Focke and Co Ltd v. Thomas Robinson Sons and Co Ltd* (1935) 52 Lloyd’s Rep. 334; and *Focke and Co Ltd v. Hecht* (1938) 60 Lloyd’s Rep.
sellers; time charterers caught between vessel owners and voyage-charterers; and insurers squeezed between insured and re-insurers. But the concept itself covers the circumstance of all who, without adequate provision for claim concentration and regardless of contractual configuration, refer to arbitration differences that eventually prove related. Potentially, this is every arbitration agreement. Inter-award conflict, not equal treatment, is then the greater worry.

Calling this second situation 'multi-party arbitration' is inexact, since two two-party references can raise consistency issues. If the prefix 'multi' had to stay, it would have to


5 See, e.g., The 'Kostas K.' [1985] 1 Lloyd's Rep. 231 (QB 1984) (head charterer, having signed back-to-back charter parties with vessel owner and sub-charterer, lost to both on mutually exclusive grounds (but later appealed successfully), even though the two arbitrations had been heard together and the same evidence had been admitted in each case). See also The 'Tropicane,' [1981] 2 Lloyd's Rep. 159; Aquator Shipping Ltd v. Kleimar NV ('The Capricorn I') [1998] 2 Lloyd's Rep. 379 (QB 1998).

6 Examples include joint venturers in their relationship with one another, in their relationship with the joint venture (assuming the venture acquires legal personality under the governing law), and in their relationship with third parties. In each of these cases, the reliance requirement is satisfied to a more or lesser degree, albeit in a manner subtler than in the examples given in the text.

7 In 2003, the ICC Secretary General reported a significant increase in the institution's complex arbitration caseload. Of the 185 multiparty cases filed with the ICC in 2002, 18.4% involved multiple claimants and multiple respondents, 30.8% involved multiple claimants, and 50.8% involved multiple respondents. Altogether, the percentage of multiparty cases filed with the organisation over the last ten years has climbed from 20.4% to 31.2%. One fifth of the organisation's current caseload involves multi-contract claims. See Whitsell & Silva-Romero (2003) 7 (notes 2, 3, and 4).
qualify ‘claim,’ not ‘party.’ In any event, this dissertation uses the term ‘complex arbitration.’

Traditionally, writers have sought to reduce complex arbitration to what they considered its essential characteristics. Taking as their guide the contractual matrix underlying related references, they distinguished between a relatively trouble-free scenario where several parties sign the same arbitration agreement, and another considerably more problematical one involving different arbitration agreements. When conditions are so variable and episodes so unpredictable, even the best taxonomy will seem reductive. But this one is especially inadequate. On the one hand, it claims to focus on contractual configuration, and thus pays no attention to structure of references; e.g., it does not distinguish between single- and multiple-reference situations. On the other hand, it gives too reductive an account of the contractual configuration that it claims as its focus; e.g., it does not differentiate between same- and different-party agreements.

A clearer and more useful taxonomy would operate two levels of distinction. The first would distinguish between single- and multiple-reference situations; the second would distinguish between several partial and combinable multiple-reference scenarios in which contractual configuration combines with procedural structure.

First, there are same-contract/same-party references. Typically, these involve either (a) claimants who, for technical or strategic reasons, decide to prosecute same-contract claims separately, or (b) respondents who, for similar considerations, institute fresh

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8 Other complements are usually under-inclusive. See, e.g., Leboulanger (1996) (‘Multi-Contract Arbitration’).
11 For a broadly similar taxonomy employing a different nomenclature, see Grigera Naón (1994) 690. See also Mustill (1991) 7.
12 For clarity’s sake, these scenarios now appear in their simplest form, assume a compromissory clause (rather than a compromis), and refer to contracts whose parties did not cross-reference their arbitral undertakings clauses so as to give all signatories the right and, upon request, the obligation to participate in references initiated under any.
proceedings against the original claimants (rather than simply counter-claiming). Second, there are same-contract/different-party references. For instance, A, B, and C sign the same contract. A then claims against B in reference P; whereupon B claims against C in reference Q. Third, there are different-contract/same-party references. For instance, A and B conclude two contracts: contract X for the sale of plant, and contract Y for its instillation. A then sues B in reference P for breach of contract X; whereupon B responds by seeking monies due under contract Y, in reference Q. Fourth, there are different-contract/different-party references. For example, A and B sign contract X; and B and C sign contract Y. A then starts reference P against B; whereupon B starts reference Q against C.13

The risk that these scenarios present originates in two related developments characterising modern arbitral practice. The first, a shift from consent to contract (in particular, from the ex post to the ex ante arbitration agreement) as the practical basis of modern arbitration, altered the nature of the arbitral process. From a quasi-legal institution animated by a genuine desire to have well-defined disputes settled by specific persons enjoying the parties’ mutual confidence, this became a legalistic process allowing users irrevocably to submit future indeterminate disputes to the decision of persons latterly chosen.14 When arbitration served to settle disputes whose parties agreed ex post facto they should go to third-party determination, few would have agreed to arbitration in circumstances involving a risk of double liability. But when (as now) the vast majority of arbitration agreements are in clause-form, and hence agreed with only a vague idea of

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13 For analytical purposes, the case would be no different in this scenario if both the agreement and the resulting references were such that no single party were involved in the references, that is, if contract X had been between A and B, contract Y between C and D, and the references, therefore, instead of A-B / B-C, were A-B / C-D. In both cases, both the agreements and the references would involve different-party constellations, which is what gives the scenario its distinctiveness.

14 See Craig et al. (2000) 38 (conceding that ‘the issue of consent may be more controversial [in case of an arbitration clause] than in the context of a special submission.’) How much arbitration’s consensual ethos has been whittled away can be seen in the following remark, ‘If parties insert a requirement of mutual consent, they no longer have an arbitration.’ Ibid., at 128 (Emphasis added.)
potential disputes and disputants, arbitral undertakings often turn out to exclude parties and claims that a *compromis* would doubtless have included.\textsuperscript{15}

The second development, the increased deference to arbitration agreements, means that neither courts nor arbitrators can now mitigate the parties’ failure to anticipate claim relatedness in the way they once did. England\textsuperscript{16} is a good example of this development.

Until 1975, English courts would sometimes refuse to stay actions brought in violation of arbitration agreements that covered only part of a larger dispute.\textsuperscript{17} But when

\textsuperscript{15}On the dominance of the *ex ante* clause today, see Oppetit (1998) 98; Craig *et al.* (2000) 37. Of course, submissions, too, might exclude disputes and parties that ought properly to be included. But this is much less likely, especially when (as is usually then the case) expert advice is involved.

\textsuperscript{16}For brevity, ‘England,’ ‘English law,’ and derivative expressions, are used throughout, instead of ‘England and Wales,’ ‘English and Welsh,’ and so on.

\textsuperscript{17}See, e.g., *The “Eschersheim”* [1974] 2 Lloyd’s Rep. 188 (QB 1974), aff’d. [1976] 1 Lloyd’s Rep. 81 (CA, 1976); *Taunton-Collins v. Cromie* [1964] 1 WLR 633 (CA); *The “Pine Hill”* [1958] 2 Lloyd’s Rep. 146 (QB 1958). But see *Bulk Oil (Zug) A.G. v. Trans-Asian Oil Ltd* [1973] 1 Lloyd’s Rep. 129 (an infringing counterclaim stayed; defendants had only themselves to blame for agreeing different jurisdictional provisions). For non-English examples, see *Prince George (City) v. McElhanney Engineering Services Ltd.*, repr’d in [1997] *Arb. & Disp. Resol. L.J.* 315 (an arbitration agreement became inoperable if a multi-party situation arose in which further litigation or further arbitration proceedings before another arbitral tribunal would be needed to dispose of the remaining issues) (Sup. Ct. BC, 1994) (Can.); *SOPAC Italiana Sp.A v. Bukama GmbH and FIMM Sp.A*, repr’d in (1977) 2 *Yearbook* 248 (arbitration was ‘null, void or incapable of being performed’ where only some of the parties had agreed to arbitration; multi-party litigation ordered instead) (Trib. Milan 22 March 1976); *Indian Organic Chemicals Ltd v. Chemtex Fibres Inc.* (US), [1978] 65 *All India Reporter*, Bombay, s. 106 (HC Bombay 1977) (court refusing to defer to agreement to arbitrate disputes under one of three related agreements, the other two contemplating arbitration in London; instead, itself deciding the dispute, *inter alia*, because it is preferable to deal with all of the issues in one procedure). See also *WC Thomas & Sons Pty Ltd v. Bunge (Aust) Pty Ltd* [1974] *VR* 615 (Austl.); *Colandira v. Government of Malta and Ambassador of Malta in Italy*, repr’d in (1989) 14 *Yearbook* 682 (Trib.)
the *Arbitration Act 1975*\(^{18}\) gave effect to England’s international obligations under the New York Convention,\(^{19}\) English courts, when seized of an action in a matter in respect of which the parties had concluded a valid arbitration agreement, were required, upon request, to stay the action, regardless of substantive (including conflict) implications.\(^{20}\) This position the *Arbitration Act 1996* has since confirmed.\(^{21}\)

Naples 19 May 1985). But see *Quantas Airways Ltd v. Dillingham Corporation* [1985] 4 NSWLR 113, 118 (Com. L. Div., 1985). Incidentally, refusal to stay an infringing action did not usually mean (at least in England) restraining a parallel arbitration, *unless* a restraining order caused the claimant no injustice, or if pursuing the arbitration were ‘oppressive, vexatious or an abuse of the process of the court.’ See, e.g., *University of Reading v. Miller Construction Ltd* 75 BLR 91 (CA 1994); *The 'Oranie' and The 'Tunisia'* [1966] 1 Lloyd’s Rep. 477 (CA, 1966).


\(^{19}\) The reference in the text is to the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958* (signed in New York, on June 10, 1958, repr’d in (1959) 330 UNTS 38, no. 4739). The change the Convention wrought, though eventually considerable, was gradual. As late as 1974, only 42 of the 133 states presently bound by the Convention had ratified it. Of the 30 OECD member-countries, only France and (former) Czechoslovakia had ratified by 1959; ten more did so in the period 1960-65; two more (including the US in 1970) during 1966-70; seven (including the UK in 1975) in the period 1971-75; and another seven from 1976 until now (2003). (Iceland is the only OECD countries that has neither signed nor ratified the Convention.) Source: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/part1/chapterXII/treaty1.asp> (visited 30 March 2003).

Formerly, too, arbitrators, when appointed to related references (a frequent occurrence in maritime arbitration, for example), would sometimes join hearings, and then publish a single award dealing with all the matters in dispute. But this, the courts now said, arbitrators had no right to do. First, The Takamine decided that absent special agreement, an arbitrator who enters on two related arbitrations must publish separate awards. Next, The Eastern Saga decided that, however convenient, the hitherto assumed power to consolidate or concurrently to decide related arbitrations, if not expressly agreed, did not exist. Both decisions left parties to shift for themselves.


See Arbitration Act 1996, ss. 1(c), 9(4). The discretion to refuse a stay in case of domestic agreements survived right up to 1996. Indeed, the Arbitration Act 1996 recognises to courts the power to refuse to stay actions brought in breach of a domestic arbitration agreement where ‘there are sufficient grounds for not requiring the parties to abide by the arbitration agreement.’ But the relevant provision, section 86(2)(b), has not been brought into force. See (Commencement No.1) Order 1996 (SI 1996 No. 3146) art. 3. Fear of violating Britain’s obligations under article 6 of the Treaty of Rome (the obligation not to discriminate on grounds of nationality) is the most likely reason why section 86 remains in abeyance. See Craig et al. (2000) 537–38, 541.


See Oxford Shipping Co Ltd v. Nipon Yusen Kaisha, The 'Eastern Saga' (No. 2), [1984] 3 AllER 835, 842 (QB 1984) (‘The concept of private arbitrations,’ the court said, ‘derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between them. It is implicit in this that strangers shall be excluded from the hearing and conduct of the arbitration and that neither the tribunal nor any of the parties can insist that the dispute shall be heard or determined concurrently with or even in consonance with another dispute, however convenient that course may be to the party seeking it and however closely associated with each other the disputes in question may be.’) For recent confirmation of this holding, see Aquator Shipping Ltd v. Kleimar NV (‘The Capricorn I’) [1998] 2 Lloyd’s Rep. 379 (QB 1998).
Compare this with complex litigation. In courts, litigants have access to a raft of forum concentration procedures that help avoid substantive conflict: consolidation, impleader, intervention, concurrent hearings, counter-claims, cross claims, consolidated appeals, discretionary stays, and class actions.\textsuperscript{25} In arbitration, these procedures require specific agreement, of course. But considering the dominance of the \textit{ex ante} clause, such agreement is also rarely in place when needed.

Among specialists, arbitration’s third-party handicap, while notorious,\textsuperscript{26} elicits different reactions. Some maintain that it will prove arbitration’s undoing;\textsuperscript{27} others take it in their stride.\textsuperscript{28} The first group argues that such today is the level of interdependence in the economy that even the simplest most mundane dispute has substantial ramifications for third parties and other contractual relations. Whether because increasing specialization has many today cooperating on tasks that only one party might have previously performed; or because technology now renders feasible projects whose complexity and magnitude require co-operation on an ever-grander scale; or because (for tax and liability reasons) business arrangements are increasingly complex, economic structures, and consequently economic disputes, are everyday more complex. Arbitration could help settle these disputes consistently or lose relevance.\textsuperscript{29}

\textsuperscript{25} For examples of forum concentration measures, see \textit{Fed.R.Civ.Proc.} 42(a) (US); 28 USC s. 1404 (US). See also \textit{Connecticut General Life Insurance Co v. Sun Life Assurance Co of Canada}, 210 F3d 771 (7th Cir. 2000).

\textsuperscript{26} See Mustill & Boyd (1989) 143 (classing it among the institution’s ‘weakest features’); Okekeifere (1998) 96 (putting it down among arbitration’s ‘major drawbacks’).

\textsuperscript{27} See \textit{infra} note 29.

\textsuperscript{28} See \textit{infra} note 30.

\textsuperscript{29} See, e.g., Okekeifere (1998) 99 (‘Specialisation of persons and even organisations and the rising complexities of modern business ensure that no important contract remains strictly an affair between just two persons or entities, \textit{i.e.}, without involving a third party in one respect or another. … By being unable to find a way to accommodate third party interests, at a time when third parties are getting more involved in business and in many of the disputes that arbitration is constantly called upon to resolve, arbitration is somewhat stuck in the past!’); Bourque (1989) XVII (‘Doit-on parler de crise de l’arbitrage commercial international alors que ce procédé atteint les plus hauts sommets? Le terme n’est peut-être pas
The counter-argument says the risk of substantive conflict among related disputes is a reality of commercial life, unavoidable whenever different aspects of an economic relationship end up partly before the courts, partly before tribunals, or simply end up before courts in different jurisdictions.\(^3^0\)

This last argument is true up to a point. First, courts can sometimes mitigate award-judgment conflicts, e.g., by staying actions pending related arbitrations,\(^3^1\) or by

trop fort. \emph{La question des litiges multipartites se présente en effet un peu comme le vert dans le fruit. Si elle est réglée rapidement, l’arbitrage ne s’en porterà que mieux. Sinon, l’arbitrage est en situation de crise dans la mesure où il est incapable de résoudre une catégorie nouvelle de contentieux qui ne peut que créer en importance.}; Mapara (1987) 8 ("c’est pour l’arbitrage une question de vie ou de mort, puisqu’avec chaque affaire multipartite dans laquelle l’arbitrage était inadapté, la cause de l’arbitrage perd l’avance gagné sur les autres modes de résolution des litiges.") Cf. Böckstiegel (1995) 81 (predicting multi-party problems will only get worse).

\(^3^0\) See, e.g., DAC (1990) 390 ("[I]t must be conceded straightforward that consolidation has the attraction of avoiding inconsistent findings of fact and law in separate but related proceedings and, more importantly, the attraction of avoiding the time and expense of separate but related proceedings. These are important considerations. On the other hand, they ought not to be overemphasized. After all, it is a common feature of commercial life that one dispute is governed by an arbitration clause, while another related dispute is not, thereby inevitably involving concurrent court and arbitration proceedings"); \emph{World Pride Shipping Ltd v. Daitichi Chuo Kisen Kaisha, The Golden Anne,} [1984] 2 Lloyds Rep., 489, 497 ("[T]he inconvenience of multiple arbitrations, though it exists, can be exaggerated. The problem is not a new one; and London arbitrators have evolved ways of reducing the inconvenience, and limiting the risk of conflicting decisions by hearing arbitrations together, or one immediately after the other. True this pre-supposes co-operation between the parties. But once my decision is known, I see no reason why at least some degree of co-operation should not be forthcoming.") See also \emph{Property Investments (Development) Ltd v Byfield Building Services Ltd} (1985) 31 BLR 47 (QB 1985).

\(^3^1\) See, e.g., \emph{Alfred McAlpine Construction Ltd v. Unex Corp.,} (1994) 70 BLR 26; \emph{Nissan (UK) Ltd v. Nissan Motor Company, Decision of 31 July 1991 (CA Civil Division) unpublished but referred to in Craig et al.} (2000) 541 (staying suit against subsidiary under a contract devoid of arbitration clause, pending outcome of arbitration against parent under related contract, on the ground that the overlapping core issues between the two sets of
disallowing parallel suits in different forums. Second, courts seized of a claim pending before the courts of another jurisdiction sometimes can, and in case of treaty obligations often must, decline jurisdiction, or at least stay proceedings until the earlier proceedings conclude. Third, with arbitrability restrictions now practically gone, and arbitration standard in an increasing number of contracts, the risk of inter-award conflict today is particularly acute.

proceedings made disputes under the first contract ‘a side show’) (CA, 31 July 1991); Dale Metals Corp. v. KIWA, 442 F. Supp. 78 (staying suit vis-à-vis three non-signatory affiliates of party bound by arbitration agreement, on condition that these be allowed into the arbitration, and that all involved agree to be bound by the ensuing award) (SDNY 1977); Rhône Méditerranée Compagnia Francesa di Assicurazioni e Riassicurazioni v. Achille Laura, 555 F. Supp. 481 (action involving defendant not bound to arbitrate stayed pending related arbitration) (DC VI 1982). See also Ransel-Ucel v. G.D. Searle & Co [1978] 1 Lloyd's LR 225.


For the view that arbitration has become the dispute-settlement method of choice, see Aksen (1990) 287; Lalive (1987) 293. For the view that it is set further to consolidate this position, see Wetter (1995) 87, 92; Ridgway (1999) 52. On the inevitability of an arbitration clause in international economic transactions, see Paulsson (1985) 3; Veeder (2000) 136; Craig et al. (2000) 312; Li (1993) 19, 72, and 252. For an estimate of the prevalence of such clause in international contracts, see Berger (1993a) 8 (fn. 62) (who, citing Albert Jan Van den Berg et al., Arbitragerecht (1988) 134, puts this at ninety percent). The estimate is clearly exaggerated, but the point is valid. For the view that restrictions on arbitrability are now virtually no longer, see ‘Introductory Remarks’ by Sir Thomas Bingham in Hunter et al. (1995) 5; Wetter (1995) 101; Goode (2001) 20. For a modern account of the doctrine of arbitrability and its relation to public policy, see generally
II. Three Approaches to Conflict Avoidance

Inter-award conflict is mitigable in three ways: by means of estoppel agreements; by extensively interpreting arbitration agreements; or through forum concentration.

An estoppel agreement is an agreement by which, subject to certain conditions, a party undertakes to abide by the outcome of a reference not involving himself; e.g., a sub-contractor abiding by the outcome of proceedings between employer and contractor.\(^\text{35}\) Conditions usually include timely notice of, opportunity to help defend, and beneficiary diligently and faithfully to prosecute, the controlling proceedings.\(^\text{36}\) Decisions, but not settlements, are typically covered.\(^\text{37}\)

It is not altogether clear how far courts will enforce an agreement—even one concluded in the course of business—that, by definition, undermines the right of the party to defend itself. A recent House of Lords decision, *Lafarge Redland Aggregates v. Shepard Hill Civil Engineering*, shows that the issue is finally balanced. On the one hand, Lord Hope in that case intimated that an estoppel clause, though not ideal, was enforceable. ‘In the end of the day,’ he said, ‘the parties would require to exercise their


\(^{35}\) [2000] 1 WLR 1621, 1643 (where a minority (Lord Hope of Craighead and Lord Clyde) interpreted clause 18(2) of the *FCEC Standard Form of Sub-Contract*, Sept. 1984 ed., as creating an estoppel precluding the sub-contractor disputing the arbitrators’ findings in disputes under the main contract. The provision in question covered ‘any dispute [that] arises in connection with the main contract and [that in] the contractor[‘s]... opinion ... touches or concerns the sub-contract works.’) (HL 2000).


\(^{37}\) Ibid., at 1629.
own judgment before entering into a contract in these terms as to whether they wished to commit themselves to this procedure.38 On the other hand, Lord Hobhouse took the view that an estoppel clause violates natural justice, adding that to interpret an ambiguous clause as imposing an estoppel would be both 'uncommercial and unprincipled.'39 Of course, this is not the same as saying that the clause is unenforceable; but it does at least establish a presumption against it. If so, *ex post* agreements are unlikely to cause courts much concern; *ex ante* agreements, on the other hand, if explicit, the courts would interpret *contra preferentem*.

Another way of mitigating inter-award conflict is to interpret the arbitration agreement so that it binds as many interested parties as possible. Some situations are typical: for instances, cases involving groups of companies or states and their instrumentalities. Here, arbitrators must decide whether, as a matter of construction, a non-signatory has so conducted itself as effectively to have accepted arbitration.40 The facts then are clearly relevant; but whether the arbitrator may lift the corporate veil is ultimately a question of law. In other situations, the question is whether, as a matter of law, an arbitration agreement either benefits or binds a non-signatory. The question, then, is either one of subrogation, statutory or consensual novation, agency (agent and

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38 Ibid., at 1636–37. See also Goodwins, Jardine & Company Ltd and Liquidator v. Charles Brand & Son (1905) 7 F. 995 (where a sub-contractor tender stipulated work 'according to plans and specifications' in a main contract that included an arbitration clause, this clause precluded the sub-contractor contesting arbitral findings under main contract, though it did not apply to matters strictly between contractor and sub-contractor) (Ct. of Session (Scot.)); Haskings (Shutters) Ltd v. D. & J. Ogilvie (Builders) Ltd [1978] SLT (Sh. Ct.) 64 (where facts and holding resembled Goodwins) (Sh. Ct. at Sterling (Scot.)).

39 Ibid., at 1643. See also Fouchard (1982) 216.

principal; trustee and beneficiary), statutory succession, contract or claim assignment, as the case may be.\[^{41}\] Evidently, the legal questions sometimes overlap.

The third approach to conflict avoidance involves forum concentration. This approach assumes that hearing claims together, though it does not force parties to run consistent arguments (alternative pleading remains possible), at least precludes certain factual inconsistencies (e.g., a party introducing a document in one set of proceedings, whose very existence he denies in another) and more importantly compels arbitrators to come to consistent decisions. A good example is the situation where an employer begins arbitral proceedings against a main contractor, who in turn begins parallel proceedings against his sub-contractor. Whether or not these arbitrations are somehow procedurally linked, the main contractor might assert a liability against the sub-contractor that he denies against the employer.\[^{42}\] But linking them puts psychological and intellectual pressure on the arbitrators to come out the same way every time.

Concentration improves transparency in another way too. An example is the situation in which the vessel owner claims against the time charterer, whereupon the latter claims back-to-back against the voyage charterer. Under standard discovery rules, the voyage charterer normally cannot subpoena evidence in the possession, custody, or control of the vessel owner and, through discovery, also available to the time charterer.\[^{43}\]


\[^{42}\] See, e.g., A. Monk & Co Ltd v. Devon County Council, (1978) 10 BLR 9 (where main contractor (Monk) denied liability for extra costs to sub-contractor but, fearing liability might nevertheless attach, claimed in respect of the same liability in dispute with employer).

\[^{43}\] See, e.g., Compania Espanola de Petroleos v. Noreus Shipping, 527 F2d 966, 970 (1975). In Continental Europe, the power to subpoena evidence from third parties is 'largely unknown.' See Craig et al. (2000) 436. In England, such power is very limited. See The 'Sargasso' [1994] 1 Lloyd's Rep. 412, 417 (a party issuing a *subpoena duces tecum* to compel production of documents in the possession of third party must be careful only to require relevant documents and, in any event, may be defeated on grounds of confidentiality); Lomho v. Shell Petroleum, [1980] 1 WLR 627 (for discovery purposes, documents held by subsidiary are not in the power of parent if parent does not have an enforceable right to obtain documents) (HL, 1978); The 'Lorenzo Hakouss' [1988] 1 Lloyd's Rep. 180 (*subpoena...
Concentration does not abridge these rules; but it can (for instance, in the case of concurrent hearings) gives the time charterer de facto knowledge of any evidence that the others introduce.

III. Scope of This Study

Of the three approaches to conflict avoidance just considered, this dissertation deals only with forum concentration.\(^4^4\) Space constraints are one reason for the decision to limit the scope of the study in this way; another is that the question of extensive interpretation has most recently been studied by Legros, in ‘L'arbitrage et les operations juridiques à trois personnes.’\(^4^5\) As for estoppel clauses, there is not much more to add on the subject.

Further, this dissertation only deals with international commercial arbitration properly so called, a twentieth-century dispute-settlement mechanism widely used in building, engineering, licensing, technology-transfer, joint venture, management, agency, concession, service, sale of goods (other than on ‘commodity markets’) and transport transactions. Subject to three caveats presently to be set out, interstate, treaty-specific, guild, and domestic arbitrations, are all outside the scope of this dissertation.

\(duces tecum\) set aside as abuse of process where party to an arbitration had attempted to use it to obtain discovery against a third party) (QB 1988). Arbitrators sitting in the United States have power directly to subpoena documents in the possession, custody, or control of third parties (9 USC s. 7), but that power is quite modest in practice. This is because, first, arbitrators prefer to limit themselves to powers granted by the institutional rules; second, the power in any event is limited to the district in which the arbitrator sits; and third, in practice, motions in aid of arbitration to compel production of documents in the hands of third parties are ‘routinely denied.’ See Craig et al. (2000) 435, 489 (n. 58), and 487.

\(^4^4\) On multi-party non-binding expertise, see Mapara (1987) 284–86.

\(^4^5\) Legros’s dissertation, submitted in 1999, to the Université de Rouen (UFR de Droit, de Sciences Economiques et de Gestion), received the Prix Jean Robert, awarded by the Association Française d'Arbitrage. A previous dissertation on the same subject, submitted by Xiao-Ying Li, in 1993, to the Université de Bourgogne (Faculté de Droit et de Sciences Politiques), is entitled ‘La transmission et l'extension de la clause compromissoire dans l'arbitrage international.’
Inter-state arbitration is omitted because it gives rise to considerations alien to the common run of commercial disputes. In the case of treaty-specific arbitration (e.g., arbitration under the Law of the Sea Convention, the World Trade Organisation, the Algiers Declaration, or the North American Free Trade Agreement), the specificity of the treaty framework precludes generalised treatment. Domestic arbitration is excluded, partly because it answers to different needs and responds to different policy considerations than those relevant to international commercial arbitration (specifically, the need to avoid ‘hometown justice’), partly because it is mostly foreign to that which makes the concerted settlement of international claims the challenge that it is, namely, the anarchic\(^{46}\) structure of international society.\(^{47}\) Finally, guild arbitration is left out partly to conform to customary definitional practices, partly because such arbitration displays characteristics that set it distinctly apart from mainstream arbitration, e.g., market-wide dispute-settlement structures over which a single market governing body

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\(^{46}\) The word ‘anarchic,’ which is borrowed from the discipline of international relations, is used here to describe the decentralized and non-hierarchic nature of the institutional and statutory environment in which international commercial arbitration operates, an environment that lacks a centralised legislative or institutional hierarchy entitled to command and control. The analogy with the ordering principles of the inter-state system is this. ‘The parts of domestic political systems stand in relations of super- and subordination. Some are entitled to command; others are required to obey. Domestic systems are centralized and hierarchic. The parts of international-political systems stand in relations of coordination. Formally, each is the equal of all the others. None is entitled to command; none is required to obey. International systems are decentralized and anarchic.’ See Waltz (1979) 88.

\(^{47}\) For the view that avoidance of hometown justice is international arbitration’s raison d’être, see Brower (1994) x; Loquin (1989b) 1031; Veecher (2000) 136; Craig et al. (2000) 6, 10; Ridgway (1999) 52; Beresford Hartwell (1997) 12–13. In a survey of people involved in international arbitration, 72% of respondents said neutrality was ‘highly relevant’ in their choice of arbitration, while 64% put award enforceability in this category. Expertise and finality received 36% and 37%, respectively, of the votes. See Bühring-Uhle (1996) 395 (app. 1). For the view that international arbitration is supposed to be many things that in reality it is not, e.g., expeditious and cheap, see Kerr (1987); Grigera Naón (1992) 20-21; Oppenit (1998) 34; and Nariman (2000) 264.
wields oversight, direction, and enforcement powers incomparably greater than anything that a regular arbitral organization has as its disposal.\footnote{Although content at present to use the common disciplinary definitional practices, I later denounce them as value-laden. See discussion on page 203.}

As already mentioned, the above exclusions are subject to three caveats. First, while domestic arbitration is excluded, legislation governing domestic arbitration will be treated whenever residually applicable to non-domestic references. Second, guild arbitration is treated to the extent that its successes with claim-concentration help emphasize the limitations of international commercial arbitration. Finally, discussion will refer to case law on domestic arbitration to compensate for the dearth of non-domestic (\textit{i.e.}, international) precedents, with, of course, such qualifications as are appropriate.

IV. The Thesis

There are five chapters to this dissertation. Chapter 1 comprises two parts. Part 1 defines and refines the common-sense intuition that the risk of inter-award conflict merits attention. Part 2 defines concentration measures that are relevant to arbitration, examining their uses, misuses, and the pitfalls they present. Thereafter this dissertation divides conceptually into two complementary but distinct parts: complementary in substance, since the first part clears the way for the second; and distinct in their argumentative styles and critical approach.

On substance, the first part, comprising Chapters 2, 3, and 4, explores the extent to which private, institutional, and legislative initiatives could help mitigate the risk of inter-award conflict between substantively related but formally distinct disputes. In all three cases, the conclusion is reached that nothing more than imperfect palliatives are possible before the problem of inter-award conflict. In Chapter 3 and 4, the further conclusion is reached that traditional legal arguments, \textit{i.e.}, arguments that appeal both to decisional criteria intrinsic to law and to value-free technical rationality, \textit{e.g.}, arguments from autonomy, from jurisdictional propriety, from the nature of arbitral justice, \textit{etc.}, cannot explain why that is so.

In the case of contractual initiative, Chapter 2 begins by emphasizing the inevitable tension between, on the one hand, the dictates of contractual conflict avoidance and, on the other, commitment to traditional arbitral values like efficiency, confidentiality, and party control of arbitrator choice. After proposing ways in which this
tension may be relaxed, Chapter 2 turns around and questions the wisdom of expecting private initiative effectively to manage conflict risk, when in practice most arbitration users, instead of tailoring procedure to circumstance, tend to adopt standard contractual or institutional arbitration clauses that typically make no allowance for procedural multiplicity. This line of argument runs counter much scholarship on the subject, which assumes at least the long-term effectiveness of contract-based solutions to the problem at hand.

In the case of institutional concentration initiatives, writers often assert that whatever might be said of contractual solutions arbitral organizations are uniquely well placed to promote inter-award harmony between formally distinct but substantively related claims. On the one hand, Chapter 3 attempts to establish the unsoundness of this view. On the other, it seeks to demonstrate why arguments often used to justify the efficacy and principledness of institutional concentration, namely, arguments from inference, expectation, and jurisdictional propriety, are at best inconclusive, at worst circular.

In the case of statutory concentration initiatives, there is already consensus that problems of multiplicity in arbitration do not lend themselves to legislative solutions. Chapter 4 joins this consensus but attacks the underlying logic, a logic that once again centres around what Chapter 4 claims are incoherent and indeterminate arguments from autonomy, inference, efficiency and principle.

This line of reasoning leads directly to the question considered in Chapter 5, namely, ‘What, if not the traditional arguments populating traditional scholarship on the subject, accounts for the failure of extra-contractual concentration initiatives to resolve the problem of inter-award conflict?’ More generally, ‘Why is modern international arbitration unable to secure a social objective like inter-award harmony?’

In response, and subject to the methodological account that appears immediately below, Chapter 5 locates the reason in what it calls modern arbitration’s ‘self-imposed ideological limitation.’ The argument proceeds in two steps. Step 1 claims that arbitration’s institutional architecture, many of its doctrinal arrangements, the sensibility of many of its scholars and practitioners, are all characteristic expressions of a mode of thought that is laissez-faire in orientation, averse to social engineering, and committed to an ideal of formal neutrality, namely, neo-liberalism. Step 2 claims that these ideological commitments—and not, as much writing on the subject would have it, legal logic or
value-free technical considerations—account for arbitration’s inability to secure the social objective in question.

V. Methodology

This section addresses the issue of methodology underlying the arguments set out above. Specifically, it sets out the considerations underlying the marked discontinuity of style and content between, on the one hand, Chapters 2, 3, and 4, and on the other, Chapter 5.

As already noted, the two-part argument that Chapters 2, 3 and 4 run are largely refutatory: contract will not mitigate inter-award conflict, and traditional formal arguments alone cannot explain why *extra*-contractual initiatives will fare no better. The critique here is internal. It is concerned with the incoherence, indeterminateness, and circularity of arguments traditionally deployed either to justify or to discredit the different types of conflict-avoidance initiatives, and deals with them in their own terms. Because it appeals to logical and prudential considerations familiar in much arbitral scholarship, the critique will have a familiar ring to it.

By contrast, Chapter 5 appeals to a wider body of thought, to answer a question that the earlier chapters have thrown up. Here the emphasis is on broader considerations drawn from the political science literature. And this in turn raises a question as to the appropriate level of detail. *Inter-disciplinarity* promises deeper insight into familiar legal conundrums than do styles of legal argument that appeal exclusively to criteria intrinsic to law. Yet, the argument that this chapter runs raises a specific methodological concern, namely, that it apparently relies on the practical but narrow problem of inter-award conflict, to advocate a self-consciously generalised critique of the entire institution of modern arbitration.

But there is simply no question in Chapter 5, or indeed in the dissertation, of revising modern arbitration against conclusions drawn from a study of inter-award conflict: rather, what is at issue is arguably a novel theoretical framework for *re-conceptualizing* modern international arbitration in a way that promises to increase our insight both into the problem of inter-award conflict and possibly into other enduring doctrinal problems in the field.

49 But see Weinrib (1988) (for an impassioned, if ultimately self-defeating, defence of formalism).
Still, readers might suspect that the present study predicates an ambitiously wide-ranging theoretical analysis of the institution on too fine a point of practical inconvenience. 'Why,' they might ask, 'rather than simply use the inter-disciplinary methodology to explain the intractableness of inter-award conflict—if indeed use it one must—use it to advocate even a generalized re-conceptualization of arbitration, when the ground for the latter task could not possibly have been laid within the limited, as well as limiting, confines of a study devoted to inter-award conflict?' If a field reconceptualization be the objective, it should be much more broadly based.

There is no denying the force of a critique along those lines. But there are sound methodological considerations underlying the present structure of this study.

No student of a limited technical problem (such as inter-award conflict) ever starts out intending to reconceptualize his research field. Rather, he begins with no thought except that of resolving the little problem that he has set himself, using nothing but traditional disciplinary investigative procedures. And if he is lucky, the little problem yields, and the research is declared successful.

Sometimes, however, the problem does not yield, despite the student's persistent efforts at checking and rechecking both his material and his investigative procedures. At that point, the student, if he persists, begins to examine those procedures, in the hope that a minor but judicious modification might help cure the problem. Occasionally, this strategy pays off, the little practical problem yields, and the student gets extra credit for investigative competence.

But now and again, the study of the investigative procedures reveals a fundamental inadequacy, forcing the student to choose between aborting the enquiry whole and experimenting with alternative methodologies. Again, the most he intends at that relatively advanced stage of the enquiry is to find a methodology that would solve the little practical problem. And if he is even a little lucky, the alternative methodology cures the problem, leaving the field's fundamental tenets intact, and landing the student even more credit for his experimental prowess.

In some rare instances, however, the new methodology does more than just cure the anomaly—it suggests a different way of conceiving the field. This new conception does not, of course, solve all of the field's outstanding problems, leaving room for future research. To be accepted, it merely needs to give more convincing accounts of the field's fundamental observations and more persuasive solutions to some of its enduring
conundrums, than do competing conceptions. Nor does the new conception immediately change the content or orientation of the field: what was there remains, for a while anyway; but it now looks different, communicates different knowledge, and invites different forms of engagement.

This dissertation originated, not in a desire to engage in a wide ranging reconceptualization of the modern institution of arbitration, but rather in the hope of solving a limited set of practical problems relating to the risk of inter-award conflict. As work on those problems advanced, however, two puzzling features of the material seemed to call for attention. The first, which may be called the 'consensual anomaly,' may be stated as follows. On the one hand, writers agree that the usual position of the arbitration clause among the tail-end boilerplate provisions in a contract very nearly represents its importance to the parties, who, accordingly, rarely give its detail more than cursory attention. On the other hand, writers—sometimes the same ones—after sustained good-faith attempts at finding an extra-contractual solution to the problem of complex arbitrations, declare that respect for private will—the selfsame will they moments earlier conceded was only formally exercised—put paid to their efforts.

This disjunction between premise and conclusion seemed to have gone largely unobserved. No-one, it seems, paused to consider the curious circumstance of a counterfactual proposition—party control of procedural design in arbitration—could preclude solving a problem that all agree calls for a solution.\(^5\) Conceiving of complex

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\(^5\) To give some examples, Mapara never once questions what he calls 'la théorie de la primauté et de l'autonomie de la convention d'arbitrage.' See Mapara (1987) 225. He never asks why, if most parties rarely give a moment's thought to compromissory clauses they include (or find included) in substantive agreements, party autonomy should preclude extra-contractual solutions to the problem at hand. Instead, when once he touches on party autonomy, it is to muster the question-begging defence, according to which autonomy is sovereign (a) because 'arbitration is an important instrument of commerce,' (b) because 'the parties, having agreed to arbitration, must assume the risks of their choice,' and (c) because 'though we know freedom of contract entails difficulties, we do not proceed to abolish it, and why should it be otherwise in arbitration.' In his words: 'Il faut constater plutôt que la théorie de la primauté et de l'autonomie de la clause compromissaire entraîne d'énormes problèmes et des difficultés dans la pratique, dont on ne connaît pas de solutions simples. Toutefois, nous pensons que ces difficultés pratiques ne doivent pas nous détourner de l'idée de la primauté
arbitration as a practical field of enquiry, devoid of theoretical interest, has arguably left these anomalies unexamined.\textsuperscript{51}

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et de l’autonomie de la clause compromissoire. A l’appui de cette opinion, il existe, comme nous le croyons, plusieurs arguments parmi lesquels on retrouve celui pour qui, l’arbitrage est un instrument important du commerce. En plus, il faut dire que si les parties ont opté pour l’arbitrage, elles doivent supporter les risques ou changer ou modifier leurs rapports contractuels. Notre dernier argument se réfère à la liberté contractuelle. On sait que cette liberté peut entraîner certaines difficultés et inconvénients pour les parties. Toutefois, on n’abîme pas la liberté contractuelle en évitant ses désavantages. En arbitrage, pourquoi faut-il réagir d’une autre façon? See Mapara (1987) 228–29. Much the same complacency is chargeable to Bourque, whose otherwise insightful analysis never once queries whether the consent of the parties really must underlie any solution to the problems engendered by claim relatedness in arbitration; that ‘le consentement des parties doit rester le point de soudure principal de tout arbitrage multiparti’ is, for Bourque, simply an article of faith. See Bourque (1989) 211. When a solution compatible with the parties’ supposed autonomy proves doubtful, Bourque, rather than investigate why the arbitral system would not yield extra-consensual solutions to a problem everyone agrees defies contractual solution and yet needs solving (and which he himself considered sufficiently grave to imperil the very survival of the arbitral process), simply quips, ‘l’arbitrage multiparti est possible, dans la mesure où l’on n’exige pas des parties qu’elles l’aient voulu et à la condition qu’elles n’aient pas à nommer leur arbitre.’ See Ibid, at XVII, 584.

\textsuperscript{51} See, e.g., Mustill (1992) 5 ([I]ooking through the journals … to see what are the contemporary preoccupations of those concerned with arbitrations … [these] seem to be threefold. First, there are the issues of theory. These come in various sorts. There are those areas of study whose difficulty and popularity vary inversely with their practical importance. As examples I would cite our old friend the lex mercatoria, and the concept of \textit{kompetenz-kompetenz}. These are genuinely interesting, if one is interested in that sort of thing…. Other questions of theory are more deserving of study, and it is a pity that they are so little explored—perhaps because procedural law is mistakenly believed to have little conceptual interest. … \textit{The second class of preoccupations are practical in nature. Some of these are only too familiar. For example multiparti disputes where the dispute-resolution agreements along the different strands of the web are not the same. How to avoid duplication and inconsistency while respecting the parties’ choice?}) Though Lord Mustill acknowledges the conceptual interest of procedural issues, he relegates multi-party arbitration to a different class of practical
The second puzzling feature of the material is the highly manipulable structure of argument often deployed to credit or discredit various conflict avoidance initiatives.

These two features are obviously responsible for the style and content of Chapters 2, 3 and 4. But they also determine the approach that Chapter 5 adopts: by identifying an anomaly that traditional legal argument seemed incapable of curing, they invited experimentation with alternative ways of conceiving the issue. In this way, Chapters 2 to 4 lead to Chapter 5, which in turn mainly attempts to answer the question that they raise. In the context of such an attempt, it is impossible to pre-determine the level of analytic engagement at which a methodology drafted in following an anomaly-induced crisis of the kind described above will yield interesting answers. Indeed, when a methodology shows the problem to be an instance of a greater universal, insisting on an exclusively lower-level analysis becomes pointless.

And if the outcome of this enquiry should somehow prove helpful to others studying different problems in the field, so much the better.

VI. What Proof is Sufficient Proof?

The foregoing methodological account borrows directly from Kuhn’s essay, The Structure of Scientific Revolutions; substituting for ‘paradigm’ the notion of ‘conceptualization’. Of course, Kuhn was concerned in that essay with research in the natural sciences, where the challenge is to find the theoretical construct displaying the best ‘fit’ with nature. Considering that a scientific community typically acknowledges common standards of proof and agreed working methodologies—indeed is a scientific community by virtue of these features—one would expect paradigm debates in the natural sciences to be easily resolvable by appeal to physical correspondence with nature. Not so, says Kuhn:

To the extent, as significant as it is incomplete, that two scientific schools disagree about what is a problem and what a solution, they will inevitably talk through each other when debating the relative merits of their preoccupations with, he seems to imply, little in the way of theoretical interest. True to this view, Lord Mustill had earlier written an incredibly incisive account of the multi-party arbitral conundrum, but written it without so much as an allusion to the theoretical interest or political dimension of the subject. See Mustill (1991).

52 See generally Kuhn (1996).
respective paradigms. In the partially circular arguments that regularly result, each paradigm will be shown to satisfy more or less the criteria that it dictates for itself and to fall short of a few of those dictated by its opponents. There are other reasons, too, for the incompleteness of logical contact that consistently characterizes paradigm debates. For example, since no paradigm ever solves all the problems it defines and since no two paradigms leave all the same problems unsolved, paradigm debates always involve the question: Which problems is it more significant to have solved? ... [T]hat question of values can be answered only in terms of criteria that lie outside of normal science altogether, and it is that recourse to external criteria that most obviously makes paradigm debates revolutionary.53

But then, if validating field re-conceptualization turns out to be so difficult in a community that normally acknowledges common standards of proof and agreed working methodologies, surely the same must present even greater difficulties in the social sciences, where such standards and methodologies are much less developed.

To substantiate its claim that modern arbitration exists as the expression of modern liberal commitments in the field of international adjudication, this dissertation does what social scientists typically do in their attempt to understand social phenomena—namely, use suggestive correlations to explain patterns of social activity. The argument in this case rests on two correlations: the first, broad-brush and general in its import, correlates modern arbitral canons and the tenets of modern liberal thought; the second, more precise and problem-specific, correlates characteristic liberal notions of accountability, established liberal opposition to social engineering, and typical liberal understandings of freedom as the absence of public constraint, on the one hand, and the rise, development, and ultimately the immitigability of inter-award conflict, on the other.

Unlike in the natural sciences, the test here is neither verifiability nor falsifiability (which require community-wide consensus on proof standards) but plausibility. Indeed, this is always the case in the social sciences.54

53 Ibid., at 109–10.
I. Introduction

In *Abu Dhabi Gas Liquefaction v. Eastern Bechtel*, Lord Denning cautioned against inter-award conflicts: it is, he said, 'most undesirable that there should be inconsistent findings by two separate arbitrators on virtually the self-same question, such as causation.' Like most who concerned themselves with inter-award conflict, he did not explain why it is 'very desirable that everything should be done to avoid such a circumstance.' Significantly, too, he did not say that mitigation is essential, content to describe it merely as 'desirable.' The significance of this will become gradually clear, although initially the focus will be on refining and defining Lord Denning's common sense intuition (II).

Another feature of discussion that will retain attention is terminology. 'Inadequacy and ambiguity of terms unfortunately reflect, all too often, corresponding paucity and confusion as regards actual legal conceptions.' This statement, with which Hohfeld set out to define terms like 'right,' 'privilege,' 'power,' and 'immunity,' whose looseness he blamed for much logical fuzziness in nineteenth-century American case law, applies with equal force to the debate on complex arbitration; except the confusing words then become 'consolidation,' 'joinder,' 'third-party,' etc., words that many seem to assume have some universal meaning. The assumption, of course, is mistaken, and produces great confusion. This chapter aims to clear that confusion in two ways: by showing how similar-sounding concepts possess different meanings in different legal cultures (III); and by exploring, in more general terms, the uses, misuses, and pitfalls of each of these procedural concepts (IV).

II. The Case for Inter-Award Harmony

What follows is an attempt to make a principled case for the pursuit of inter-award harmony (A), to challenge it (B), and then to defend it (C)—without at this stage suggesting that any specific type of concentration initiative is practical or achievable.

2 Ibid.
3 See Hohfeld (1913) 29.
A. The Case

Apart from any intellectual passion for *elegantia juris*, or concern for arbitration’s image, or commitment to procedural thrift—all of which are doubtless good reasons for working to avoid claim bifurcation and the attendant risk of inter-award conflict—there are several concrete grounds on which it might be especially justifiable to do so.

Economically, inter-award conflict is unfortunate: first, because it distorts value-allocation (as liability lies otherwise than with the culprit); second, because it inflates *ex ante* transaction costs (as at-risk parties factor into price the cost of collateral bonding or similar protection against double-liability exposure); and third, because it increases *ex post* transaction costs (as victims of conflict seek redress).

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4 The expression is borrowed from Cardozo J. See Cardozo (1921) 34.

5 See *International Sea Tankers Inc. v. Hemisphere Shipping Co.*, [1982] 2 AllER 437, 444 (Dunn LJ noting that inter-award conflict would ‘certainly not rebound to the credit of London arbitration’).

6 See *Re Shui On Construction Ltd v. Schindler Lifts (HK) Ltd.*, [1986] HKLR 1177 (fighting uncoordinated battles on separate fronts is not conducive to the most economical disposal of resources and is especially intolerable where the arbitrations are inextricably intertwined).

7 This is not a law-and-economics dissertation. The attempt to touch on the economics of relatedness, which none better than the author knows how far it falls short of the ideal, is undertaken with humility, in the hope it might induce others better qualified to probe the question further and deeper.

8 Transaction costs, defined as the ‘costs of running the economic systems,’ and likened to friction in physical systems, are two kinds—*ex ante* and *ex post*. The former are the costs of drafting, negotiating and generally creating a contractual framework that safeguards the agreement concluded. The latter include: (1) maladaptation costs incurred when transactions drift out of alignment in relation to ... the “shifting contract curve”; (2) haggling costs incurred if bilateral efforts are made to correct *ex post* misalignments; (3) the setup and running costs associated with the governance structures ... to which disputes are referred; and (4) the bonding costs of effecting secure commitments.” See Williamson (1985) 20–21.
Psychologically, fear of inconsistency might drive courts or arbitrators unwarrantably to assert their jurisdiction over parties whose exclusion, they apprehend, might trigger parallel references—a practice which, objectionable on principle, also undermines arbitration’s general consent doctrine.9

Morally, it is deplorable that someone should lose two back-to-back arbitrations on mutually exclusive grounds. As Miller (somewhat dramatically) puts it:

If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles. If a case was decided against me yesterday when I was defendant, I shall look for the same judgment today if I am plaintiff. To decide differently would raise a feeling of resentment and wrong in my breast; it would be an infringement, material and moral, of my rights.10

Politically, the modern State uses the monopoly of coercion to maintain law and order. But it can only do so with the general consent or acquiescence of the citizenry, and subject to various constitutional safeguards. In modern society, law stands as the embodiment of the general will, and as such, functions, at least formally, as the primary legitimating factor of public action. Citizens in general would seem to use complex notions of fairness to judge such action. In extreme cases, actions that fail this popular test of fairness not only might attract no compliance but will also undermine respect for the responsible institutions.11

Awards ultimately rely on state power. For a state to enforce conflicting awards, however, arguably calls into question its judgement, the legitimacy of its action, and in extreme cases the authority of the responsible institutions.12 Of course, conflicting

9 On the practice of extensive, or ‘purposive,’ interpretation, see discussion on page 11.

10 See Miller (1903) 335.

11 ‘At some point, the legitimacy of government itself is undermined when the organs of justice are misperceived as the instrument of injustice.’ See Schwartz (1987) 141.

awards, when considered apart, might well seem proper; together, however, they suggest that justice has miscarried. Whatever may be said about arbitration's private nature, or about freedom of contract, or party autonomy, or the parties' failure to agree proper arrangements, the perception would remain that, in endorsing the anomalous outcome, the State, the repository of justice, has countenanced an injustice.

B. Defence

Now, none of these arguments is uncontroversial. By its very nature, the economic argument is relative: conflict costs versus the cost of conflict-avoidance. The psychological argument might seem speculative. He to whom the economic argument might appeal—the hardboiled practitioner whom years of practice have taught that efficiency is the linchpin of commercial justice—might wince at the emotive language suffusing the argument. And if the moral argument fails to persuade so too will the political argument. Even those who accept the moral argument might either deny the relevance of any enforcement conflict to the forum state (on the ground that international awards are mostly enforced elsewhere), or simply deny public responsibility for the performance of a private mode of dispute resolution.

an award previously set aside in its country of origin (Switzerland), were subsequently asked to enforce another award, irreconcilable with the first, that had been published at the conclusion of a second arbitration instituted in Switzerland following the setting aside of the first award. After a series of conflicting enforcement decisions by trial and appellate courts in Paris, Nanterre, and Versailles, the Cour de cassation, wishing to end a very embarrassing situation, invoked article 1351 of the Code civil (on res judicata) to deny enforcement to the second Swiss award. It is scarcely exaggerating to say that the affaire Hilmarton brought the French judicial process, and possibly arbitration as well, into open ridicule. On the enforceability in France of foreign awards set aside in their country of origin, see generally Gaillard (1999). On the responsibility of 'secondary,' i.e., enforcement, jurisdictions to defer to review decisions in 'primary,' i.e., place-of-arbitration jurisdictions, see Reisman (1992) 116.

13 See, e.g., Hascher (1984) 143. For the role of legal education in insidiously inculcating this supposedly 'legal' outlook, see Kennedy (1983) 6–13, 17–26, esp. at 7.

14 The view that awards rendered between non-nationals 'do not at all concern our country' prevailed in the Belgian parliamentary debates on what later became article
C. Rejoinder

Except for the inherently contingent economic consideration, all these objections are answerable. Take, first, the psychological argument. With the courts’ acquiescence, arbitrators have previously used ‘purposive’ interpretations to assert jurisdiction over persons whom an orthodox reading of the controlling instruments would have suggested never agreed to participate in the relevant arbitration. This they did now to avoid conflicts between awards and judgements, now to assert jurisdiction over parties whose participation they regarded as either legally or practically necessary for the proper disposition of the case before them. There is no reason to suppose that concern for inter-award harmony will not tempt arbitrators further in that direction. And even if judicial review ultimately protects the constitutional right of those who have not signed an arbitration agreement to be judged by the ordinary courts, the nuisance value of an arbitration agreement remains.

Take next the argument from efficiency. It is one thing to maintain that considerations of administrability, certainty, reliance protection, etc., influence commercial decisions, and quite another wholly to assimilate commercial justice to these considerations. ‘Justice,’ as Schwartz has noted, ‘is not merely a matter of economic efficiency, or of social expediency, or of public policy in the sense of the pursuit of the greatest good for the greatest number . . . on the contrary, the characteristic and overriding concern of justice is fairness to the individual.’ Equating justice with mechanical value allocation is simplistic and, considering the impossibility of value-free assessment anyway, arbitrary as well. Granted it is often difficult to tell by which, if any, moral theory we measure fairness. Granted, too, it would be unsatisfactory to say that

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1717(4) of the Code judiciaire (Moniteur Belge of 13 April 1985). See Vanderelst (1986) 86. While in force, that provision peremptorily precluded all judicial recourse against arbitral awards made in Belgium between non-nationals. In response to almost universal criticism, the provision in question has since been amended to recognize an excludable right to have the award set aside. See the law of of 19 May 1998, repr’d in (1999) 15 (1) Arbitration International 101. For criticism of the earlier legislation, see Park (1988) 628–29; (1989) 647.

15 For example of ‘purposive’ interpretations, supra note 40, on page 12.

we simply and directly know that the fairness or unfairness of a situation, and that no account need be given of how this comes about or of how one might justify it. And clearly, the most that could be hoped for is to come nearer apprehending the origin of our moral intuitions. Acknowledging all this—and even recognizing the difficulty of determining in what proportion process and outcome influence public perceptions of fairness—does not justify denying any value to considerations irreducible to economic value.

Likely, Hume's famous dictum, that 'Reason is and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them,' which in idiomatic contemporary philosophy translates into, 'In moral and political philosophy one is looking for adequate premises from which to infer conclusions already and independently accepted because of one's feelings and sympathies'—has it right. See Hume [1739] 415. For the contemporary idiom, see Hampshire (2000) xiii.

On the one hand, we apparently follow (no doubt unconsciously) the general trend in modern scientific and philosophic thought 'to weaken the distinction between substance and attribute... and to emphasize the importance of method, process, or procedure,' and hence worry about procedural irregularities, independently of any outrage we feel at blatantly unfair outcomes. See also Lever (1999) 285 ('Parties are more likely to regard their treatment at the hands of the law as unjust because of what they perceive to be defects of procedure than because of what they perceive to be defects of substantive law.') The little empirical research done on the influence of 'distributive' and 'procedural' justice on perceptions of fairness seems to confirm this. Ridgway, for instance, reports one set of research findings as follows: 'Assessments of legal proceedings depend much more on perception of the fairness of procedures and relatively little on results. ... In arriving at a sense of whether the legal process is fair, lay people—and to a remarkable extent, lawyers as well look to nuances of their treatment by authorities, rather than the larger structural elements of the process... [E]ven in cases involving stakes of hundreds of millions of dollars, and corporate rather than individual parties, personal feelings of fairness are critical to acceptance of the resolution of a case.' See Ridgway (1999) 50 (emphasis added and numbering omitted). But what is much less clear is how this affects inter-award conflict. Two readings of the findings above are possible. Emphasizing the relative unimportance of results, one might conclude that only misconduct is relevant to fairness perception, and that parties therefore ask no more than that the procedure in each reference conform
Take, third, the argument that the forum state need worry little about conflicts whose implications would be felt elsewhere. Both the premise and the conclusion of this argument are false. On the one hand, legislation often treats as ‘non-domestic’ awards involving nationals, domiciliaries and ordinary consumers. More importantly, non-
to minimum standards of due process. Alternatively, one could stress the relative importance of procedures and the nuances of treatment by authorities, precisely to argue that parties look at the extent to which the legal system has afforded them a forum within which they could be reasonably confident of a fundamentally equitable adjustment of their claims conceived in their totality. Of course, the fact that substantive conflict is chargeable to a procedural mishap (bifurcation) accounts for the ambiguity. In any event, the empirical evidence is slight.

19 The justification for such treatment varies. One is that the reference somehow ‘implicates the interests of international commerce.’ See NCPC, art. 1492 (Fr.). Thus, the French nationality of both parties does not preclude the internationality of their arbitration. See Craig et al. (2000) 550. See also Rawlings v. Société Kovorkian, (CA Paris, 1 Dec. 1993), repr’d in 1994 Rev. Arb. 693, 694 (arbitration between attorneys of a French law firm involved international commerce—and was therefore ‘international’—since among the firm’s attorneys there were American citizens practicing law both in France and in the U.S.). See generally Gaillard & Savage (1999) 45–61; Fouchard (1970) 71-74. So far as concerns consumer contracts, the French Cour de cassation has recently characterised as ‘international’ an agreement for the purchase of an £290,000-limited-series-Jaguar for personal use, on the ground that the contract, which involved the transfer of goods and funds between France and the UK, as well as prescribed arbitration in London, implicated international commerce. See Renault v. société V 2000 (Jaguar France) (Cass. 21 May 1997) repr’d in (1997) Rev. Arb. 537. On the ‘international’ character of arbitration, see generally Redfern & Hunter (1999) 14–18. Another ground on which a domestic reference is treated as though it were international, is that the parties have agreed, possibly indirectly, that it shall be so treated. See Fung Sang Trading v. Kai Sun Sea Products & Food Co (SC, 29 October 1991) repr’d in (1992) XVII Yearbook of Commercial Arbitration 289 (characterising as ‘international’ an arbitration under a contract between two Hong Kong companies for the sale of Chinese soybean extract meal where the buyers had to nominate a vessel to take delivery of soybean in the People Republic of China) (HK).
domestic awards are often enforceable in a forum state whose nationality or domiciliary rights the award-debtor happens to enjoy. On the other hand, if many states were to under-regulate national processes whose negative implications are typically felt elsewhere, eventually all states would be equally at risk. Today, state A (as the state of enforcement, or the state of the award-debtor's nationality or habitual domicile) would suffer the consequences of state B's failure properly to regulate international arbitrations within its jurisdiction; tomorrow, the boot would be on the other foot.20

This leaves the objection from the privateness of arbitration, which raises questions about arbitration's communal significance and the degree of communal control it ought to attract, both of which questions that, Chapter 4 will attempt to demonstrate, are unanswerable except by appeal to extra-legal criteria.

III. Terminology

This section investigates the meaning and import of concentration measures useful in multiple- as well as single-reference situations. The former include consolidation, concurrent hearings, consecutive hearings, and discretionary stays (A); the latter include various forms of third-party proceedings (B). For want of arbitration-specific definitions or case law, discussion will often rely on litigation parallels, with, it is understood, appropriate qualifications.

A. Multi-Reference Concentration Measures

The term 'consolidation' is used to indicate different procedures, sometimes within the same jurisdiction. In England, it indicates fusion: actions, once consolidated, become one.21 In the United States, 'consolidation' designates three different procedures: joint

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20 See Reisman (1992) 116 (making essentially the same argument, in support of the proposition that states have an obligation to provide review jurisdiction under the New York Convention).

21 Halsbury's defines consolidation as 'a process by which two or more causes or matters are, by order of the court, combined or united and treated as one cause or matter.' See 37 Halsbury's Laws of England 60 (para. 69) (4th. ed.) (Emphasis added.) This, presumably, applies equally to arbitration. See generally 37(2) The Digest 230 (1983 reissue).
hearing of related proceedings;\textsuperscript{22} stay of all but one action, with the outcome of the action tried controlling the rest;\textsuperscript{23} and merger of multiple actions pending between the same parties and involving claims that could have been set out as separate counts in a single complaint.\textsuperscript{24}

Now, if two supposedly kindred legal systems agree so little on the usage of the word, it should come as no surprise that a survey of four historically less connected legal systems, chosen primarily for their practical accessibility, namely, the French,\textsuperscript{25}

\textsuperscript{22} See Stipanowich (1986-1987) 506; Wright & Miller (1987–2000) 429-431 (s. 2382) (vol. 9); 113-114 (s. 2382) (vol. 9, pocket). See generally Virden (1991). This procedure leads to as many awards as there were originally independent references. See 9 Wright & Miller (2000) s. 2382 (note 7, at 113-114). Cf. Federal Rules of Civil Procedure, r. 54 (b). See also S.L. Sethia Liners Ltd v. Egyptian Co for Maritime Transport, 1988 AMC 68, 69 (SDNY 1983) (SMA and AAA arbitrations ordered to be heard jointly, leaving parties in each case free to choose the same or different arbitrators); Czarnikow-Rionda Co Inc. v. Manumante S.A., 512 F. Supp. 1308, 1309 (SDNY 1981) (in a footnote to his order, the judge, after directing that a single five-person panel should decide the consolidated reference, suggested that, subject to the parties' unanimous agreement, the parties might substitute for his order concurrent hearings before two three-person tribunals, including a common a chair).

\textsuperscript{23} See 9 Wright & Miller (1995) s. 2382 (at 429).

\textsuperscript{24} Ibid. This type of consolidation results in a single judgement being entered; from which one may reasonably infer that the original actions fuse. In England, this procedure has its equivalent in the rules governing the joinder of causes of action. See generally 37(2) The Digest 230 (1983 reissue). For the historical background to this veritable terminological morass in American law, see 9 Wright & Miller (1995) s. 2382 (at 428-430); Steinman (1995).

Canadian, Swedish, and Japanese legal systems yields even greater definitional variety.

In the interests of consistency, discussion will henceforward stick to the ‘English’ sense of ‘consolidation,’ and so that term will denote the amalgamation of related arbitrations with the intention of treating them as one and of disposing of them jointly. The only exception to this usage occurs in Chapter 4, specifically when reviewing the American case law on ‘consolidation.’ There, altering the terminology that American courts have used—albeit used irregularly—would only add to the confusion.


The position in Canada is broadly similar to that in the US; that is, Canadian courts use ‘consolidation’ as much for proceedings fused together as for those merely heard together while retaining their procedural distinctiveness. See Williston & Rolls (1970) 411.

For the position in Sweden, see Ginsburg & Bruzelius (1965) 259–261.

For the position in Japan, see Hattori & Henderson (1985) 7–52 (s. 7.04 [4]).

Nor is the situation at the inter-state level straightforward either. For instance, the Rules of the International Court of Justice use ‘consolidation’ to describe what are in fact concurrent hearings, and use ‘joinder’ to describe the situation in which related cases combine to form an indivisible whole. See Rosenne (1997) 1251–1260, esp. at 1257.

‘Consolidation’ is also often referred to as ‘joinder of actions.’ For alternative definitions of arbitral consolidation, see Dika (1985) 129; Stipanowich (1986-7) 506; Chiu (1990) 53; and Oehmke (1990) 144.
time and in the same place. The caveat in the preceding sentence signals the difference between concurrence and consolidation, which in turn accounts for their practical differences. For instance, a concurrence order does not create a procedural nexus between those initially party to the original proceedings. Nor does such an order presuppose, or necessarily lead to, identical tribunals, let alone a single tribunal. Nor does it authorize tribunals to issue procedural orders effective across the board. Nor, finally, does a concurrence order warrant the publication of a single award dealing with all the related claims, even though the tribunals in each case might be identical. All of this, it is understood, consolidation allows.

Perhaps the only significant commonality between the two orders is that both require arbitrators to consider all the evidence that the parties adduce or that the tribunal-appointed experts give in the (related) hearings.

Another procedure to be distinguished from consolidation is the holding of consecutive hearings. Here, the references are scheduled to run one immediately after the other. An order directing such sequencing is intended to allow information to pass to and through the arbitrator(s) sitting on all the relevant tribunals.

This is different from an order staying one set of proceedings until another concludes. Typically, this is useful when the outcome of the second reference might reasonably be expected to render the other moot, to cause it to settle, or authoritatively to decide questions of fact or law common to both references.

31 See, e.g., Arbitration Act 1996, s. 35(1)(b) (Eng.).

32 Cf. Czarnikow-Rionda Co Inc. v. Manumante SA, supra note 22 (where the procedures are clearly distinguished).


34 See, e.g., Uniform Arbitration Act, s. 8 (1)(b) (Can.).

35 See, e.g., International Arbitration Act 1974, s. 24 (Austl); Arbitration Act 1996, 2nd Schedule, art. 2 (NZ). When a reference is only partly stayed, it is often because the issues it raises in common with another have been severed and referred to a separate (possibly consolidated) tribunal. In this case, the outcome of the common-issue proceedings controls the remaining claims. See, e.g., Arbitration Act 1986, art. 1046(4) (NL).
B. Single-Reference Concentration Measures

A 'third party' is generally someone whom a writ, originating summons, or similar instrument addresses neither as plaintiff nor as respondent. But in arbitration, the expression denotes three distinct classes of actors: (a) those who sign neither the arbitration agreement nor the substantive agreement; (b) those who sign the latter agreement only; and (c) those who sign both agreements but whose names nevertheless do not appear in a request for arbitration or similar instrument. Subject to a requirement of consent of varying degrees of strictness, all three classes of actors could as well intervene as be joined into pending references. Depending on circumstances, the appropriate procedure is then called intervention (1), joinder (2), or interpleader (3).36

36 Of course, it is possible, if unlikely, for a party to sign a stand-alone arbitration agreement without at the same time being a signatory to the underlying substantive contract. An example would be a company that signs a compromis to settle differences arising from a contract involving one of its subsidiaries. Depending on the exact terms of the compromis, the mother company may then be taken to have acceded to the substantive contract, which, if subsequently that company sought to intervene midway through proceedings begun under the compromis, would make it a 'third party' to those proceedings, as this expression is defined in the text above.

37 Another remedy, available under French law in case of domestic arbitrations alone, is 'tière opposition.' Briefly, tière opposition is a challenge procedure available to anyone who, being neither proximately or approximately party to the original proceedings, can show that the decision causes him actual or potential damage. In practice, this boils down to showing 'a legitimate interest' in having the decision set aside. Tière opposition can be used to challenge any decision (except those of the Cour de cassation, but including those of domestic tribunals) that is res judicata between the parties to the original action. Critics of this remedy claim it is both unnecessary and anomalous, since decisions, including on matters in rem, are res inter alios acta. Supporters draw a distinction between legal effectiveness of a judgement—which they concede only affects parties—and the presumption of legal verity—which, they argue, every judgement attracts and which, in their view, a third party ought to be allowed to challenge, especially where the decision has been procured by collusion. See generally Cohn (1976) 67–69. For writers lamenting the unavailability of the remedy in case of international awards, see Bellet (1991) 238–39; Legros (1999) 512.
1. Intervention

Typically, a third party intervenes in pending proceedings in order (a) to claim title to goods in dispute, (b) to support the contentions of another whose interests he shares, or, more generally, (c) to safeguard any other legally recognizable interest. In civilian jurisdictions, the protected interest usually determines the form of action, which in turn determines standing. French law, for instance, recognises two types of intervention, principale and accessoire. The former covers juridical interests, and gives third parties full standing to prosecute their claims as they see fit; the latter covers both economical and moral interests, but leaves third parties subordinate to whomever they mean to assist.38

By contrast, common law jurisdictions, rather than distinguish how third parties should intervene, focus instead on when they may do so. Thus, the American Federal Rules of Civil Procedure distinguish between intervention as of right and permissive intervention. A right to intervene exists (a) if expressly recognized by statute, and (b) where a third party alleges an interest in the subject matter of the proceedings and is so situated that, as a practical matter, the disposition of the action in his absence might impair or impede his ability to protect that interest.39 By contrast, intervention is merely discretionary if a federal statute says it is, or if a third party’s claim or defence raises questions of law or of fact common to the original action.40 Once admitted into proceedings, however, third parties in common law jurisdictions prosecute their defence freely, and, in return, are fully bound by the decision.41

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38 See NCPC, arts. 329, 330. The position under Dutch law is broadly similar, except then the procedures are called tussenkomst and Voege, respectively. See Sanders & van den Berg (1987) 26; Sanders (1987) 199-200; van den Berg et al. (1993) 70.


40 See Fed.R.Civ.Proc. rule 24(b). The need, under Rule 24(a), to prove that one’s interests are not already adequately represented in the proceedings reduces the automatism of the rule and with it the differences between the two types of intervention.

41 Whereas the English Rules of Supreme Court do not recognise a general right of voluntarily intervention, English courts allow intervention in a limited number of cases, namely, in representative actions, where the intervener belongs to the class the plaintiff claims to represent in circumstances where the intervener objects to such representation; where the intervener alleges that his proprietary interests stand to be affected by the
But as already noted, similar-sounding words can hide significant substantive differences, even within so-called legal ‘families.’ For instance, both French and German law recognize direct intervention; but whereas intervention principale in France causes third parties to join the original proceedings, the equivalent German procedure, Haupt­intervention, merely allows interveners to sue the original parties in a separate action whose outcome, curiously enough, is not even res judicata as against those very parties. Similarly, whereas Russian and Bulgarian law both share this last feature with German law, third-party proceedings in those jurisdictions merge with the original action; in Germany, such actions remain distinct.

2. Joinder

Just as third parties may choose to intervene in pending proceedings, so they may also be required to participate in such proceedings, usually, at the instance of a party (rather than that of a court or of a tribunal). A third-party notice does not compel attendance, but failure to enter an appearance or to file a defence usually precludes the recipient contesting the outcome as against the notice issuer.

Most legal systems allow joinder; but judging by the consequences that they each attach to the procedure, some are decidedly less enthusiastic about enlarging proceedings midway than others are. For instance, Austrian law allows respondents to join anyone against whom they claim an indemnity or otherwise stand exposed to a claim; but the procedure (called Streit­kündung) has been described as little more than a ‘suggestion to intervene.’ By contrast, French law recognises the highly versatile demande incidente en outcome of the dispute, e.g., in rem admiralty proceedings; and in actions for specific performance in which the third party’s interests stand to be affected, especially by the way the contract is to be performed.

42 On French law, see Vincent & Guinchard (1999) 807-08; on Dutch law, see Sanders (1987) 199-200; Sanders and van den Berg (1987) 26; otherwise, see Cohn (1976) 55-58.

43 Synonyms to ‘join’ include ‘vouch’ (Scottish) and ‘implead’ (American).

44 See generally Cohn (1976) 62–63. German law is similar in this respect: Streit­kündung, like Neben­intervention, creates a limited form of estoppel. Significantly, the indemnity itself is typically not decided in the original action, but only in subsequent proceedings between the defendant and the relevant third party. Ibid.
garantie, which when formelle (in rem actions) allows respondents either to drop out of the proceedings or stay on in order to assist his garant, and when simple (actions in personam) results in the third party being added. 45

Both English and American law take a similarly liberal attitude towards impleader. For instance, respondents in England may issue third-party notices in three classes of cases: (a) when claiming an indemnity; 46 (b) when seeking relief relating to the original subject matter and substantially similar to that sought in the original action; 47 and (c) when requiring that a question connected with the subject matter of the original claim be determined in manner binding on a third party. 48 Third parties found liable usually have judgement entered against them in the same proceedings. (Under the old ‘voucher of warranty’ system, fresh proceedings had to be instituted, in which the claimant pleaded the original decision, by way of estoppel 49).

American law exhibits the same liberal attitude towards party joinder—in fact it recognizes not one but two joinder procedures. The first, contained in Rule 19 of the Federal Rules of Civil Procedure, the broad equivalent of England’s Order 16, allows respondents to implead anyone whom they claim is or may be liable to them for even part of the plaintiff’s claim. The second procedure, none other than the old voucher

45 See NCPC, arts. 109, 335–38. See generally Vincent & Guinchard (1999) 809–11. In addition the demande incidente, French courts have developed two additional procedure: la mise en cause, by which a plaintiff may join anyone whom he might originally have named as respondent; and l’assignation en declaration de jugement commun (now given statutory recognition), by which third parties neither directly nor indirectly represented at trial may intervene (or be joined) on appeal. Unlike la mise en cause, l’assignation does not lead to judgement being entered against the third party. See NCPC, art. 553–54. See also Cohn (1976) 62.

46 See O. 16, r. 1 (a).

47 See O. 16, r. 1 (b).

48 See O. 16, r. 3.

49 See O.16, r. 4(3)(a); r. 5(1)(a–b).
system frozen in time, is useful whenever conflict between federal and state jurisdiction precludes impleader proper.\textsuperscript{50}

As already noted, joinder requests usually proceed from the parties rather than from the courts (or the tribunals). This is because the latter often cannot order a third party to be joined \textit{ex officio}, e.g., Spanish, Swedish, and American courts; or can but will not do it, out of respect for the adversarial nature of the system, e.g., the English courts. But there are exceptions to this rule. For instance, French and Italian courts will sometimes order third parties joined \textit{pro proprio motu}. True, these courts will still only do it indirectly, \textit{i.e.}, by instructing a party to issue a third-party notice. But the order is practically just as effective, since non-compliance means striking out the delinquent party’s claim or defence. Compliance, on the other hand, renders the situation broadly similar to a regular party joinder.\textsuperscript{51}

3. Interpleader

A party confronted with rival claims that he can only satisfy by risking double liability might be able to ‘interplead’ his rival claimants. This allows him to drop out and let the claimants fight it out, or at least secure that one set of proceedings would decide the issue between all those concerned. In modern times, interpleader has received the greatest attention in common law jurisdictions. For instance, English law allows someone in possession of goods or money in which he claims neither title nor interest but that form the subject matter of rival claims, to issue an interpleader summons. If the summons proves \textit{bona fide}, the court normally stays the contending actions and orders that the matter be tried between the respective claimants.\textsuperscript{52} In civilian jurisdictions by

\textsuperscript{50} See Cohn (1976) 61; Wright & Miller (1986) s. 1601 (vol. 7).

\textsuperscript{51} See generally Cohn (1976) 59–60.

\textsuperscript{52} See RSC O. 17. See also \textit{Arbitration Act} 1996, s.10 (‘Where in legal proceedings relief by way of interpleader is granted and any issue between the claimants is one in respect of which there is an arbitration agreement between them, the court granting the relief shall direct that the issue be determined in accordance with the agreement unless the circumstances are such that proceedings brought by a claimant in respect of the matter would not be stayed.’ English law recognises another type of interpleader, the \textit{sheriff’s}, which is useful whenever a third party claims as his own (or as chargee) goods that the sheriff has seized. In that case, the sheriff serves an interpleader summons on both the
contrast, interpleader, while known, lacks this kind of influence. For instance, while there is a hint of interpleader in the French Code civil (where once Roman law recognized a similar procedure, i.e., in the contrat de bail), there is not a trace of it where one would most expect to find it, i.e., in the Nouveau Code de Procedure Civile, wherefrom it has been displaced by the functionally similar procedures of mise en cause and exception en garantie.53

IV. Uses, Misuses, and Pitfalls of Different Concentration Measures

This section considers the uses, misuses (A), and pitfalls (B) of the concentration measures reviewed above. Once again, it is worth repeating that there is little arbitration-specific authority on exactly which fit which fact-setting and that analysis therefore has to rely on suitably qualified analogies derived from the case law on the concentration of actions.54

claimant and the third party, that they may litigate the matter between themselves. See Cohn (1976) 64. In the United States, Rule 22(1) of the Federal Rules of Civil Procedure, once described as ‘the most modern and liberal method of obtaining interpleader to be found anywhere,’ is the rough if more generous equivalent of the English stakeholder’s interpleader. See Moore & Vestal (1962) s.14.06.

53 See Code civil, art. 1727. Formerly, laudatio auctoris allowed a tenant faced with an action for eviction, to seek his substitution in the action by the lessor. In Germanic jurisdictions, a roughly equivalent procedure is urheberbenennung. See generally Cohn (1976) 63–66.

54 Extant authority is limited to two trial-level decisions: both from Hong Kong; both concerning construction disputes; both implicating a choice between consolidation and concurrent hearings; and both contradictory in the main. In Shui On Construction v. Schindler Lifts, Rhind J. held that concurrent hearings were preferable to consolidation for two reasons: (1) because ‘[a] party being both a claimant and a respondent is simply incompatible with formal consolidation,’ and (2) because otherwise consolidation would require parties to amend their pleadings, which he considered cumbersome. [1986] HKLR 1177. But in Shui On Construction v. Moon Yik Co, Deputy High Court Judge Cruden conceded (1) above, which however he distinguished, but rejected (2). Instead, he held that consolidation was preferable, supposedly, because it increases the arbitrator’s power and facilitates the better disposal of issues, for example, by allowing interlocutory orders effective across the board to be made. [1987] HKLR 1224. Faute de mieux; the case
A. The Uses and Misuses of Various Concentration Measures

The focus of much scholarly attention, consolidation is in fact an inflexible concentration measure: useful in a relatively rare case (when a single claimant, or co-claimants, start the related references), it otherwise comes, if it comes at all, with strings attached. For example, the situation in which respondent B in reference M, rather than counterclaim, begins a separate reference N against claimant A. The only way M and N could be consolidated is if N were ordered to stand as the counter-claim in the consolidated proceedings—a prospect which A might welcome, but which B, to be cast as overall respondent, might well resist. 55

Another example is where different claimants begin two references against the same, or against different, respondent(s). Consolidation then works only if the claimants (a) join formally (which guarantees respondents a consistent statement of claim), and (b) instruct the same lawyers (which prevents them exploiting their artificial separateness, e.g., during cross-examination). 56

A third example is where respondent Y in reference P cannot directly implead Z, and so sues him instead in a parallel reference Q. Contrary to common belief, P and Q simply cannot be consolidated. They cannot be consolidated because they are irreducible to the dual-interest configuration (claimant v. respondent) inherent to the logic of a single (even if consolidated) reference. 57

law on the concentration of actions will inform discussion, with appropriate reservations and adaptations. On the concentration of actions, see generally 37 Halsbury's Laws of England 60 (para. 69–71); RSC O.9 r.4 (Engl).


57 See Schindler Lifts, supra note 54; Moon Yik, supra note 54. For an example of the erroneous belief that such proceedings could be consolidated, see article 13 of the Arbitration Rules of the Zurich Chambre of Commerce. That provision reads: ‘If there are several claimants or several respondents, or if the respondent, within the deadline for the answer, files a claim with the Zurich Chamber of Commerce, against a third party based on an arbitration clause valid..., an identical three-man Arbitral Tribunal is appointed according
If consolidation is an inflexible concentration measure, third-party proceedings are just the opposite: impervious to which party brought which proceedings, alongside or against whom, they merely require two related claims. And concurrent hearings are only slightly less versatile: for reasons of administrability, they work better with a common chair and work best with identical tribunals. Consecutive hearings, on the other hand, merely require that the membership of the relevant tribunals overlap, if only by a single arbitrator. And even discretionary stays, which are in principle useful only when the outcome of one reference promises to hasten the other’s conclusion, are still more useful than consolidation.

B. The Pitfalls of Concentration

Useful, however, does not mean risk-free. Concentration measures raise a range of due-process concerns, mostly in relation to common arbitrator appointments. In principle, of course, anyone may accept arbitral office in related references, provided he (a) discloses the common appointment to all concerned, and (b) does nothing to prejudge either reference. Still, if one accepts certain basic assumptions about human nature, the risks that common appointments pose are obvious. These risks will now be considered.

The least problematic scenario involves the same parties and the same tribunal. Here, there is practically neither risk of information travelling between references in violation of due process or confidentiality rules, nor risk of informational asymmetries

to Art. 12 subs. 3 for the first and all other arbitrations. The Arbitral Tribunal may conduct the arbitrations separately, or consolidate them, partly or altogether.’ (Emphasis added.) Of course, consolidation would not work in case of third-party proceedings for the simple reason that it would be impossible to tell who the claimants and the respondents would then be.


59 See IBA Code of Ethics, art. 4(2).

between arbitrators such as would allow some of them a disproportionate influence on outcome.\textsuperscript{61}

Somewhat more complicated is the scenario involving the same parties but different tribunals. Here, there is the risk of informational asymmetries between arbitrators, and hence the risk of disproportionate influence.

But serious though this may be, it is nothing compared to the risks all run where both the parties and the tribunals are different.\textsuperscript{62} Then, the ‘common’ party must fear that failure in one reference might prejudice another. The remaining parties must fear the effect of ‘illicit’ information travelling improperly between arbitrators and influencing outcome. The common arbitrator must fear the moral hazard of such information. And the remaining arbitrators must fear the disadvantage of informational asymmetries.\textsuperscript{63}

To appreciate some of these concerns, assume a situation in which a party denies in one reference the existence of a potentially conclusive document that he introduces in another. What is an arbitrator sitting in both these references to do? On the one hand,

\textsuperscript{61} Cf. \textit{Ali Shipping Corporation v. Shipyard Trogir} [1998] 1 Lloyd’s Rep. 643 (CA 1998). In this case, the (English) Court of Appeal held that confidentiality precludes a party introducing in one reference documents that he obtained in another, between the same parties. With respect, this is clearly exaggerated, especially considering the documents in question had not even been discovered, and so there was never any question of a public policy in encouraging full discovery. In any event, the arbitrators in \textit{Ali} were not the same, and it would be odd if the Court were to maintain the same position above if they were. For a fuller examination of \textit{Ali Shipping}, see infra note 35, on page 62.


\textsuperscript{63} See Rubino-Sammartano (1990) 185–86; Reymond (1991) 6–7. But see van Houtte (1989) 400 (arguing that an arbitrator (a) may disclose information obtained in a sister arbitration provided he does so in general terms, and (b) may seek a court order enjoining a party to produce the necessary document.) The answer to (a) is that information often does not readily lend itself to generalisation, and to (b), that most jurisdictions do not recognize such power to arbitrators, and in any event few arbitrators would willingly involve courts in ‘their’ references.
he may neither query the anomaly, nor silently draw adverse inferences: the first, on
grounds of confidentiality, the second, lest he should deny the presumptive miscreant
the opportunity to explain away the discrepancy. But surely nor can he now fully
expunge all memory of the relevant document, now perfectly recall it.

All these are real concerns that parties must address if they are to get the full benefit
of concentration. But not all the concerns expressed about concentration are real. For
instance, concentration does not (as some have suggested) increase the risk of arbitrator
error or exacerbate its consequences. Similarly, it is facile to go on about intricate webs
of factual and legal issues that arbitrators supposedly must disentangle, different
substantive laws they must apply to related but distinct claims, the challenge of drafting
awards that satisfy different contractual requirements, and so on. In practice, related
claims involve similar points of fact or law, by definition, which means that the tribunal’s
workload does not increase proportionately to the number of claims that it is asked to
decide. Similarly, different substantive laws are no more difficult to apply to separate
contracts than they are to apply to different claims under a single contract (dépeçage),
which arbitrators might have to do even in simple bilateral disputes. Where
exceptionally arbitrators face incompatible award requirements, they can, and sometimes
must, publish separate awards.

64 See Inso Lines v. Cyromar, 1975 AMC 2233 (SDNY 1975); Higley South, Inc. v. Park Shore
Dev. Co, 494 So.2d 227, 229 (Fla. 2d DCA 1986). The observation is relevant because two
deceptively pertinent lines of cases might suggest otherwise. The first, long since
overruled, deprecates resort to arbitration whenever complex questions of law or fact are
at issue. For this (now abandoned) view, see Dillingham Constructions Pty Ltd v. Downs
(1969) 90 WN (Pt 1) (NSW) 258; American Safety Equipment Corp. v. J. P. Maguire & Co,
391 F2d 821, 826-27 (CA2 1968). For the current view, see Quantas Airways Ltd v.
Dillingham Corporation et al. [1985] 4 NSWLR 113, 118 (Com. L Div., 1985); Mitsubishi
altogether irrelevant, disallows concentration when it risks confusing jurors. See Schacht v.
Janits, 53 FRD 321 (DC NY 1971); Flinthkote Co v. Allis-Chalmers Corp., 73 FRD 463 (DC
NY, 1977); Fleishman v. Prudential-Bache Secs. Inc., 103 FRD 623 (DC Wis. 1984); Hasman v.

Like any procedure, concentration lends itself particularly well to certain situations, well enough to others, and not at all to many more.
Chapter Two. CONTRACTUAL CONCENTRATION

I. Introduction

'It is for the commercial parties to provide the answer [to claim-relatedness], if they wish to do so, by making the appropriate contracts.' With these words, Lord Hobhouse confirmed what arbitration specialists well knew by then (2000) to be the position of English law on the concentration of related arbitrations. Nothing, of course, is simpler, or more in keeping with the ethic of voluntariness characterising international arbitration, than to let parties provide what solution they consider fit for a problem whose significance only they can properly judge; after all, contract is 'the foundation stone of modern international commercial arbitration.' Unfortunately, reality is more complex than this account supposes.

First, there is the question of technical expertise: complex arbitration mechanisms are technically complex to design (II). Second, there is the difficulty of so designing those mechanisms that they effectively reconcile the desire for inter-award harmony with competing desires widely assumed to be fundamental to arbitration, e.g., the desire for efficiency, for confidentiality, for direct tribunal choice (III). Third, there is the question of foresight: for various systemic, and hence resilient, considerations, parties are now unlikely to use their formal contractual freedom to fashion procedures suited to their circumstance (IV). Add these factors together, and faith in a contractual solution the problem of inter-award conflict begins to seem somewhat misplaced.

These factors will now be considered.

II. Two Techniques of Contractual Concentration

There are essentially two contractual techniques for concentrating related claims: call one 'unitary' and the other 'nexus' (A). Their weakness lies in their contractual nature; their strength lies in their interoperability with parallel institutional concentration arrangements (themselves discussed in Chapter 3) (B).

1 See Lafarge Redland Aggregates Ltd v. Shephard Hill Civil Engineering Ltd, [2000] 1 WLR 1621.

A. The ‘Unitary’ and the ‘Nexus’ Techniques

These techniques will first be discussed in detail (1), and then their relationship to ordinary privity rules will be considered (2).

1. How they work

The unitary technique involves parties signing a single arbitration agreement that gives all those concerned a (conditional) right to assert claims against all the others, severally or jointly. Perhaps the best-known specimen is the ambitious model clause by Robert, drawn up with complex projects in contemplation, and assumed to feature in all project-related contracts. This reads:

[a] Les litiges auxquels donneront lieu, entre toutes parties intéressées au ‘project’ à un titre quelconque (suit l’indication contrôlée du projet), en ce compris les études ayant concouru au projet, la réalisation de celui-ci sous toutes ses formes, son acceptation ou son refus avec les conséquences qui s’y attachent, le financement des opérations ayant concouru au projet, les opérations de transport grâce auxquelles il a été réalisé, seront résolus par voie d’arbitrage, conformément au Règlement de (...) auquel toutes personnes qui se réclameront de la présente ‘clause’ seront obligées. [b] Dès l’instant qu’elles ont été signataires d’un contrat contenant la clause, toutes personnes intéressées au projet à l’un des titres ci-dessus énumérés, pourront s’en réclamer à l’encontre de toutes autres vis-à-vis desquelles elles pourront faire état d’un rapport de droit suffisant justifiant de leur intérêt à agir, sous la seule réserve que ladite partie soit également, même si c’est à l’égard d’une autre, mais au titre du même projet, adhérente à la clause. 

... [d] Le tribunal arbitral ... aura pour première mission, à l’occasion de chaque demande dont il aura été saisi, de se prononcer par sentence préalable sur sa saisine si elle lui est contestée par la partie à l’encontre de laquelle la demande est portée. A ce titre, il lui appartiendra de vérifier de l’existence des rapports de droit allégués en fonction de l’appartenance respective des parties au projet, selon les termes qui précèdent. La décision des arbitres sera définitive quant à leur saisine. [e] Si plusieurs demandes arbitrales jugées connexes par le tribunal arbitral sont pendantes devant lui, il lui appartiendra d’en ordonner la jonction, à la demande d’une partie quelconque, s’il lui apparaît qu’il existe entre toutes les parties intéressées à la jonction un rapport de droit justifiant celle-ci et si la jonction apparaît conforme à l’intérêt général des parties intéressées. En cas de jonction, la sentence à intervenir sera réputée commune à tous
Next, there is the nexus technique, which relies, not (as in the case above) on all concerned adhering to one and the same clause, but rather on the relationship between different but interlocking arbitration agreements that entitle and upon request oblige some or all signatories to participate in any reference arising out of one of them. An example is clause 41 of the Standard Form of Building Contract (JCT 80), the (now updated) flagship contract of the Joint Contracts Tribunal, itself the body representing the main interest groups in the British building industry.

Clause 41 of JCT 80 entitles both employers and contractors to refer any dispute that ‘raises issues which are substantially the same as or connected with issues raised in a related dispute between [either of them and the nominated sub-contractors or nominated suppliers]’ to the same ‘[a]rbitrator appointed to determine the related

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4 Under JCT’s most recent edition of its Standard Form of Building Contract (JCT 1998), clause 41B.1.2 merely provides that ‘Where two or more related arbitral proceedings in respect of the Works fall under separate arbitration agreements, [CIMAR] Rules 2.6, 2.7, and 2.8 shall apply thereto.’ It is not entirely clear what ‘related’ exactly means, but it is thought wide enough to cover claims arising under other JCT standard forms of contract, such as would allow arbitrators, where conditions apply, to order their concentration. See Furst & Ramsey (2001) 867. The JCT forms setting out the terms of engagement of both nominated sub-contractors and nominated suppliers include similar language. See, e.g., JCT Nominated Sub-Contract Agreement, cl. 9B.1.2.
An arbitrator who finds that disputes so referred are indeed related may proceed to 'make such directions and [render] all necessary awards in the same way as if the procedure of the High Court as to joining one or more respondents or joining corresponding or third parties [were] available to the parties and to him. The arbitrator's assertion of jurisdiction is subject to judicial review (unlike with the Robert clause).

Obviously, the two techniques are just that—techniques that could work to rope in as many, or as few, parties as their users consider appropriate. When only a handful of parties are implicated, it is usually safer as well as simpler to give everyone standing; otherwise, a restrictive test is necessary to avoid cumbersome references. (This, for instance, is one of the dangers of Robert's all-embracing clause.) Such a test could be objective, subjective, or hybrid. A subjective test excludes all bar certain specifically pre-identified parties. An objective test excludes claims that do not satisfy objectively verifiable criteria, e.g., common questions of fact. And a hybrid test combines the two preceding criteria, e.g., by excluding those whose interest in the matter is insubstantial, excepting certain pre-identified parties, who may always (or, as the case may be, may never) participate. An example of a hybrid test is clause 6.4.6 of the General Conditions of the Contract of Construction, sponsored by the American Institute of Architects:

No arbitration arising out of or relating to the Contract shall include, by consolidation or joinder or in any other manner, the Architect, the Architect's employees or consultants, except by written consent containing specific reference to the Agreement and signed by the Architect, Owner, Contractor and any other person or entity sought to be joined [subjective preclusive]. No arbitration shall include, by consolidation or joinder or in any other manner, parties other than the

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5 See JCT 80, cl. 41.2(1).

6 Ibid., cl. 41.2(1). For another (this time American) institutional use of the nexus, see the 1997 edition of contract forms sponsored by the American Institute of Architects, particularly clause 4.6.4 of General Conditions of the Contract for Construction, clause 1.3.5.4 of the Standard Form of Agreement between Owner and Architect, and clause 6.2.4 of the Standard Form of Agreement between Contractor and Subcontractor.

Owner, Contractor, a separate contractor as described in Article 6 [subjective inclusive] and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration [objective]. No person or entity other than the Owner, Contractor or a separate contractor as described in Article 6 shall be included as an original third party or additional third party to an arbitration whose interest or responsibility is insubstantial [objective].

Because decisions on standing are by their nature interlocutory, impressionistic, and (when negative) sometimes final, a test of standing should generally be relatively tight. Just how tight depends on the concentration and similar managerial prerogatives that

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8 See, e.g., AIA's General Conditions of the Contract for Construction A201-1997 (15th ed. 1997), cl. 4.6.4. The balance of the provision reads: 'Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a Claim not described therein or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.' A test cruder but easier to administrate appears in a recent unitary project-wide complex arbitration scheme that forms part of a Build-Own-Operate-Transaction involving a US$ 1.2-billion power plant in the Middle East. The project's contractual documentation is roughly divisible into three categories. Category 1 comprises the 'Project Structure Agreements,' which govern the Project Company's (PC) relationship to the Host State and its agencies. Category 2 comprises the 'Financing Documents,' which govern the PC's relationship to the consortium of lending banks. Category 3 comprises the 'Erection and Procurement Agreements,' which govern the PC's relationship to the project's contractors. Under the project-wide complex arbitration scheme, only same-category claims may be consolidated; different-category claims, however related, must each be settled independently. The test, as already note, is simple but crude; for instance, it excludes claims arising out of nationalisation-induced loan defaults. (Agreement on file with author)
the arbitrators are granted under the arbitration agreement: the more limited those powers, the tighter the test should be—and, of course, *vice versa.*

2. Concentration and Privity

Because it sometimes entails the joinder of proceedings pending between signatories to different substantive agreements, forum concentration in arbitration may be thought to override ordinary rules of privity. For example, the most invasive of concentration measures is consolidation. Assume a situation in which A and B sign contract X, and A and C sign contract Y. Assume that X and Y are related, and contain each the same unitary arbitration clause giving arbitrators the right to consolidate related references begun under either or both of these contracts. Finally, assume that, acting on valid authority, a tribunal consolidates references A/B and A/C. Could C then, on this basis alone, bring claims against B that but for such consolidation C either could not bring at all or could only bring before the courts? It cannot. Consolidation, the *Cour de cassation* has held, creates no privity relations. Nor, in principle, would the answer differ if B’s claim sounded in tort (rather than in contract), or if B brought it in the exercise of a statutory right. This is because claims can only be consolidated once validly brought, which in turn depends on the arbitration agreement—consolidation has nothing to do with it. Consolidation fuses *proceedings,* not arbitration agreements, much less the underlying substantive agreements.

9 But see Hascher (1984) 136. See also *County of Sullivan v. Edward L. Nezlek, Inc.*, (1977) 397 NYS 2d 371 (where architect sought to overturn an order consolidating its arbitration with the employer with another pending between contractor and the employer’s sponsor (the county) on the ground that consolidation might force it ‘to deal with claims of the country with which it had no contract in addition to those of the college with which it did have a contract, result in confusion and the risk of its being whipsawed.’)

10 Cass. Civ. (2nd Chambre), 9 May 1985, *Bull. Civ. II* (no. 93). The decision, it is true, deals with the consolidation of actions; but there seems to be no valid ground for varying the answer in case of arbitration.

11 See *Lafargue Redland, supra* note 1, at 1640 (HL 2000) (Lord Hobhouse describing as ‘elementary’ the contractual origin of the arbitrator’s jurisdiction). See also Redfern &
The converse is also true. By itself, a right of direct action neither entails nor includes a right to seek the concentration of related claims. For example, simply because \( A, B, \) and \( C \) may bring claims against one another does not necessarily entitle \( B \) to intervene in proceedings begun by \( A \) against \( C \). To do so, \( A \) usually needs (express) contractual authority.

Clearly it is possible to conceive of circumstances in which the above answers would need qualification. For instance, a unitary clause, like Robert's, might give all signatories title to vindicate, as against one another, and regardless of privity relations

Hunter (1999) 260 (describing the rule that ‘[a]n arbitral tribunal may only validly determine those disputes that the parties have agreed that it should determine’ as ‘an inevitable and proper consequence of the voluntary nature of arbitration’).

Cf. van den Berg (1987) 268 (arguing that, for the limited purposes of enforcement under the New York Convention, consolidation fuses not only the arbitrations, but also the underlying arbitration agreements). Clearly, it would not avail the sub-contractor to argue that the relevant arbitration agreements cover disputes ‘in connection with’ the underlying contracts, since, under standard privity rules, these agreements apply strictly inter partes. But it is an open question whether, if the substantive agreements somehow gave the sub-contractor a direct claim against the employer without clearly establishing a right to vindicate that claim by way of arbitration, such claim would be arbitrable. Often, the consolidation technique used will have established such a right to arbitrate clearly. If it did not, the answer would depend on the exact language of the contracts in question.

For the argument that midway concentration cannot be presumed, see Aksen (1981) 114–20. For the contrary proposition, see Connecticut General Life Insurance Co v. Sun Life Assurance Co of Canada, 210 F3d 771, 775 (per Chief Judge Posner: ‘We cannot say that these textual inferences are conclusive in favor of consolidation, but they support it, as do practical considerations, which are relevant to disambiguating a contract, because parties to a contract generally aim at obtaining sensible results in a sensible way’) (7th Cir. 2000); Trifulgar House Construction Ltd v. Railtrack plc., 75 BLR 55 (1995) (recognizing that the arbitration provisions in the various JCT forms of contract are clearly intended to avoid the injustice of inconsistent findings reached in multiple proceedings, and that as a matter of construction, and if necessary by implication, they should be interpreted in such a manner as would give effect to their intended common purpose).
under substantive agreements, rights arising out of, or in connection with, the underlying project. A model clause that ICC once sponsored (apparently, without much success) sought to do just that, by giving ‘adherents’ to that clause the right:

to pursue any type of claim against any other adhering party, regardless of whether or not they are parties to the same contract; to intervene in any arbitration proceedings between two or more other adhering parties, again, regardless of whether or not they are parties to the same contract; to involve one or more other adhering parties in the arbitration; and to obtain the recognition of, or compliance with, any award on the part of all the other adhering parties, whether or not they were parties to the arbitration proceedings, so long as they were given an adequate opportunity to become parties.14

Under the circumstances, it is possible that an ‘adhering’ sub-contractor should be able to bring, for instance, tort-based or statutory claims against an ‘adhering’ employer with whom he otherwise lacks privity. But this is only because the arbitration agreement allows it. It is thus wrong to assert (as Veeder does) that consolidation could compel award-creditors to enforce their rights against strangers about whose corporate whereabouts and assets they know nothing or could leave award-debtors in hock to strangers to whom liability falls outside the debtor’s legal liability insurance cover.15

B. Strengths and Weaknesses of these Techniques

The basic weakness of the techniques examined above—indeed the weakness of all contractual arrangements—is that they only bind signatories. The unitary technique, for instance, only works if all or most participants in the common economic endeavour whose differences the unitary clause means to settle sign up. Robert’s clause is a case in point. Few will deny that clause the merits of exhaustiveness and attention to detail; but this is no reason to overlook the clause’s basic limitation—namely, that it only works effectively if it is signed by most project participants.

The same applies to the nexus technique: its effectiveness, too, ultimately depends on the extensiveness of the underlying contractual network—with the more extensive


this network, the more parties sign up to the arrangement, and the less likely related claims escape concerted settlement; and, of course, *vice versa*.

This basic condition, if reasonably satisfiable when participants are pre-identifiable, is otherwise seriously limiting. For there is then simply no effective way of compelling participants to procure the adherence of third parties whom they latterly propose to engage on the relevant project. Merely providing that none who fails to adhere shall become party to some contractually defined project documentation will not do it.\(^{16}\) It will not (a) because the stipulation only operates *inter se*, and (b) because the third party might happily forgo an option to sue signatories that brings with it a corresponding risk of counter-suit.

For the same reason, but also because enforcement is then impracticable, it is useless trying to forbid signatories concluding project-related agreements that do not contain the relevant provision.\(^{17}\) Enforcement then would be impracticable because, breach of the obligation would go unsanctioned, unless, of course, failure to procure adherence were set down as an event of default—an unlikely proposition.

The problem in both cases, of course, is less serious when the relevant arbitration clause features in some industry-wide standard conditions of contract, for the conditions

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\(^{16}\) For just such a provision, see Wetter (1987) 5. This says, ‘2.2 No additional party shall become a party to any Project Document or to a contract referred to in Article 2.3 hereof, unless such person becomes a subscribing party to this Agreement by executing a counterpart hereof.’

\(^{17}\) See, e.g., *ibid*. The relevant provision reads, ‘2.3 No two or more Parties shall enter into a contract with one another relating to the Project, and no Party shall enter into a contract relating to the Project with a person not a party to this Agreement which alters or amends in any material respect any of the rights or obligations of any Party under any Project Document, unless (i) such contract is first added to Schedule A hereof and thereby becomes a Project Document and (ii) a clause is included in such contract stating that any Dispute arising thereunder shall be exclusively and finally resolved pursuant to the provisions of this Agreement and that all Parties to any such contract expressly consent to be bound by this Agreement as if signatories hereto.’ *Ibid.*
then impart their universality to the clause in question.\textsuperscript{18} Whether the arrangement then is not more heteronymous (i.e., involving subjection to external law, albeit one rendered in conventional form) than autonomous, depends on whether one thinks standard terms are typically the product of industry-wide consultations in which industry members get a roughly equal chance of influencing outcome, or whether influence then corresponds to economic power.

A certain complementarity between contractual and institutional concentration techniques compensates for the weaknesses of the former. Care then is necessary to ensure that the techniques ‘hang’ together. But assuming care is taken, the conjunction of both strategies could (a) expand the range of claims covered, by ‘roping-in’ more parties and more claims, (b) give arbitrators additional powers the more effectively to manage related claims, and (c) fill lacunae that either technique alone would suffer. The following example, once again from JCT-80 documentation, shows how reference to the industry-wide Construction Industry Model Arbitration Rules (CIMAR) can create interesting synergies.

\textsuperscript{18} The Danish building industry is a case in point. Most building projects in Denmark are governed by \textit{General Conditions for Works and Deliveries (AB92)}, under which disputes ‘between [the employer, contractors, subcontractors, supplier or the technical advisers employed on the works] in connection with or arising out of the Contract [are] … settled by the Court of Arbitration for the Building and Civil Engineering Works.’ This is to be contrasted, for example, with the situation in the Netherlands, where most construction and building contracts incorporate the \textit{Uniform Administrative Conditions for the Execution of Works (UAV)}. Under those \textit{Conditions}, only disputes between employers and contractors ‘in connection with or as a result of the Contract or any subsequent agreement arising out of the Contract [are to] … be settled by arbitration in accordance with the rules defined in the Regulations or under the rules of the Court of Arbitration of the Netherlands Building Industry [\textit{de Statuten van de Raad van Arbitrage voor de Bouwbedrijven in Nederland}].’ See UAV, art. 49. The fact that the rules of this Court allow third-party proceedings is immaterial, since both joinder and intervention require the third parties’ consent. See BIN Statutes, art. 21(4), 22(3). But see discussion of the industry’s attempt to promote industry-wide forum concentration, on page 94.
Alone, the JCT-80 concentration regime, a textbook nexus arrangement, excludes non-JCT-based disputes, e.g., disputes involving architects and other professional consultants. But under CIMAR, parties considering the appointment of arbitrators under separate but related arbitration agreements have an obligation, regardless of whether the same parties are involved in each case, to give due consideration to appointing the same arbitrator—which significantly increases the likelihood of the same tribunal determining nexus as well as non-nexus disputes.\textsuperscript{19} Furthermore, where the same arbitrator is appointed to the related references, the JCT concentration regime merely sanctions third-party proceedings; CIMAR, on the other hand, adds the option of concurrent hearings, and if the parties are agreed, the option of consolidation also.\textsuperscript{20}

The complementarity works in another way, too. JCT 80 says nothing about how to resolve differences concerning the suitability and qualification of an arbitrator appointed under one dispute to determine another; under CIMAR, such differences trigger a default court appointment.\textsuperscript{21}

\textsuperscript{19} CIMAR rule 2 reads: '… 2.6 Where two or more related arbitral proceedings on the same project fall under separate arbitration agreements (whether or not between the same parties) any person who is required to appoint an arbitrator must give due consideration as to whether (i) the arbitrator, or (ii) a different arbitrator should be appointed in respect of those arbitral proceedings, and should appoint the same arbitrators unless sufficient grounds are shown for not doing so. 2.7 Where different persons are required to appoint an arbitrator in relation to arbitral proceedings covered by Rule 2.6, due consideration includes consulting with every other such person. Where an arbitrator has already been appointed in relation to one such arbitral proceeding, due consideration includes considering the appointment of that arbitrator.'

\textsuperscript{20} See CIMAR, rules 3.7, 3.8, and 3.9.

\textsuperscript{21} See CIMAR, rule 2.4. See also \textit{Arbitration Act 1996, s. 18 (Eng.)}. Another example of the same complementarity features in the documentation of the American Institute of Architects (AIA), though, in this case, it is the standard contract that complements the laconic industry-standard institutional arbitration rules, the American Arbitration Association’s Construction Industry Arbitration Rules. (The AAA Rules merely sanction consensual and, where available, statutory joinder.) See \textit{AIA Construction Rules}, rule 9; \textit{General Conditions of the Contract for Construction}, cl. 4.6.2 (reproduced on page 49).
III. Harmony, Efficiency, Confidentiality & Arbitrator Choice

Clearly, it is technically possible for the parties to write their agreements so that the same arbitrators take cognizance of related claims. But it takes more than technical expertise to fashion a procedural framework favourable to inter-award harmony: it takes negotiation skills, flexibility, and most of all, it takes consideration for the concerns of one's counterpart. More than anything, the challenge that complex arbitration presents lies in reconciling the desire for decisional harmony with other considerations that many maintain are important to the users of the arbitral process, e.g., the desire for efficiency (A), for confidentiality (B), and for direct arbitrator choice (C). The tension between these considerations will now be considered.

A. Concentration and Efficiency

Is concentration efficient? The question is longstanding, the answer contested. Doubters point to the logistics of involving more parties, more lawyers, and possibly more arbitrators, than normally would feature in two-party references. They call to attention the extra time that arbitrators must spend on fathoming criss-crossing claims, reviewing extensive evidence, deliberating their decision, and drafting one or several awards disposing of an uncommonly large number of possibly heterogeneous claims.22

But supporters of concentration object that such criticisms overlook the various ways in which concentration could improve efficiency and at the same time promote consistent outcomes. And so they underline how concentration often leads to empanelling a single tribunal; how it permits adjudicating identical or similar cases only once; how it facilitates deciding preliminary common issues, potentially rendering moot whole classes of claims; how apportioning cost-increases according to benefit derived, applying time limits to, and restricting appeal from, decisions on concentration, could substantially mitigate adverse consequences otherwise chargeable to concentration.23


23 See Level (1996) 42; Chiu (1990) 61. On the power of arbitrators to apportion costs, see Craig et al. (2000) 393-96. For an example of restricting appeals from decisions on concentration, see Arbitration Act 1996, 2nd Sch., art. 2(8) (NZ).
Clearly, there is truth in both these accounts. But efficiency is relative. For instance, the so-called ‘business community,’ which both accounts above usually take as their putative subject matter, is a kaleidoscope of sectoral groupings whose notions of efficiency vary according to market conditions. In this case, the relevant conditions probably include risk perception, market volatility, capital-liability ratios, industry contracting practices, market institutional structure, and claim homogeneity. Speaking very broadly, one may identify a pro-concentration bias with markets in which, typically, claims are related, actor capitalization bears a relatively close relation to potential liability (making double liability ruinous), standard-form contracting is prevalent, and dispute-settlement is centralized. The converse, of course, is also true. In practice, these factors rarely align to produce either clear inclination or clear disinclination towards concentration. And then the combination of standard-form contracting and centralized dispute-settlement is usually conclusive. An example is the international grain market.

On the one hand, grain is traded in a fast-moving market in which each trader concludes scores of transactions, each netting him a relatively (to capitalization) modest profit, and entailing correspondingly limited potential liabilities; all of which should disfavour concentration. On the other hand, this a market that uses standard-form contracting and is structured around successive homogeneous transactions whose disruption produces domino-like arbitrations typically conducted under the auspices of a central governing-body (the Grain and Feed Trade Association), itself the sponsor of the

Commenting on this relativity, Lord Mustill writes, ‘It has become a cliché of discussion on arbitration theory and practice in the last ten years that speed, economy of cost and finality are always the most important.’ ‘It may be,’ he adds, ‘that in many users’ minds that is so, but I do not believe that every user would agree.’ See Mustill (1999) 89. Other writers play down the significance of efficiency considerations even more. Hunter, for instance, says, ‘The general preference for arbitration in international transactions’ has nothing to do with the advantages of speed and cost saving.’ Rather, ‘[t]he main reason we see arbitration clauses in international commercial contracts is that corporations and governmental entities engaged in international trade are simply not willing to litigate in the other party’s “home” court.’ See Hunter (2000) 382. Pithily, and with a twist of irony, Klitgaard remarks, ‘Speed and finality are virtues, but only if you win.’ See Klitgaard (1996).
standard contract forms; all of which should favour concentration. Now apply the trump rule above, and, unexpectedly, you get the 'string arbitration' regime of the GAFTA Rules—market-wide arbitration rules that prescribe proceedings between ‘first sellers’ and ‘last buyers,’ with the outcome binding on all ‘intermediaries.25

Compare this now to the international building market: a slow-moving market in which deals are few, stakes considerable, disputes related, and potential liabilities frequently disproportionate to capitalization—all of which should favour concentration. On the other hand, the building market knows neither market-wide contracting (the form most widely used internationally, FIDIC, is far from universal) nor centralised dispute-settlement structures. Further, claim heterogeneity in that market means that concentration typically favours some market participants more than it does others. Contractors, for instance, typically favour concentration, because they fear double liability to employers and sub-contractors. So do employers, if to a lesser extent, and then only vis-à-vis contractors and architects; employers usually want nothing to do with sub-contractors. Sub-contractors, on the other hand, are typically loath to join contractor-employer proceedings, which (a) usually involve much that is irrelevant to their claim, and (b) may render their liability moot anyway. The same dislike of concentration is characteristic of architects, who (a) typically avoid liability by blaming contractors, and (b) fear, however unreasonably, that concentration might attract the higher duty of care appropriate to non-professionals.26 Applying the trump rule above, one would expect, and upon examination would find, no industry-wide enthusiasm for concentration.27

On the grounds already emphasized, but also having regard to the considerable stakes arbitration nowadays involves,28 as well as the significant costs that arbitration

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25 See, e.g., GAFTA Rules, r. 7. On string arbitration, see discussion on page 91.


27 See the AIA’s General Conditions of the Contract for Construction A201-1997 (15th ed. 1997), cl. 4.6.4., reproduced on page 49.

28 See Knull & Rubins 537 (‘the stakes can be tens, hundreds, or even thousands of million of dollars’). Around 55 percent of ICC-arbitrations filed in 1998 were valued at more than US$ 1 million, and approximately 20% were valued upward of US$ 10 million.
itself entails, it would seem reasonable that at least some arbitration users should sooner get awards, if not right, at least consistent one with the other, than get them quickly or on the cheap. If so, concentration remains an option.

B. Concentration and Confidentiality

Substantive claims that are presented as true by definition must be approached with care. This applies to the aphorism that 'Private dispute resolution has always been resolutely private.' Is arbitration private, in the sense of confidential? And assuming it is, to what extent does confidentiality exist in tension with the desire for consistency? In case of outright conflict, which should trump? These questions will now be considered.

Legal systems today tend to treat arbitral confidence in three ways. Some deny that arbitration is confidential and, failing express contrary agreement, refuse to censure

In 1999, 58 percent of disputes were valued at upwards of US$ 1 million. Being exclusive of revised and additional claims, these figures are actually depressed. See Craig et al. (2000) 743.

On the exorbitant legal costs of arbitrating, see Craig et al. (2000) 395 (reporting that 'arbitrators in many ICC cases have awarded [cost] recoveries of more than $500,000' and that 'awards of cost in excess of US$ 1 million are unremarkable in the biggest cases."


See Mustill (1989) 43.

The following account is based mostly on case law dealing, not with the relationship between confidentiality and concentration, but with the related, if distinct, question, whether there exists in arbitration a duty of confidence that precludes a party disclosing, in the course of a reference, or in subsequent litigation, or for some other reason,
disclosures, actual or threatened. Australia, the United States, and Sweden do this. Other legal systems recognise a general but ill-defined duty of arbitral confidentiality, which, absent contempt powers or jurisdiction to award punitive damages, remains largely ineffectual. France exemplifies this approach. A third group recognises a qualified duty of arbitral confidence that courts are both willing and able to police, e.g., by ruling on the propriety of actual or threatened disclosures and, where appropriate, sanctioning breach by contempt sanctions. But in this case, experience shows that the documents or information generated during an earlier arbitration. Clearly, these are different questions; but the case law reviewed here addresses a question fundamental to both, namely, whether the law actually recognises a duty of confidence in arbitration, and, if so, what, if any, limitations it places on that duty.


34 See G. Aïta v. A. Ojeb, (1986) Rev. arb. 583 (Oct.-Dec. 1986) (Paris CA, 1986) (awarding a paltry FF. 20'000 for breach of confidentiality). For blithe scholarly reference to the principle of confidentiality, see Gaillard (1987b) 154-55; de Boisséson (1990a) 684. To enforcement difficulties, there may also be added the inherent difficulty of assessing even compensatory damages. To be sure, civilian judges could try to induce compliance by resorting to moral damages, e.g., for loss of reputation; but it is uncertain whether, and if so how far, appellate courts will suffer them doing so.
list of qualifications, typically long when first drawn up, usually lengthens the more arbitration reaches into public-law areas, the more emphasis is placed on transparency in corporate governance, and the more clearly courts discern the extent to which arbitral confidence conflicts with other important policy considerations. England here is the exemplar.\textsuperscript{35}

Only a few jurisdictions, then, recognize even so much as a partial duty of arbitral confidence.\textsuperscript{36} Add to this the fact that neither arbitration agreements nor arbitration

\textsuperscript{35} The leading English decision on arbitral confidentiality is \textit{Ali Shipping Corporation v. Shipyard Trogir} [1998] 1 Lloyd's Rep. 643 (CA 1998). This decided that, subject to a list of significant exceptions, parties to an English arbitration have a duty to maintain the confidentiality of the proceedings and of such material as is prepared for or generated during those proceedings. \textit{Ali Shipping} originally excepted the following from the scope of this duty: (a) disclosure necessary to comply with statutory requirements; (b) disclosure necessary to exercise a statutory right, e.g., the right to have award set aside; (c) disclosure necessary for the protection of a party's legitimate interests, which includes disclosure necessary to found a cause of action or ground of defence, as well as such disclosure as is necessary to satisfy bona fide contractual or other obligation; (d) disclosure necessary in the public interest; and (e) disclosure necessary in the interest of justice, defined as 'the importance of a judicial decision being reached upon the basis of the truthful or accurate evidence of the witness concerned.' But since \textit{Ali Shipping} came down, an additional exception, based on custom and practice, has found its way into the law on arbitral confidentiality. See \textit{The Hamturn' and 'St. John,'} [1999] 1 Lloyd's Rep. 883, 900 (QB 1999). For pre-\textit{Ali Shipping} case law, see \textit{London & Leeds Estates Ltd v. Paribas Ltd} (1995), 1 EG102 (QB); \textit{Insurance Co v. Lloyd's Syndicate}, [1995] 1 Lloyd's Rep. 272 (QB 1994); \textit{Hassneb Insurance Co of Israel et al. v. Stewart J. Merv}, [1993] 2 Lloyd's Rep. 243 (QB 1992); \textit{Dolling-Baker v. Merrett} [1990] 1 WLR 1205 (CA 1990); \textit{Oxford Shipping Co Ltd v. Nipon Yusen Kaisha, The Eastern Saga (No. 2)} 2 Lloyd's Rep. 373 (QB 1984); \textit{Tournier v. National Provincial and Union Bank of England}, [1924] 1 KB 461 (CA 1924).

\textsuperscript{36} On the difficulties of imposing a general duty of confidentiality, see generally Paulsson & Rawding (1995).
rules usually advert to the matter,\textsuperscript{37} and it becomes clear that, though arbitral confidence may fall in with our common habits of thought, it has solid foundations neither in positive law nor in actual contractual practices.\textsuperscript{38}

Anyway, to what extent is confidentiality in tension with the desire for consistency? Clearly, concentration can sometimes compromise arbitral confidentiality, result in bad publicity, and compromise commercially sensitive information.\textsuperscript{39} But concentration and confidentiality do not always conflict; for instance, not where the relevant proceedings involve both the same parties and the same substantive contractual relationships.

Third, assuming they conflict, it is not clear which should trump. Granted business generally values discretion, it does do not do so absolutely. 'If polled,' Craig \textit{et al}. write:

\begin{quote}
... users of the ICC arbitration would undoubtedly list confidentiality as one of the advantages which led them to choose arbitration over other forms of dispute resolution and particularly as compared to court litigation. If the subject were discussed further, however, it is by no means clear that they would want to see the principle of confidentiality in
\end{quote}

\textsuperscript{37} For instance, neither ICC nor ICSID impose such obligation on parties, though both do on arbitrators. As far as the ICC is concerned, it is relevant that, during the review process that eventually led to the 1998 amendment, the ICC's International Arbitration Commission rejected a proposal by the ICC Court of Arbitration to include a general provision on confidentiality. Instead, the modest article 20(7) was adopted, empowering the tribunal 'to take measures for protecting trade secrets and confidential information.' See Craig \textit{et al}. (2000) 313–14. On ICSID, see \textit{Amco Asia Corp. et al. v. Republic of Indonesia}, 24 \textit{ILM} 365 (1985) (noting the 'good and fair practical rule, according to which both parties should refrain, in their own interest, to [sic] do anything that could aggravate or exacerbate the dispute,' but adding that 'the [ICSID] Convention and the Rules do not prevent the parties from revealing their case.') For institutional rules that impose a qualified duty of confidentiality on the parties, see WIPO Rules (1994) arts. 73–76; LCIA Rules (1998), art. 30.

\textsuperscript{38} Cf. Herrman (1999) 225 ('confidentiality many not be presumed...; if parties want it, they should so stipulate."

\textsuperscript{39} See Veeder (1986) 320.
arbitration applied absolutely or that they ... would be willing to bind themselves to secrecy in all circumstances; nor is it certain that they would have considered all the implications of an absolutist rule.40

But assuming a desire of discretion nonetheless, how is this desire to be reconciled with the desire for consistency? Often, a combination of careful scheduling, access restrictions on certain classes of information, mutual concessions and reciprocal undertakings will solve the problem.41 For instance, concerning the use of identical testimony in a second reference, it might be sufficient to recognise that, subject to appropriate undertakings, a party or his counsel would have access to sensitive but related information.42 Failing such compromises, the parties, of course, will once again have to settle their preferences.

C. Concentration and Arbitral Choice

The ideal tribunal selection procedure lets parties choose arbitrators directly, equally, all the while taking interest alignments into account in order to produce 'balanced' tribunals.43 This ideal, challenging even in bipartite proceedings, is simply unrealisable in a multi-party setting. As explained below, something has to give.44

40 See Craig et al. (2000) 311. See also Diamond (1991) 407 (arguing that the contrary view 'elevat[es] ... [the] subsidiary virtues [of confidentiality] into something of a sacred cow.')

41 See Chiu (1990) 60. For an example of institutional rules that recognise a duty of confidence and allow dispute concentration measures involving third parties, see LCIA Rules, arts. 22(1)(h), 30(1), respectively.

42 See Baldwin (1996) 469.

43 The assumption here is that party-appointed arbitrators will not only ensure that the case of whoever appointed them is correctly understood and fairly considered, but will also display a special measure of sympathy for that party's position. Certainly, parties expect such sympathy. See Hassan (1991) 106; Schlosser (1988) 752–3; Hunter (1991) 25; Lalive (1991a) 122. In practice, this expectation is often met: considering their mode of selection, party-appointed arbitrators will often incline, quite naturally, to what is likely to be a familiar argumentative style, a common conceptual understanding of the matters in dispute, a shared worldview—eventually seeing things 'their' party's way rather than that
Eight tribunal selection procedures are conceivable. The first has parties pre-designate the arbitrators. The second lets them choose the arbitrators ex post, by of the other. It follows that what neutrality characterizes a panel results from conflicting and hence mutually cancelling biases. The proof that this is so is to be found in the refusal to have each party appoint an arbitrator for fear that the ‘majority’ arbitrators ‘gang-up’ against the ‘minority.’ See Bourque (1989) 554; Schlosser (1989-90) 354.

44 ‘How therefore is the desire to have an arbitrator of one’s own choice to be accommodated in a multi-party arbitration system? The answer is quite simply that it cannot be done.’ Per Humphrey Lloyd, unpublished address to the ‘Colloquium on Multi-party Arbitration’ (organised by the Centre for Commercial Law Studies, Queen Mary College, University of London, on 14-15 March 1986), at p. 17. See also Bourque (1989) 545.

45 Few statutes address how tribunals should be constituted in the event of multiplicity, initial or supervening, with those that do tending to concentrate on initial multiplicity. English law, for instance, recognizes the parties’ right to agree their tribunal, on the express understanding that default of agreement would preclude concentration. See Arbitration Act 1996, s. 35, 1(c) (Engl.). The law of the state of Florida, on the other hand, from the outset limits concentration to two classes of cases: that in which the tribunal itself or its method of appointment has been agreed by the parties; and that in which the related references just happen to be pending before the same tribunal, in which case this tribunal retains jurisdiction of the concentrated proceedings. See Fl. Stat. Ann., s. 684.12(1). California distinguishes between cases pending before the same and before different tribunals. In the first instance, the common tribunal retains jurisdiction; in the second, the court, acting either alone or in cooperation with the parties, determines the post-concentration tribunal. See Cal. Civ. Proc. Code, Title 9, s. 1281.3, 1281.6. Finally, New Zealand and the Netherlands each gives courts the power, failing the parties’ agreement, to fashion or re-fashion the tribunal(s) as they see fit. See Arbitration Act 1996, 2nd Sch., art. 2(3) (NZ); Arbitration Act 1986, art. 1046(3) (NL). All existing statutes use one, or a combination of these methods. A similar story can be told about institutional rules. They, too, rarely prescribe how tribunals should be constituted in the event of multiplicity; and when they do, they almost never deal with the supervening variety. In all, they adopt one, or a combination of, five solutions. The first is expressly or impliedly
consensus. The third gives 'claimants' and 'respondents' equal choice, regardless of how many parties there are on each 'side.' The fourth excludes the right of some parties to nominate arbitrators, so that the rest may, as between themselves, exercise equal influence on the nomination process. The fifth lets parties each nominate an arbitrator, to restrict concentration to those cases in which the related references are already before the same tribunal. See, e.g., CIMA Rules, arts. 3(7), 3(9); JCCA Rules, art. 41(1). The second is to authorise the administrator to refer related requests to the same tribunal. See, e.g., ZCC Rules, art. 13; ICA Rules, s. 40. The third is to have the matter decided by an arbitrator that the institution appoints specifically for the purpose. See, e.g., AAA Construction Rules 1999, rule 9. The fourth is to leave the arbitral institution to do the appointing. See, e.g., CEPANI Rules, art. 20. The fifth solution is to let courts appoint the tribunal on application. See, e.g., SMA Rules, s. 2.

While commonly associated with East European institutions, this method is often used elsewhere. For examples from Eastern Europe, see CCIRF, s. 20 (4) (Russ.); Zagreb Rules, arts. 11–12 (Croatia); PCC Rules, s. 13 (Pol.); HCC Rules, art. 17(1) (Hung.); BCCI Rules, art. 14 (3) (Bulg.). For other examples, see LCIA Rules, art. 8 (Engl.); JCAA Rules, rule 10(2) (Jap.); AFEC Rules, art. 10 (Aust.); SMA (salvage) Rules, rule II(b) (US); ECACI Rules, art. 2; (Nancy, Fr.); CIETAC Rules, art. 27 (China); PRIPD art. 18 (Philip.).

See, e.g., Vigo S.S. Corp. v. Marship Corp. of Monrovia, 257 NE2d 624 (on petition by time-charterer to consolidate two arbitrations, one with vessel owner, the other with voyage-charterer, held in circumstances where petitioner had accepted the arbitrator appointed by the former as his own, the latter failed to establish that consolidation undermines his substantive rights); Marine Trading Corp. v. Ore International, 432 F. Supp. 683 (considering both the time-charterer and the sub-charterer accepted the arbitrator appointed by the vessel owner as their own, each objecting party's right to select an arbitrator for his claims has been preserved and honoured); Inso Lines v. Cypromar, 1975 AMC 2233, 2234 (SDNY 1975) (in appointing a consolidated tribunal, the court ordered the ship-owner and the voyage-charterer, but not the petitioner time-charter, each to appoint an arbitrator, the chairman to be appointed by the two arbitrators so chosen); In Re Shova Shipping Co, Inc., 1975 AMC 790, at 791 (Sup. Ct. N.Y. 1975), (the court consolidated arbitrations between ship-owner, prime-charterer, and sub-charterer by
and, if an odd-numbered tribunal is mandatory under the applicable law, has the nominees unanimously elect a president ("Nereus"). The sixth procedure involves several parties each nominating an arbitrator, with the nominees then appointing a chairperson ("Manumante"). This produces not one but two tribunals that sit together to decide references either concurrently or consecutively. The seventh procedure lets an external appointing authority send all the parties an identical list of candidates, which, once the parties have shortened (by exercising a maximum number of peremptory objections) and graded (according to preference), constitutes the basis on which the said authority makes the appointments. The eighth procedure involves an external appointing authority ordering (suggesting?) that prime-charterer withdraw its appointed arbitrator, thus permitting the arbitrators appointed by the others to select a neutral; *Voest-Alpine International, Inc. v. Supreme Maritime Ltd.*, 1982 AMC 921 (court consolidating arbitrations between ship-owner, voyage charterer and buyer, before a tripartite panel formed by dropping the arbitrator selected by petitioner voyage-charterer, and having the remaining arbitrators elect a chairman).


50 See, e.g., AAA Commercial Rules, s. 13. Without using up a peremptory objection, a party may challenge a candidate on grounds of partiality, dependence, or disqualification. Failure to return a list equals acceptance of all the names appearing on it.

51 A little-used ninth appointing process is the ‘cascading’ method. Suited to multiplicity resulting from interventions by a third party, this method allows the intervening party to nominate an arbitrator, in which case an external authority, e.g., the administrator, will, if necessary to make up odd-number tribunal mandatory under the applicable law, nominate another arbitrator. See, e.g., *Arbitration Chamber of the Strasbourg Trade Exchange*, art. 14, referred to in Bourque (1989) 555.
designating the whole tribunal, standing or *ad hoc*, without reference to the parties’ wishes.\textsuperscript{52}

As already noted, none of these procedures is foolproof. For instance, no process is as personalized, as equitable, and yet more likely to fail, as *post*-dispute consensus is.\textsuperscript{53} Pre-designation gets round the difficulty of reaching agreement at a time when interests are no longer aligned, but does so only by sacrificing equality and balance to power bargaining. ‘Grouping’ is unlikely *ex post* (since interests by then have diverged), and is objectionable *ex ante*, on equality grounds.\textsuperscript{54} The same goes for unilateral renunciations:

\textsuperscript{52} For a standing tribunal, see, e.g., COFACI Arbitration Rules (1986), arts. 2(4) and 9. For *ad hoc* tribunals, see, e.g., SMA Rules, s. 2; AAA International Rules, art. 6(5); JCCA Rules, r. 26; ICC Rules, art. 10; DIS Rules, s. 13; WIPO Rules, art. 18; LCIA Rules, art. 8. Apart from SMA, AAA, and JCCA, which designate the court as appointing authority, all these institutions entrust the arbitral institution with the task of appointing the arbitrators. But all without exception authorise the appointing authority to act only in default of party appointment. For an example of an institution whose rules vest in the administrator the primary responsibility for appointing arbitrators, see CEPANI Rules, art. 20.

\textsuperscript{53} See Goldstein (1997) 118.

\textsuperscript{54} For an example of compulsory grouping adjudged *contra* due process, see *BKMI Industrieanlagen GmbH* and *Siemens AG* v. *Dutco Construction Co*, (1992) Mealey’s International Arbitration Report 14 (*Cour de cassation*, 1992). Some writers are less concerned than the *Cour de cassation* was in *Dutco* about formal equality (i.e., about each party having an equal right to participate equally in selecting arbitrators), preferring instead a test that asks whether parties sharing conflicting interests participate equally in the constitution of the tribunal. See Devolvé (1993) 1998, 200–01; Schlosser (1989-90) 352, 353; Schwartz (1993) 14. There are three objections to this approach. First, the proposed test assumes that interest can be reliably and definitively determined at the nomination stage, which it cannot. Second, it assumes that interests are perfectly opposed, which is not always true. Third, it assumes that interest-identity precludes disagreement over arbitrator choice, which is also false: parties in the same interest can reasonably disagree on a candidate’s competence or general suitability. See Bellet (1992) 477. The options are therefore two: to allow everyone equal say in the constitution of the tribunal, or to farm out the entire
suspect \textit{ex ante}, unlikely \textit{ex post}, and either way only acceptable within limits; e.g., courts are unlikely to tolerate an agreement under which one party designates all the arbitrators.\textsuperscript{55} Both 'Nerens' and 'Manumante' seem pragmatic, when in fact they endanger decisional balance and are liable to produce mammoth tribunals. The 'list' method gives parties 'in the same interest' more strikes, which violate equality, and in any event allows only the merest choice. This leaves external appointments, which, though difficult to improve on in efficiency, equality, and balance, depersonalise choice, by definition.

So we come to the same conclusion once again: the parties must decide whether the benefits of concentration are worth the costs.

IV. Why Contractual Concentration Will Not Resolve Inter-Award Conflict

Discussion so far has emphasized the degree of technical competence and the level of negotiation skills that effective contractual concentration requires. At a more fundamental level, however, contractual concentration requires an agreement. The constitutive process. See Fouchard (1980) 64; Schlosser (1989-90) 344. For the ICC's pre-\textit{Duto} grouping practice, see Bond (1991b) 44. For its post-\textit{Duto} practice, see Goldstein (1997) 106. For pre-\textit{Duto} judicial support for the ICC's practice, see \textit{Westland Helicopters Ltd v. the Arab Organization for Industrialization et al.}, 23 ILM 1071, 1088); [1984] \textit{Semaine Judiciaire} 309 (Court of Justice of the Canton of Geneva, 1982); Swiss Federal Tribunal affirmed; see summary of decision of May 16, 1983, excerpted in Craig \textit{et al.} page 31. For doctrinal criticism of \textit{Westland}, see Bourque (1989) 549. For pre-\textit{Duto} criticism of the ICC's grouping practice (on equality grounds), see Bourque (1989) 547–50.

\textsuperscript{55} See van den Berg (1981) 324 (arguing that an agreement that gave a party the exclusive right to appoint the whole tribunal could be denied enforcement under the New York Convention). Cf. Mustill & Boyd (1989) 57 (arguing that, 'In addition to the limits imposed by statute, the power of the parties to agree upon their own procedure is also limited by considerations of public policy,' and that 'in extreme cases the Court will conclude that the agreement is so contrary to fundamental principles that it must be treated as contrary to public policy, and invalid'); Redfern & Hunter (1999) 282 (arguing that '[t]he requirement that the parties must be treated equally operates as a restriction on party autonomy.')
difficulty here no longer lies in technicalities or in competing preferences, but rather in an arbitral system that systematically discourages party initiative, *ex ante* as well as *ex post*.

Take, first, *ex ante* initiative. Whether because modern arbitration is relatively new, or because arbitration clauses generally receive little drafter attention, or simply because complex arbitration agreements are technically complex to draft, the fact is that most arbitration users, including many of the best advised and most powerful, rarely use their formal contractual freedom to anticipate claim-relatedness.

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59 See Bourque (1989) 583–84. The failure to tailor process to circumstance is limited neither to small concerns nor to first-time users. See, e.g., *République de Guinée v. Chambre arbitrale de Paris et al.*, repr’d in (1987) *Revue de l’arbitrage* 373 (TGI Paris 1986) (wherein the employer of a construction project, the Republic of Guinea, concluded three contracts—with project manager, main contractor, and financial guarantor—containing irreconcilable arbitration clauses). Even top-tier New-York law firms can bungle multi-party arbitration agreements. For example, in a US$ 1.2-billion power-plant agreement, between a Middle Eastern state and a multinational corporation, both represented by leading New York law firms, the provision on consolidation neither requires parties to
To stimulate private initiative, well-meaning writers have sometimes proposed model clauses. But theirs has arguably been labour misspent, for three reasons: first, because templates are dangerous for tyros, who might use them 'as is,' without amendment; second, because templates are superfluous for experts, who do not need to work off a pattern; and third, because, if there is question of templates, most users will simply adopt those two-line clauses which arbitral institutions generally sponsor, and which (Chapter 3 will establish) make no provision for complex forms of procedural multiplicity.

In the circumstances, the temptation is always to suppose that, in due course, when the process is novel no longer, and the parties for their past errors considerably the wiser, all would be well. In fact, the failure to tailor procedure to circumstance is attributable to systemic developments characterizing modern arbitration. One such development—the shift from *ad hoc* to *ex ante* arbitration agreements as the practical basis of most arbitral proceedings today—has already been noted. The other—the move from *ad hoc* to institutional arbitration—is symbolized by the contemporary tendency to adopt standard institutional clauses that incorporate rules which, even when skeletal and (unlike ICC Rules) consistently deferential to party agreement, effectively appoint the same arbitrators, nor details how a consolidated tribunal would be empanelled. (Agreement on file with author)


61 On the limitations of institutional concentration, see Chapter 3.

62 See discussion on page 4.

63 Article 15 of the ICC Rules reads: 'Proceedings shall be governed by these Rules, and *where these Rules are silent*, by any rules which the parties or, failing them, the arbitral
transfer procedural initiative to arbitrators and institutions. The standard treatises recognize as much. ‘International practice,’ the editors of one particularly influential treatise write:

... has witnessed a trend which is not entirely in keeping with the principle of the primacy of the parties’ intentions. It is becoming increasingly rare for the parties to choose their arbitrators and organize their procedure directly. Instead, permanent arbitral institutions have been set up throughout the world and now handle the vast majority of international commercial arbitrations. The existence of an institutional and the application of its procedural rules may lead to greater efficiency, but will also entail a corresponding reduction of the role of the parties in selecting the arbitrators and in the conduct of the proceedings. The advantages of ad hoc arbitration, principally the confidence the parties have in arbitrators whom they have selected directly and the flexibility of a procedure suited to each particular case, are sometimes lost in institutional arbitration. Instead there is the risk of an anonymous, cumbersome administration, a ‘judicialization’ of arbitration, albeit in a private setting.64

These developments—the shift from ex post to ex ante and from ad hoc to institutional arbitration—while clearly distinct, are nevertheless related. For instance, the idea was probably always naïve that effective party control of arbitral proceedings would survive the move from ex post to ex ante agreements. Once arbitration became an

tribunal may settle on.’ (Emphasis added.) That the Rules often recognize expressly the parties’ right to tailor certain aspects of their arbitration otherwise than indicated in the Rules does not change the fact that, considering most parties do not make use of their formal contractual freedom ex ante and are unlikely to agree much ex post, it is ultimately the Rules, and by implication the arbitrators, who determine what the parties may do—which, after all, is presumably what institutional arbitration is about. Indeed, such today is the resignation before this state of affairs that commentators now blithely justify so counterintuitive an order of precedence on the matter-of-fact ground that, otherwise institutions would refuse parties their services. See Craig et al. (2000) 295.

indefeasible obligation assumed in advance and therefore in relative ignorance of how it would play out, parties were unlikely to continue to regulate much about ‘their’ proceedings. Want of foresight meant that they did not agree much *ex ante*, inflexible enforceability (resulting from increased deference to arbitration agreements) made *ex post* accommodation unlikely. The prospect of agreement thus weakened, a third party (judge, arbitrator, or institutional officer) had to be found to resolve deadlocks. Beginning the 1970s, the judges became statutorily limited in what, absent specific contractual authority, they could do to repair or complete arbitration agreements. Arbitrators, on the other hand, are appointed *ad hoc*, and hence possibly too late to act. So in stepped arbitral institutions, claiming the right to settle all manner of threshold procedural questions.

But relying in this manner on institutions produced three mutually reinforcing tendencies. First, like all bureaucracies, arbitral institutions gradually developed their own rulebooks, which, like all rulebooks, grew increasingly detailed, as experience revealed new contingencies. Second, the easier it became for parties to leave matters to the rules, the more they did, to the point today when not only do they buy into future rule-amendments,65 but also writers routinely caution against so much as adapting those rules,66 to say nothing of agreeing to *ad hoc* arbitration.67 Third, the dimmer the memory grew of the time when parties were expected to agree how best their proceedings should be conducted, the less likely it became that they would ever do so once again.

The same development has also lessened the likelihood of *ex post* agreements. When arbitration was a consensual affair, one could suppose that timely, well-reasoned requests for claim concentration would receive appropriate consideration, especially if accompanied by appropriate concessions, e.g., on arbitrator choice and confidentiality.68

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65 See, e.g., article 6(1) of ICC Rules 1998.


68 Mr. Justice Lloyd certainly seemed to think so. ‘[T]he inconvenience of multiple arbitrations,’ he said, ‘though it exists, can be exaggerated. The problem is not a new one; and London arbitrators have evolved ways of reducing the inconvenience, and limiting the risk of conflicting decisions by hearing arbitrations together, or one immediately after
Today, however, one can no longer assume such a thing.\(^6\) If ever arbitration was truly an amicable mode of dispute settlement, it has become as antagonistic, as quarrelsome, and as adversarial as litigation ever was.\(^7\) This was to be expected. A spirit of trust and a desire for reconciliation quite naturally animate those who voluntarily submit their differences to a trusted arbiter; mean-spiritedness and pugnacity just as naturally characterize those compelled to refer differences to persons latterly chosen, in part, for partisan considerations. The former dispense with formalities; the latter insist on

the other. *True this presupposes co-operation between the parties. But once my decision is known, I see no reason why at least some degree of co-operation should not be forthcoming.* See *World Pride Shipping Ltd v Daiichi Chuo Kisen Kaisha, The ‘Golden Anne,’* [1984] 2 Lloyds Rep., 489, 497 (Emphasis added.) In 1984, this was probably already too optimistic, even with reference to (the relatively genteel) field of maritime arbitration. For examples of contentious maritime concentration, see cases cited infra note 29, on page 116. Today, this view would be simply untenable.

\(^6\) See Goldstein (1997) 118 (‘The opportunity for the parties to provide for multi-party arbitration in their contracts, or in submission agreements after a dispute arises, is too often not meaningful.’)

\(^7\) Lord Mustill has expressed himself in similar terms. ‘It is impossible,’ he says, ‘to overlook the change in the character of arbitration which has occurred during recent decades. In the past it might have been possible without excessive idealism to see arbitration as a vehicle for the pacific settlement of disputes, producing awards that would be honoured either because it did not occur to the loser to do anything else, or because a default would have exposed him to the censure of his peers and to a damaging loss of reputation. We now live in a harsher world. Winning is what matters. Whether because a change in commercial attitudes or simply because the stakes are so much higher, many arbitrations are now fought with as much zeal for taking every available advantage, whether procedural or otherwise, as any action in court.’ See Mustill (1988) 118–19. See also *LaFarge Redland Aggregates Ltd v Shephard Hill Civil Engineering Ltd,* [2000] 1 WLR 1621, 1643 (per Lord Hobhouse of Woodborough: ‘arbitration, like litigation, is essentially adversarial’) (HL 2000); Nariman (2000) 262 (arbitration ‘has become almost indistinguishable from litigation’); Kerr (1997) 123 (calling arbitration ‘international disputology’); Oppetit (1998) 25 (making essentially the same point).
importing the ponderous litigation apparatus, that proceedings may as nearly as possible satisfy ordinary due-process requirements.\textsuperscript{71} The former likely use no or only internal legal advisers; the latter invariably entrust matters to outside counsel, who, of course, can be trusted as nearly as possible to recreate the adversarial format, with which by training he is most familiar.\textsuperscript{72} Nothing, therefore, is less likely today than arbitral proceedings conceived as an impartial quest for justice. In today’s brave new world, parties give no quarter, much less agree to claim concentration after their interests have diverged.\textsuperscript{73} 

Taken together, these developments explain why private initiative is unlikely to avert inter-award conflict and, more generally, account for the dismal spectacle of a process whose users once chose to escape dependence on formal, inflexible, other-imposed rules but which now systematically excludes those users’ preferences, whilevesting authority in institutional bureaucrats and arbitrators whose only claim to

\textsuperscript{71} See Oppetit (1998) 28; Paulsson (1985) 3.

\textsuperscript{72} See Craig \textit{et al.} (2000) 444.

\textsuperscript{73} This is not to say that everyone acts opportunistically. As Atiyah rightly points out, ‘between private commercial organizations, the fact that business relationships are so often continuous means that the desire to maintain the goodwill of other contracting parties is often more important than the letter of a contract.’ See Atiyah (1979) 714-15. But transactions are neither all, nor always, idiosyncratic and thus continuous: the vast majority are of a class ‘for which continuity has little value, since new trading relations can be easily arranged by both parties.’ See Williamson (1985) 79. In any event, whatever the nature of the parties’ relationship originally, it rarely holds after a request for arbitration has been filed. Except in those rare instances where the parties would sooner forsake the point at issue than compromise the business relationship, a request for arbitration is often intended, and is usually taken, as a hostile act. See \textit{Lafarge Redland, supra} note 70, at 1640 (Lord Hobhouse describing arbitration as ‘hostile’). Granted parties may continue to negotiate after arbitral proceedings have been initiated, they still do so in their shadow and use them as pressure mechanisms to reach favourable settlement. Victory is their aim. To achieve it, they would veto anything that risks reprieving their adversary, including from the risk of double liability.
independence resides in either chance appointment or mutually-cancelling biases. To borrow a Marxist concept, contractualizing arbitration has ‘alienated’ its users, estranging them from what are properly their functions and creations, functions and creations that, instead of the users controlling, now control the users.

V. Conclusion

Judging from the emphasis that arbitral scholarship places on contractual solutions to the problems engendered by procedural multiplicity in arbitration, one might suppose that, given an appropriately permissive statutory framework, parties would decide whether concentration is for them, and if so, proceed to fashion a suitable procedural framework. On this view, inaction must be evidence of a conscious decision to exclude claim concentration. But as discussion has already shown, the paramountcy of the parties’ will so often trumpeted in arbitration literature seriously distorts a reality in which most users, far from tailoring procedure to circumstance, generally adopt standard institutional clauses, either as part of standard form agreements or at the fag-end of otherwise painstaking contract negotiations.

In any event, assuming parties were to try to address claim relatedness contractually, there would still be real limits to what they could accomplish. The main limit, of course, is the boundedness of human knowledge: at the time of contracting (which is when it matters), parties simply cannot account for all those who in case of dispute would need to partake in the ensuing proceedings. The second limitation is subjectivity: assuming interested parties could be identified ex ante, there would still be no guarantee that they would all agree to the principle, let alone to the detail, of claim concentration. Add to the foregoing the element of simple human fallibility, i.e., the possibility that parties, identifiable ex ante and agreed on how concentration should work, might still get the procedure wrong, and you begin to see why Lord Hobhouse’s reliance on private initiative leading the fight against inter-award conflict may not be entirely well misplaced.


75 For discussion of the Marxist concept of alienation, see Kamenka (1972) 12.

76 See text accompanying note 64 on page 72.
Two reactions are possible before such findings. One is cheerfully to observe that many of the solutions expounded above, while certainly not foolproof, could with forethought and deliberation be made essentially adequate, and on this basis to counsel letting well alone. Adherents to this view are typically loath to concede that the failure of a prescription to yield the promised results, however long the wait, is evidence of error—and so, rather than take notice of the facts, they continue to protest that institutions should function in such and such a way, and if real institutions function differently, then so much the worse for reality.

The other reaction is to note that, for all the reasons given above, private initiative is unlikely to succeed where it has hitherto consistently failed, and on this basis to counsel a search for extra-contractual solutions. The only stricture then would be that, whatever the proposed solution, it must not undermine the workability of the overall system which it is the purpose to improve. This is the attitude of those who are favourable to private initiative but recognize that there are such things as market-failures for which purposive social action is sometimes a proper remedy.

Following the latter logic, the coming two chapters consider institutional (Chapter 3) and statutory (Chapter 4) remedies to the problem of inter-award conflict. To the extent that either or both remedies prove inadequate, the question of what, if anything, this says about modern international arbitration will be addressed in Chapter 5.
Chapter Three. INSTITUTIONAL CONCENTRATION

I. Introduction

Chapter 2 has sought to show how the move from *ex post* to *ex ante* arbitration agreements had set off a parallel move from *ad hoc* to institutional arbitral proceedings, and how both moves have combined to shift real control of arbitral proceedings from parties to arbitrators and institutional officers. Now, this shift would have been at least partly welcome if it had meant that arbitral organizations succeeded where parties seem hitherto to have failed—namely, in ensuring inter-award harmony. In fact, those organizations have realized no such success—and not for want of trying.

This chapter consists in two parts: the first reviews the various institutional responses to the challenge of inter-award conflict (II); the second examines the notion, influential in some quarters, that whereas private initiative is inherently unreliable, arbitral organizations are well placed to promote inter-award harmony between formally distinct but substantively related claims (III).

The dual hypothesis informing discussion is (a) that institutional conflict avoidance initiatives fare no better than the contract-based type, and (b) that neither legal logic nor value-free technical considerations can explain why this is so. Specifically, the claim is that arguments from autonomy, from jurisdictional propriety, from the nature of arbitral justice and from arbitration’s institutional environment cannot determine the propriety of institutional concentration initiatives one way or other.

II. Review of Institutional Rules

Discussion has so far distinguished between single- and multiple-reference relatedness; this chapter adds the distinction between *simple* and *complex* relatedness. Simple relatedness refers to the situation in which related claims satisfy the twin conditions of party identity and common contractual origin, *i.e.*, the condition that claims must involve the same parties and arise out of the same or out of formally related arbitration agreements. Complex relatedness covers everything else.

Whereas virtually all institutional rules address simple relatedness (A), there is widespread and persistent disagreement over whether complex relatedness is amenable to *any* institutional solution (B).
A. Institutional Rules on Simple Concentration

By authorizing ancillary and counter-claims, arbitral institutions have long been able to facilitate the concerted settlement of related claims that satisfy the twin conditions of party identity and common contractual origin. Under the ICC Rules, for instance, respondents may counterclaim, and, subject to approval by both Secretariat and tribunal, any party may apply to have decided as part of those proceedings new claims brought 'in connection with a legal relationship in respect of which proceedings between the same parties are already pending under these Rules.' This is before the Terms of Reference are signed: afterwards, claims are admitted depending on their nature, the timing of the request, and such other considerations as the arbitrators consider relevant. Similarly, the default position under the ICSID Rules is that, subject to certain conditions being satisfied, respondents may present incidental, additional or counter claims. Admissible claims must (a) arise directly out of the subject matter of the original dispute, (b) fall within the scope of the arbitration agreement, (c) come within the jurisdiction of the ICSID Centre, and (d) meet the test of timeliness set by the rules. To give one more example: under the AAA Rules, counterclaims are due along with the Statement of Defence (but may be amended later), while additional claims are allowable at any point in the proceedings. Both types of claims must fall within the scope of the arbitration agreement and are admissible only if neither overdue, prejudicial, nor otherwise objectionable.

Virtually all modern arbitration rules contain some variation of these provisions.

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1 See ICC Rules, arts. 5(5) and 4(6), respectively.

2 See ICC Rules, art 19.

3 See ICSID Rules, rule 40.1. Ordinarily, incidental or additional claims should be made no later than the Reply, and counter-claims no later than the Statement of Defence. When justified, leave to submit claims outside these time limits is possible. See ICSID Rules, rule 40.2.

4 See AAA International Arbitration Rules, rules 4 and 2 (3), respectively.

5 See, e.g., UNCITRAL Rules, art. 19(3); LCIA Rules (1998), art. 15(3); CIMA Rules, arts. 3(2)–(3).
B. Institutional Rules on Complex Concentration

Arbitral institutions have hitherto had much less success in dealing with related claims that do not satisfy the twin conditions of party identity and common contractual origin. The long-standing debate over how best to deal with those claims has generally produced one of two outcomes: either the institution resolved to deal with cases *ad hoc*, within the limitations of its existing rules (1); or it introduced an amendment specifically dealing with complex arbitrations (2).

1. The *Ad hoc* Approach to Complex Concentration

Both the ICC (a) and the AAA (b) opted for the *ad hoc* approach. Their experiences will now be reviewed.

(a) Forum Concentration in the International Chamber of Commerce

ICC’s institutional interest in complex arbitration dates back to a 1972 Moscow seminar, but it was not until 1978 that the organization first set up a Working Party to study and report on the difficulties engendered by multiplicity and relatedness in arbitration. A report published two years later expounded two rule-based solutions—

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6 ICC events apart, there has been, to name only the largest and best known, a dozen or so gatherings that devoted the whole, or a good part, of their proceedings to complex arbitration, including the International Law Association’s Helsinki Conference (1996); the IIBLP’s (Institute of International Business Law and Practice) Stockholm Conference (1989); the Young Lawyers International Association Geneva Conference on ‘Arbitration and Groups of Companies’ (1988); the IIBLP/School of International Arbitration Law London Joint Colloquium (1986); Colloquium on Multi-Party Arbitration, organised by the Centre for Commercial Law Studies, Queen Mary College, University of London (March 14–15, 1986); ICCA Symposium (under the aegis of the Polish Chamber of Foreign Trade) in Warsaw (1980); Fourth Congress of Maritime Arbitrators in London (1979); and the IIBLP Annual Meeting in Paris (1979). Most recently, the Institute of International Law has published a preliminary report by its 12th Commission (Professor Allan Philip, acting as rapporteur) entitled ‘Arbitral Settlement of International Disputes Other Than Between States Involving More Than Two Parties.’ See (2002-2003) 70 (I) Yearbook of the Institute of International Law 95 (Session of Bruges).
claim consolidation and claim coordination. Initially, the former seemed the more welcome, but when following the report the ICC published its *Guide on Multi-Party Arbitration*, the organisation seemed to take a more conservative position: as Lord Hobhouse would later do, it simply declared that any solution must rest firmly on contract.  

Initially, the former seemed the more welcome; but when following the report the ICC published its *Guide on Multi-Party Arbitration*, the organisation seemed to take a more conservative position: as Lord Hobhouse would later do, it simply declared that any solution must rest firmly on contract.

Five years later, the ICC returned to the subject, publishing a model clause and a set of guidelines on complex arbitration, both prepared by a Working Party that the ICC Commission on International Arbitration had earlier set up. But when neither the guidelines nor the clause appeared to excite much interest among users, the Commission remitted the clause to the Working Group for reconsideration. Further efforts to produce a satisfactory alternative have failed, reportedly because members of the Working Group could not agree on whether or how to preserve party control over arbitrator choice.

The opportunity for a full-scale review of the subject next arose in 1992, after the French *Cour de cassation* condemned the ICC's practice of forcing multiple respondents to appoint a single arbitrator in circumstances where the claimant had been allowed independently to appoint another. In response, the ICC Secretariat quickly published a Note setting out a revised appointing procedure, and asked the Commission on International Arbitration to study the subject of complex arbitration anew. Revealing

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9 See text accompanying note 1 on page 46.

10 See ICC (1982).

11 Curiously enough, the rejection, which took place on 13 March 1986, followed the clause's publication by the ICC. See ICC (1986) (annexes 1 & 2); Wetter (1987) 2 (fn. 2).


how little opinion within ICC had changed since 1982, the resulting 1994 Devolvé Report concluded that only private initiative held the answer to the problem of inter-award conflict.\(^{15}\)

In the circumstances, the ICC Court’s practice (according to the ICC Secretary General) has been to process claims initially as filed, but then, provided certain (fairly restrictive) conditions are satisfied, to allow three measures of forum concentration.

First, the Court now seems increasingly willing to allow claimants or (more likely) respondents to join third parties where (a) the third party in question has signed the arbitration agreement underlying the pending proceedings, and (b) one of the original parties is actually asserting a claim against that third party (rather than, for instance, merely reserving the right to assert such a claim at some later stage).\(^{16}\)

Second, the Court may now allow a single arbitration to proceed in a multi-contract situation where (a) the same parties have signed the relevant contracts, (b) the relevant contracts all relate to the same commercial transaction, and (c) the relevant arbitration agreements are compatible (e.g., on tribunal choice, language of proceedings, place of arbitration, etc.).\(^{17}\)

Finally, the ICC Court may allow the consolidation of arbitration requests originally filed separately where (a) the same parties are involved in each case, (b) the arbitration requests pertain to the same legal relationship, and (c) where more than one arbitration agreement is involved, those agreements are compatible.\(^{18}\)

(b) Forum Concentration in the American Arbitration Association

After the ICC, the American Arbitration Association probably has the most important international caseload of any arbitral organization. International claims submitted to the AAA are in principle subject to its International Rules, which, except for the usual provisions on ancillary and counter claims, do not contemplate claim relatedness. If the AAA has contemplated amending its International Rules on this

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\(^{15}\) See Devolvé (1995a).


\(^{17}\) Ibid., at 15.

\(^{18}\) Ibid., at 16.
account—and the alternative seems unlikely, considering the organization has actively considered amending its Commercial Rules to mandate complex concentration,\(^\text{19}\) and has in fact so amended several of its industry-specific rules\(^\text{20}\)—discussion must have concluded against such amendment.

Absent rule-based guidelines for dealing with the requests that the organization receives for concentrating complex related claims under its International Rules, the AAA administrative policy (according to its General Counsel) has been to initiate proceedings as filed by the claimant, regardless of how many claims or agreements are involved.\(^\text{21}\) When appropriate, the Secretariat then suggests concentration and, if the parties show interest, assigns a case administrator to assist them in solving threshold questions of

\(^{19}\) There is already record of a previous recommendation by the AAA Case Administration Advisory Committee that the *Commercial* Rules be revised to allow for the consolidation of claims on an opt-out basis, where this would be economic, efficient, and un-prejudicial. See Hollering (1997) 49. To the extent that this recommendation has had any effect (the most recent edition of the Commercial Rules (2000) does not refer to consolidation), it possibly accounts for Rule L5 (a) of Optional Procedures for Large, Complex Commercial Disputes, which allows arbitrators to ‘take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of Large, Complex Commercial Cases.’ But this provision, which in any event applies by default only to claims of ‘at least US$ 1,000,000 exclusive of claimed interest, arbitration fees and costs, and in which either (1) all parties have elected to have the Procedures apply to the resolution of their dispute, or (2) a court or governmental agency of competent jurisdiction has determined that a dispute should be resolved before the AAA pursuant to the procedures,’ —this provision is so general it is doubtful whether, on its own, it justifies arbitrators concentrating related claims between different parties, or arising from formally distinct but substantively related agreements.


\(^{21}\) See Hoellering (1997) 46–47.
propriety, method and procedure. If this fails, the Secretariat might then propose that the matter be referred to a neutral expert, who, acting as mediator or conciliator, endeavours to devise an acceptable procedural framework for the concerted settlement of the related claims. Alternatively, the Secretariat might suggest that the concentration issue itself go to arbitration, either separately or as preliminary matter in the original proceedings. If none of this proves acceptable, and one of the parties insists on seeking judicial concentration, the Secretariat processes the claims separately while expressing readiness to administer such concentrated proceedings as a court of competent jurisdiction might eventually direct.22

2. The Rule-based Approach to Complex Concentration

A commentator surveying the arbitral scene in 1989 concluded, correctly, that most arbitral organizations refused to concentrate related arbitrations or did so within very narrow limits.23 Since then, however, an increasing number of organizations have amended their rules to mandate much more than ancillary and counter claims. Rather than textually analyse each of these rules (which would only produce a running commentary on their individual merits and demerits, of limited usefulness to the overall argument), the following review focuses instead on three aspects of central importance to any institutional concentration regime—(a) the extent to which those rules are compatible with the principle of consent which provides the *leitmotif* of most arbitral scholarship; (b) the conditions, *ratione materiae* and *ratione personae*, laid down for allowing concentration; and (c) the extent to which the new arrangements facilitate the concerted settlement of proceedings pending under different institutional rules.

As already noted, the following review asks whether, and if so to what extent, rules treat the parties’ consent as a condition precedent to concentrating related claims. Strictly, of course, no rule-based concentration regime is non-consensual, since rule choice implies consent to rule content. What the following review does, therefore, is

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23 See Bourque (1989) 532.
focus on the various ways in which rules give parties more or less *practical* control over claim concentration.

There are two parts to the following review. Part 1 deals with institutional rules that contemplate multiple-as well as single-reference relatedness (a). Part 2 examines two market-wide institutional concentration schemes: the first, characteristic of guild arbitration (called ‘string arbitration’); and the second, a purpose-specific *forum conveniens*-based intra-institutional scheme that the Dutch building industry operates (b).

(a) Institutional Rules on Multiple- & Single-Reference Relatedness

Many new editions of institutional rules expressly allow administrators, arbitrators or both, to concentrate related references. Some do it on condition that the parties’ consent to concentration be express. For instance, under the Construction Industry Model Arbitration Rules (CIMAR), an arbitrator appointed to two or more references may, if he determines that common issues are involved, and provided that all concerned agree, order that those references be consolidated, regardless of whether the same or different parties are involved in each case.\(^{24}\) Similarly, under the Rules of the Reinsurance and Insurance Arbitration Society, provided all concerned agree in writing, a tribunal may ‘hear tripartite, multipartite or consolidated arbitrations ... [and] make a single award in respect of such hearings’.\(^{25}\) Non-industry-specific examples include the Rules of the Italian Arbitration Association, under which, assuming the parties agree, the Administrator may order two or more related references consolidated.\(^{26}\) Similarly, the Rules of Arbitration of the Indian Council of Arbitration allow the Registrar, subject to the same condition, to arrange joint hearings between two or more related disputes, or to refer the relevant applications to the same panel.\(^{27}\)

\(^{24}\) See CIMAR Rules, art. 3(9).


\(^{26}\) See Arbitration Rules of the Italian Arbitration Association, art. 13.

\(^{27}\) See Rules of Arbitration of the Indian Council of Arbitration (1990), s. 40. For other examples, see The Chamber of National and International Arbitration of Milan Rules,
Other arbitral institutions sanction concentration on condition that consent be *deducible* from the parties' conduct. For instance, some allow concentration by default. Thus, the Rules of the Dispute Resolution Institute of the Oslo Chamber of Commerce provide that, 'unless a party objects,' tribunals may 'allow the scope of the Arbitration to be extended through the inclusion of new claims and other parties to be joined.' Other rules 'impersonate' the parties. For instance, section 2 of the Maritime Arbitration Rules of the Society of Maritime Arbitrators provides, 'Parties agree to consolidate proceedings involving related contract disputes with others arising from common questions of fact or law.' Still other organisations give local effect to an extra-institutional concentration authority. For instance, the AAA Construction Industry Arbitration Rules provide:

If the parties' agreement or the law provides for consolidation or joinder of related arbitrations all involved parties will endeavor to agree on a process to effectuate the consolidation or joinder. If they are unable to agree, the Association shall directly appoint a single arbitrator for the limited purpose of deciding whether related arbitrations should be consolidated or joined and, if so, establishing a fair and appropriate process for consolidation or joinder.

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28 See Oslo Rules, art. 10. (Emphasis added.)

29 See AAA Construction Industry Rules (2001), rule 7. (Emphasis added.)
Here the concentration mandate originates in the *lex arbitri*, which binds either because it has been expressly incorporated or, more often, incidentally to choice of the seat or the arbitration.

Few institutions whittle down the consent requirement any further. The Japan Commercial Arbitration Association, whose rules dispense with consent altogether where ‘multiple requests for arbitration arise out of the same arbitration agreement,’ belongs to this small group of institutions.30 The Belgian Centre for the Study and Practice of National and International Arbitration, another member of the group, lets arbitrators and administrators concentrate related claims, either at the request of a party, or, which is even more remarkable, *propria motu*, and this regardless of contractual configuration.31

But whatever the consent standard the rules recognize, the appropriate decision-maker usually must still decide whether the circumstances warrant concentration. If the relevant contract includes a substantive test of propriety, that test applies; otherwise, the decision maker must seek guidance in the rules.32 Variously worded but substantially the same, these typically require that the relevant claims ‘raise connected issues of fact or law such as would make their consolidation desirable in the interest of a rational and efficient administration of justice.’33 This is simply another way of saying that

30 See *supra* note 27.

31 See CEPANI Rules, art. 20. See also the virtually identical Arbitration Rules of the Institute of Arbitration (Brussels) (1999).

32 But not all rules lay down such a test. See, e.g., the Code of Arbitration Procedure of the National Association of Securities Dealers, s. 10314(d); the Arbitration Rules of the New York Stock Exchange (NYSE Rules), r. 612(d)(2)-(4).

33 See the Franco-German Official Chamber of Commerce and Industry (COFACI) Rules, art. 9(3). In addition to ‘classical’ arbitral proceedings before persons designated *ad hoc* to decide a specific dispute, COFACI Rules sanction arbitration before tribunals whose membership the COFACI Arbitration Centre designates biennially. The text above refers to this biennial tribunal. Absent contrary intention, reference to COFACI Rules indicates agreement to refer disputes to this biennial tribunal. Under COFACI Rules, ‘classical’ tribunals have no concentration powers.
concentration may be ordered in the interest of inter-award harmony or with a view to realising time- and cost-savings. Invariably formulated as a standard, such test, even when seemingly elaborate, gives much discretion and correspondingly little predictability. An example is the ostensibly sophisticated test in the AAA Title Insurance Arbitration Rules (2001). This allows consolidation if 'a reasonable number of the following circumstances exist:

(a) Either (i) the title insurance policies on which the arbitrations are based or (ii) the parties or subject matters of the arbitrations are related in some other way so that consolidation will result in a more economical or efficient disposal of the issues presented in all of the arbitrations. 
(b) There exist common issues of fact that will be required to be determined in each of the arbitrations to be consolidated, the proof of which will or could be substantially the same. However, neither incomplete identity of factual issues nor varying policy terms or measures of damages shall be a reason for refusing consolidation, unless the differences are of a number and complexity that will make the determination of the liabilities by the arbitrator unwieldy or difficult.34

Ultimately, this boils down to (a) relatedness, (b) inter-award harmony, (c) efficiency, and (d) default of countervailing prejudice. Each of these elements calls for an exercise of judgement.

So far, discussion has focused on multiple-reference relatedness; but many of the points so far made apply as well to the rules governing single-reference situations. Whether it is third-party joinder or third-party intervention that these rules sanction (the

34 See AAA Title Insurance Rules, s. 7.
wording sometimes blurs the distinction\textsuperscript{35}, different rules set different consent requirements. Some insist on express party consent, defining 'party' now as party to the reference,\textsuperscript{36} now as party to the arbitration agreement.\textsuperscript{37} Other rules simply imply consent: by default,\textsuperscript{38} by 'impersonating' the parties ('Parties agree that ...'),\textsuperscript{39} or simply by leveraging

\textsuperscript{35} See, e.g., Rules for Certain Categories of Perishable Agricultural Products, sponsored by the United Nations Economic Commission for Europe (1979), art. 16(iv) ("If one of the parties invokes a guarantee by a third party to which it imputes all or part of the responsibility for the facts of the dispute and if that third party agrees to intervene in the dispute, the arbitral tribunal may, with the third party guarantor’s assent, hear the original claim and the claim to the guarantee together.) Though the provision speaks of intervening, it describes a textbook-joinder procedure.

\textsuperscript{36} See Arbitration Rules of the Netherlands Institute of Arbitration, art. 41 ("The joinder, intervention, or joinder for the claim of indemnity may only be permitted by the arbitral tribunal, having heard the parties and the third party, if the third party accedes to the arbitration agreement by an agreement in writing between him and the parties to the arbitration agreement (Emphasis added.)

\textsuperscript{37} See Rules of the Japan Commercial Arbitration Association, art. 40 ("Any person who is not a party to a particular arbitration may, upon the consent of such person and all the parties to such arbitration, participate in such arbitration as a claimant or be allowed to participate therein as a respondent’ (Emphasis added.)). Unless context clearly suggests otherwise, Rules that simply refer to ‘the parties’ usually intend those actually before the tribunal. See, e.g., Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, (1995) (CCRIF Rules) s. 35. (‘Any third party may only join the arbitral proceedings with the consent of the parties in dispute). (Emphasis added.) See also Rules of the Court of Arbitration at the Bulgarian Chamber of Commerce and Industry (BCCI), rule 33; Rules of Procedure for the Arbitration Court attached to the Hungarian Chamber of Commerce, 2000, (HCC Rules) art. 30; Arbitration Rules of the European Court of Arbitration of the Chamber of Commerce and Industry, art. 16.

\textsuperscript{38} See, e.g., LCIA Rules, art. 22.1(h) ("Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power... after giving the parties a reasonable opportunity to state their views... to allow, [but] only upon the application of a party,
an external standard directly or incidentally binding on the parties.\textsuperscript{40} None, though, it seems, gives arbitrators authority to join third parties \textit{proprio motu}.

Once again, quite apart from consent, leave to concentrate is still necessary,\textsuperscript{41} and may be refused if the third-party claim would render the proceedings unwieldy, would cause undue delay or would be otherwise inappropriate; e.g., if deferred or separate adjudication of the related claim would be more expedient,\textsuperscript{42} or if the new claim would

one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration) (Emphasis added.) See also article 25 (b) of the Arbitration Rules of the Singapore International Arbitration Centre Arbitration (1997).

\textsuperscript{39} See, e.g., the Arbitration Rules for the (Belgian) \textit{Institut d'Arbitrage}, art. 6 (b) ("The parties to the dispute accept [that] any third party intervenes in the proceedings").

\textsuperscript{40} The Statutes of the Building Industry in the Netherlands make particularly ingenious use of this method. Under existing Dutch legislation, specifically, article 1045 (3) of the \textit{Arbitration Act 1986}, \textit{if all concerned agree}, the President of the District Court of Amsterdam may give a third party leave to intervene in a reference, or allow him to be impleaded therein. By expressly treating as satisfied this statutory consent requirement whenever participation is agreed by no more than a third party and one of the original parties, the statutes turn this purely consensual regime into an institutional license to compel third-party participation agreed only between movant and third party. See Statutes of the Court of Arbitration for the Building Industry in the Netherlands, 1987 (BIN Statutes), art. 21(4). See also \textit{Ibid.}, art. 22(3). For the general statutory authority under Dutch law to fashion one's proceedings, see \textit{Arbitration Act 1986}, art. 1036.

\textsuperscript{41} See, e.g., Rules of the Court of Arbitration of the Polish Chamber of Commerce (2000), s. 27 ("A third party may join the pending arbitration proceedings only by agreement of the parties, and subject to a decision of the Arbitral Tribunal approving the joinder.") (Emphasis added.)

\textsuperscript{42} See \textit{van den Berg et al.} (1993) 70. Some rules make this clear. See, e.g., the Rules of the Japan Commercial Arbitration Association, art. 40 ("Notwithstanding that the consent [of the parties] has been given, the arbitral tribunal may deny participation in the arbitration
increase the tribunal’s workload considerably, especially, if the parties have refused to revise the arbitrators’ fees, particularly, the lump-sum kind.43

(b) Market-wide Concentration Schemes

Institutional concentration suffers a powerful limitation: it only works if the same set of rules governs the related claims. This limitation, relatively manageable in markets where standard-form contracting is typical and centralized dispute-settlement the rule, is otherwise decisive. Both the following sections—on string arbitration (i) and on the intra-institutional concentration scheme that the Dutch building industry operates (ii)—examine market-wide concentration arrangements. Both mechanisms assume standard-form contracting. The first assumes a single dispute-settlement authority; the second assumes a dominant dispute-settlement institution, a first among equals.

(i) String Arbitration

Broadly speaking, international commercial contracts are divisible into (a) substantively differentiated but organically related contracts, (b) so-called ‘relay’ contracts, ‘links’ in a contractual ‘chain’ along which substantially the same transaction repeats between parties who care nothing about the subject matter of the transaction, except as value-in-trade, and (c) contracts without the least impact on or remotest connection to any other. The combination of a main contract for works and a contract for engineering services exemplifies the first type of contracts. Commodity contracts exemplify the second. The third type is theoretical, at least in the commercial world. This section is exclusively concerned with ‘relay’ contracts.

Typically, a claim under one of these contracts triggers a substantially similar third-party claim by the respondent against his counterpart under a related contract, which then triggers a third claim by that counterpart against his counterpart under a third also

if the arbitral tribunal determines that such participation will delay the arbitral proceedings or for any other proper reason.43

43 Technically, these considerations would justify arbitrators deciding the issue individually, rather than in collegium. See Lalive et al (1989) 154. In practice, only a particularly obnoxious arbitrator would hold up proceedings by opposing the united wishes of the parties and his colleagues. In extreme cases, an arbitrator who felt particularly strongly about the issue would simply offer to resign.
related contract, and so on, until liability is channelled all the way up to the original goods supplier. For example, a buyer's claim alleging that goods are sub-standard usually triggers another virtually identical claim by the seller against his seller, and then a third claim by that seller against his seller, and so on, until the first seller is brought to book. To ensure that liability under these cascading claims (which typically involve the same, or at least substantially similar, questions of law and of fact) is decided uniformly, trade associations often sponsor arbitration rules that prescribe a so-called 'string' procedure between first sellers and last buyers, with the award binding on all intermediates. Rule 6(c) of the Rules of Arbitration and Appeal of the Federation of Oils, Seeds, and Fats Associations is typical. It reads:

Should the contract form part of a string of contracts which are in all material points identical in terms, except as to date and price, then: (i) In any arbitration for quality and/or condition, [...] the arbitration shall be held as between the first Seller and the last Buyer in the string as though they were contracting parties. Any award so made (in these Rules called String Award) shall, subject to the right of appeal as provided in these Rules, be binding on all the intermediate parties in the string, and may be enforced by any intermediate party against his immediate contracting party as though a separate award had been made under each contract.

Typically, someone who believes himself to be party to a string, upon receiving a request for arbitration, immediately informs the plaintiff of his position as an 'intermediate,' then proceeds to claim arbitration against his seller. Depending on the custom of the trade, he might do so formally (by requesting arbitration against that seller) or simply by notifying the pending proceedings and requesting that the seller defend or (unless he is the first seller) implead his counterpart. Where a string includes all outstanding claims, a single award usually determines liability between all concerned;

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44 This is not to be confused with another informal procedure used in maritime arbitration, which sometimes goes by the same name. With the maritime procedure, the same arbitrators appointed under the charter party are, by agreement, appointed under both the sub-charter and any additional sub-fixtures. Unlike the case with formal strings, the informal string is then entirely the fruit of sensible co-operation. See Bernstein et al (1998) 322.
otherwise, the arbitrators must publish as many awards as there are formally independent claims.\textsuperscript{45} First sellers, last buyers, and intermediates, all may seek to have the award reviewed;\textsuperscript{46} but intermediates must state whether they appeal as buyers or as sellers.\textsuperscript{47} A party on whom notice of appeal is served must notify any counterpart against whom he proposes to take up a similar appeal. The association normally appoints the appeal board.\textsuperscript{48} Multiple appeals are usually consolidated.\textsuperscript{49}

When employed appropriately and in a spirit of cooperation, strings can save time and money, as well as avoid conflict; otherwise, they can spell trouble. To begin with, strings are only suitable for quality disputes; disputes concerning condition (which might deteriorate in transit, owing to third-party negligence), to say nothing of anything more complicated, e.g., issues of supervening illegality, export-import restrictions, allegations of fraud, etc., ought to be decided directly between the relevant parties.\textsuperscript{50} Second, strings assume that the related claims arise out of contracts identical in all material respects. But if someone disputes this identity, much time and effort could be lost determining whether the differences are such that it would be improper indiscriminately to apply the

\begin{itemize}
\item \textsuperscript{45} See, e.g., FOSFA Rules, rules 6, 7; GAFTA Rules, rule 7.
\item \textsuperscript{46} See, e.g., GAFTA Rules, rule 14.1.
\item \textsuperscript{47} See, e.g., FOSFA Rules, rule 7(c).
\item \textsuperscript{48} See, e.g., FOSFA Rules, rule 9; GAFTA Rules, rules 10–15. In some cases appeals are excluded, either expressly or by default. See, e.g., GAFTA Rules, rule 17.
\item \textsuperscript{49} See, e.g., FOSFA Rules, rule 8(c).
\item \textsuperscript{50} See Mustill & Boyd (1989) 146–47. The procedure may nevertheless be useful with disputes as to condition, since it might allow arbitrators to trace the goods in transit, to ascribe liability to the party in whose (notional) custody these goods were at the time they suffered the actionable damage, and hence to apportion liability between all involved. Furthermore, when all concerned agree, rules sometimes allow strings to be used for ordinarily excluded classes of disputes. See, e.g., Arbitration Rules of the Grain and Feed Trade Association (GAFTA), rule 7.2: ‘In all other cases, if all parties concerned expressly agree, the tribunal may conduct arbitral proceedings concurrently with other arbitral proceedings, and, in particular, concurrent hearings may be held, but separate awards shall be made pursuant to each contract.
findings reached in one contract to the other. Third, strings seem like straightforward bilateral procedures between first-sellers and last-buyers; in fact, they only work if intermediates co-operate, e.g., by supplying their contracts. Finally, string awards usually do not lend themselves to summary enforcement. As Mustill & Boyd point out, an award that declares a rejection good can at best settle a formula embodying all that a court needs in order to invoice-back price and determine damages. But if the court nevertheless refuses to get involved with the arithmetic, the award-creditor must bring a new action on the award.

(ii) Intra-Institutional Concentration Scheme: The Dutch Example

String arbitration assumes a centralized dispute-settlement structure; absent this, institutional concentration only works effectively if arbitral organizations operating in a given industry agree an intra-institutional concentration scheme. Discussion has already referred to the rules governing one such scheme, namely, the (British) Construction Industry Model Arbitration Rules. This section briefly sets out the rules governing another, conceived by the Association of the Court of Arbitration for the Construction Industry, the body under whose auspices and according to whose arbitration rules the Dutch building industry traditionally settles its disputes.

The relevant provisions are articles 23 to 27 of the Association’s Arbitration Rules. These provide that anyone involved in related references of which only one reference is pending before the Court of Arbitration, may apply to the chairpersons of both that Court and the other institution for permission to have those references consolidated. (This, of course, assumes that the other institution recognizes a similar procedure, or at least allows ad hoc applications of this kind.) After consultation, the chairs of the relevant institutions decide the application and, if appropriate, determine the rules that would

51 See Mustill & Boyd (1989) 147. Whether a party whose claims fit the string may nevertheless opt to have his dispute decided apart ultimately depends on the applicable rules and, in the last analysis, on the custom of the trade. Trade associations sometimes ‘shorten’ strings by holding a single arbitration between the last buyer and the uppermost consenting seller along the string. But, as Mustill & Boyd note, this ‘is not what the clause says.’ Ibid.

52 See Mustill & Boyd (1989) 147.
govern the consolidated proceedings. And unless they are unable to agree some fundamental matter, the statutory concentration regime governed by the *Arbitration Act 1986* (discussed in Chapter 4) is excluded.

### III. A Critique of Institutional Concentration

This chapter has so far reviewed institutional rules mandating different forms of claim-concentration; drawing on this review, this section will put the principle of concentration by institutional fiat through a five-step test. Step 1 will examine the propriety of such concentration against the arbitral ideal of voluntariness (A). Step 2 will examine the tension between institutional concentration, on the one hand, and direct arbitrator choice, on the other (B). Step 3 will consider the appropriateness of vesting arbitrators or institutional bureaucrats with the power to concentrate related claims (C). Step 4 will explore the notion that the nature of arbitral justice somehow favours or disfavours the pursuit of inter-award harmony (D). Step 5 will consider the relation between arbitration’s co-archical institutional environment, on the one hand, and the organizational limits of complex forum concentration, on the other (E).

As already noted, the general hypothesis informing discussion is that formal argument alone, *i.e.*, appeal to decisional criteria intrinsic to law or to value-free technical considerations cannot determine the propriety of institutional concentration one way or the other. Specifically, the claim is that neither arguments from autonomy nor from professional competence nor from the nature of arbitral justice nor from arbitration’s institutional environment can decide the matter. This essentially refutatory argument clears the way for the theoretical claim at the centre of Chapter 5.

#### A. Institutional Concentration and Consent

As the above discussion has shown, institutional concentration regimes work either by default or by express consent. The first kind is typically attacked and defended in a series of ultimately inconclusive arguments that usually begin by the charge that such regimes foist on the average user a procedure that he does not expect; to which the

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53 Cf. DAC (1989) 33 (para. 98) (saying, in the admittedly different context of explaining why England should not even adopt the Model Law on an opt-in basis: ‘Experience tends to show that parties to commercial transactions do not give much thought to choice of a method of resolving disputes which they do not really anticipate will ever
stock answer is that, actually, the strength of institutional arbitration lies precisely in those fail-safe mechanisms that are built into the rules. 54 A rejoinder might then follow acknowledging that default regulation is in accord with principle, but maintaining that such regulation must nevertheless respect the parties’ legitimate expectations. But this once again raises the question whether parties actually expect concentration, whether one could meaningfully appeal to expectations, considering most arbitration users’ inexperience in the matter, and, more radically, whether private will is in any event sovereign. 55 In answer, someone might then propose an opt-in concentration regime, on the theory that an optional clause, while it can do no harm, can at least help those who want a concentration framework but have not themselves the expertise to design it. But of course, any such suggestion would elicit the objection that an opt-in mechanism is useless whose existence most users would in any event not discover in good time. 56 Here discussion usually would end, with each side feeling that the other is ignorant, unreasonable, or both.

To avoid this circularity, one would have to recognize that, even though there may well be a general argument in favour of the autonomous regulation of dispute-settlement processes, current practices dictate that its effects be modified in light of social reality:

arise. ... This being so, any legislation on the lines of contracting-out would in practice lead to the parties finding themselves, whether they liked it or not, with a system which, for the reasons we have endeavoured to state, is less ready to answer to their needs than the one which is already in force.

54 Cf. Redfern & Hunter (1999) 45 (arguing that ‘[a]utomatic incorporation of a book of rules is one of the principal advantages of institutional arbitration... In a default situation, such rules are likely to prove extremely valuable.)


56 Cf. Goldstein (1997) 105 (‘Any enhancement of institutional rules to support multiparty arbitration should be in the form of ‘opt-out’ rules. ... Any opt-in solution is unlikely to be useful. If the parties are sufficiently focused to opt-into special rules, they would also be likely to draft their own solution. The rules must serve parties who will adopt nothing more than a standard arbitration clause, and must fairly anticipate their needs in the event of a complex dispute.’)
once the ex ante clause dominates, the concept of the autonomous in arbitration becomes largely formal. Moreover, one would have to recognize that disputes about the degree to which legal systems should give effect to identifiable expectations are ultimately irresolvable by reference to abstract notions of voluntariness.

Clearly, it would not do to press arguments like these beyond a certain point. This is not because such questions would tend to elicit answers that would put the entire autonomy concept out of business; nor because the voluntary can be construed within limits that exclude such questions. Rather, it is because (as Chapter 4 will endeavour to demonstrate) the autonomous in modern arbitration specifically, and in legal doctrine more generally, is an inherently derivative concept that should not be asked to do too much.

B. Institutional Concentration and Arbitrator Choice

Chapter 2 has already shown how, in multi-party settings, only depersonalizing the choice of arbitrators preserves the parties’ procedural equality.57 When concentration is a matter of agreement, parties, of course, would determine whether a more inclusive but less personalized reference is appropriate. But when concentration is mandated by institutional rules, the appointment of arbitrators must, if it is to be effective in multi-party situations, be devolved unto an external authority. Whether ius facti this delegitimizes institutional concentration ultimately depends on whether direct arbitrator choice is an essential attribute of the process.

As to this point, commentators disagree. Some maintain that direct arbitrator choice is fundamental to arbitration and more than any other factor lends the process its legitimacy.58 In any event, they maintain, parties assume it.59 Others respond that the

57 See discussion on page 64.


advent of institutional arbitration has largely substituted trust in the appointing authority for trust in the arbitrator. But there are grounds for rejecting the essentialist claim for direct choice, without necessarily subscribing to the argument from institutional trust.

First, arbitration (as discussion has already shown) has changed: from a quasi-legal institution animated by a genuine desire to have well-defined disputes settled by specific persons enjoying the parties’ mutual confidence, arbitration has become a legal institution allowing users irrevocably to submit future indeterminate disputes to the decision of persons latterly chosen, mostly on partisan lines. Of course one could plead this development in favour of direct arbitration choice, on forensic grounds; but the essentialist legitimist claim above rings hollow.

Second, from an institution allowing parties to fashion a procedural framework peculiarly suited to their circumstance, arbitration now relies on model institutional clauses that, in practical terms, transfer procedural initiative to both arbitrators and institutional officers. Once again, one could argue that this renders arbitrator choice the more significant, or (in a reversal of roles) claim that, in such changed circumstances, third-party selection is the best guarantee of the process’s impartiality.

Beyond this, purely technical argument will not advance matters.

C. Institutional Concentration and Jurisdictional Propriety

Another way of evaluating institutional concentration would be to investigate the appropriateness of letting arbitrators or institutional officers decide questions of

the parties’ feelings on the issue, their lawyers simply relish their influence on the composition of the tribunal. See, e.g., Ridgway (1999) 51 (calling tribunal appointments ‘perhaps the single most critical decision that the parties make in a case’); Lowenfeld (1995) 61 (reporting that lawyers nowadays review candidates’ résumés, publications, and even interview them!).


concentration, in preference to judges. There are two basic arguments in favour of such attribution of competences, and four against it. The arguments in favour are: (1) such attribution gives effect to the parties' desire to keep their affairs out of the court system; and (2) arbitrators can concentrate claims pending in different jurisdictions, which judges cannot do. The arguments against are: (1) concentration powers must sometimes be exercised before tribunals have been appointed; (2) tribunals generally cannot, or can only with difficulty, coordinate decisions on matters transcending their individual competences; (3) arbitrators are arguably interested in concentration issues, inasmuch as concentration threatens to end their mandate; and (4) arbitrators, holding as they do their mandate from the parties directly before them, are likely to give less weight than judges might to the systemic implications of the decision on concentration.

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62 For discussion of trans-jurisdictional statutory-mandated court-ordered concentration, see on page 127.

63 See van den Berg (1986) 367.

64 See, e.g., Arbitration Act, 1986, art. 1046(3)–(4) ('[3] The President shall determine the remuneration for the work already carried out by the arbitrators whose mandate is terminated by reason of the full consolidation. ... [4] If the President orders partial consolidation, ... the arbitral tribunals before which arbitrations have already been commenced shall suspend those arbitrations. The award of the arbitral tribunal appointed for the consolidated arbitration shall be communicated in writing to the other arbitral tribunals involved. Upon receipt of this award, these arbitral tribunals shall continue the arbitrations commenced before them and decide in accordance with the award rendered in the consolidated proceedings.) (NL) Though paragraph (4) above does not expressly address remuneration in case of partial consolidation, paragraph (3) may, in appropriate circumstances (e.g., when the order for partial consolidation has considerably reduced the number and complexity of the issue that some tribunals had to decide) would apply by analogy. For the view that arbitration has become a service industry, see Mustill (1989) 55; Okekeifere (1989) 88. For arbitrator's bias on jurisdiction, see Walt (1999) 407. See also Oppetit (1998) 10–11.

65 Interestingly, a U.S. Circuit court has recently justified its preference for judicial control of concentration on the (doubtful) ground that, the alternative threatens to raise 'esoteric issues in the law of res judicata' and contractual estoppel that otherwise would not arise.
This last point is not meant to suggest that arbitrators consider themselves any less than judges do the guardians of the legal systems in which they operate: the best arbitrators endeavour to give effect to (the chosen) applicable law. Nor is it to say that international arbitrators are a cosmopolitan lot, liable to de-emphasize technical considerations that judges might find compelling, although that may be true to some extent. Rather, the point is that the prevalence of a dispute-settlement mentality in arbitration arguably means that, unlike the systemically minded and comity-conscious judges, most arbitrators will quite properly consider themselves duty-bound to de-emphasize considerations that are irrelevant to the case immediately before them. If true, this may translate into prejudice against (the generally systemically-motivated) extra-contractual concentration initiatives. But does such mentality prevail in fact. Does it carry these implications?

In a long passage, well worth reproducing because it captures the essence of the differences on this point, Oppetit writes:

_Chez nombre de spécialistes de l’arbitrage international prévalant l’idée que l’arbitre ne saurait prétendre à un rôle que celui d’un mécanisme régulateur; ne tenant ses pouvoirs que des parties en vertu du contrat d’arbitrage, l’arbitre ne doit se soucier que des seuls rapports des parties au litige et ne s’attacher qu’à résoudre le différend qui les oppose, sans avoir à se préoccuper de la défense d’intérêts supérieurs, mais extérieurs à l’objet même de l’arbitrage. Une telle conception de la mission de l’arbitre international relève d’une philosophie du droit utilitariste, de type anglo-saxon, qui limite l’appréciation des resultants à des objectifs rapprochés, et aussi de la tradition individualiste, qui assigne un rôle predominant à la volonté individuelle et plus précisément au contrat, considéré comme la seule base acceptable des règles de droit.

‘Mais on peut aussi estimer,’ Oppetit adds:

... que l’arbitre en tant que juge ordinaire des différends du commerce international, ne saurait méconnaître l’intérêt general. ... Cette tâche de défense d’intérêts collectives reconnue à l’arbitre international inscrit alors la démarche de ce dernier dans la reaction anti-individualiste et dans une philosophie du bien commun, qui affirme la

Oppenent is here trying to tease out the main threads running through the entire fabric of the law on arbitration: the individual and the social. No-one who neglects either these influences could understand many of the debates in contemporary arbitral scholarship. But at the same time, those influences are themselves so unstable, so contingent, so ambiguous, that none who tries to settle their relation in a generalised formula could avoid the four basic dangers of all social analysis—reductionism, paralysis, incoherence, and redundancy. An example of just such a trial gone awry is by Oppenent himself, who following the above quote concludes:

En définitive, on peut dire que l'arbitrage international, dans sa vocation et son fonctionnement, exprime fondamentalement les valeurs de l'humanisme, encore que, sous la pression de la technique et de l'économie, il affirme aujourd'hui à un titre égale son caractère mechaniste.67

A statement like this seems impressive on first reading: on re-reading, however, it turns out to say that arbitration is both humanistic and mechanistic, which leaves the basic question of the balance between the individual and the social unanswered.

All the same, Oppenent clearly deserves credit for his insight into the competing influences in arbitral practice. For the objection from professional sensibility to stand, however, one need only accept that many arbitrators today subscribe to the individualist arbitral conception that Oppenent has so insightfully identified.

So it comes down to this: two arguments in favour, four arguments against, arbitrator-led institutional concentration—hardly conclusive, especially when you consider that there is no reason in principle why institutional rules should not let both judges and arbitrators decide concentration issues according to a pre-established order of precedence, e.g., one that uses a combination of suitability and availability criteria.

67 Ibid., at 127.
*Mutatis mutandis,* three of the above four objections to arbitrators retaining jurisdiction over questions of concentration—namely, limited competence, interest, and professional sensibility—apply with at least as much force to institutional officers; except, there is then added the further objection that concentration issues should be decided in judicial-style proceedings, rather than following those limited written representations on which those officers typically act.

D. Institutional Concentration and the Nature of Arbitral Justice

Casting about for an alternative criterion by which to judge institutional concentration, one might consider asking whether such concentration is consistent with the nature of arbitral justice. But such an enquiry turns out to be a mere rehash of the objection from professional sensibility, since it ultimately involves asking whether, in addition to its dispute-settlement function, arbitration also promotes systemic values, in this case, the value of inter-award harmony.\(^68\) No-one before, it seems, has asked exactly this question; but at least one writer is on record giving something like an answer—Grigera Naón.

According to Grigera Naón, arbitration's role is to provide 'a just decision in the instant case,' which (in his view) accounts for the reluctance (eminently justifiable in his view) of arbitral institutions 'to set in motion under one and the same arbitration proceeding—absent a clear intent of the parties to do otherwise—arbitration claims in multicontract situations.'\(^69\) Grigera Naón is apparently *not* speaking here to the question whether arbitral institutions should amend their rulebooks to mandate concentration, but rather to the related but distinct question whether such institutions should engage in complex forum concentration *absent* both party intent and clear rule mandate. Still, he states his view so generally that he cannot, if he is to remain consistent, but come out the same way on both these distinct but related questions.

According to Grigera Naón:

\(^{68}\) Cf. Grigera Naón (1999) 267 ('By defining the role of international commercial arbitration, we also delineate or perceive its limits.').

\(^{69}\) *Ibid.*, at 274. See also Bond (1991b) 39.
distinctive trait of arbitral justice when compared with state justice is that the latter is more concerned than arbitration with pursuing certain systemic or ‘social engineering’ objectives or values, based on ideas of ‘coordination, efficiency and stability’ in part viewed from the perspective of the needs of the whole system or even wider and more general social or community interests rather than primarily from the perspective of the needs of the parties involved in the concrete dispute or transaction at stake.\textsuperscript{70}

By contrast, he continues, arbitration advances no systemic values that:

... on the basis of some paramount social engineering principle, would go beyond what may be perceived, in respect of the particular case, as the explicit or tacit stipulations or expectations of the parties regarding dispute settlement or which would imply imposing on them the terms under which they should submit to arbitration or superseding their agreements in that respect.\textsuperscript{71}

Ultimately, this line of reasoning leads Grigera Naón to the conclusion, already foreshadowed, that:

...[t]he role and accompanying characteristics of international commercial arbitration, which rest on the basic principle that the will of the parties constitutes the source and at the same time the limits of the jurisdiction and powers of arbitral tribunals and of the authority of the arbitral institutions, explain ... the latter’s reluctance to set in motion under one

\textsuperscript{70} Grigera Naón (1999) 267. Curiously, however, Grigera Naón mentions (p. 274) two cases in which the ICC, presumably under his Secretarship, directed that two pairs of related references be heard together, in one case despite conflicting terms of the relevant arbitration agreements, in the other, despite the protestation of one of the parties. His explanation for both these cases is that the ICC did no more than provisionally set in motion a joint procedure that the arbitrators could always reverse. See Grigera Naón (1999) 274–75. Arbitrators’ notorious bias in favour of their jurisdiction weakens this argument considerably. On this bias, see Walt (1999) 407.

\textsuperscript{71} See Grigera Naón (1999) 274.
and the same arbitration proceeding absent a clear intent of the parties to
do otherwise—arbitration claims in multicontract situations.72

The major difficulty with this line of argument lies in its premise—that arbitration is
‘essentially aimed at obtaining a just decision for the instant case.’ This premise, the anti­
 systemic premise, Grigera Naón neither defends nor explains.

E. Institutional Concentration and Arbitration’s Structural Limitations

From a practical standpoint, perhaps the single most compelling objection to
institutional concentration is that from arbitration’s co-archical institutional structure—
namely, that arbitration’s decentralised and co-archical institutional environment lacks a
central authority capable of concentrating claims pending under different institutional
rules.73 This objection rests on two assumptions: (a) that single-institution concentration
schemes are ineffective; and (b) that intra-institutional concentration is impractical,
inefficient, or somehow against principle. These assumptions need testing.

Discussion has already shown that, given centralized dispute settlement and market­
wide standard contracting, single-institution concentration schemes could effectively
promote inter-award harmony.74 On one view, the two caveats in the foregoing
statement are decisive against international commercial arbitration, a dispute settlement
process in which claims typically satisfy neither these characteristics. On another view,

72 Ibid.

73 Cf. Ndekugri (2000) 368 (‘[B]ecause of the fragmentation of the [construction] industry, multiplicity of appointing institutions leading to gaps in knowledge of ongoing proceedings and frequent amendments to contractors, it may not be always possible to achieve this end. ... Fragmentation of the industry works against the necessary dovetailing of the relevant contracts to enforce consolidation.’ See also van den Berg (1986) 367.

74 Generalist arbitral institutions will sometimes sponsor specialized arbitration rules. See, e.g., the Construction Industry Dispute Resolution Procedures of the American Arbitration Association. For purposes of the present discussion, those institutions are considered specialized institutions; except that, unlike the truly specialized sort, they rarely (if ever) dominate the specialized market.

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the statement, far from deciding the issue, merely raises the question, ‘Why not rationalize the institutional structure as a whole, or at least universalize the Dutch-style purpose-specific intra-institutional regulatory framework?’

There are four basic objections to such proposals. The first, from practicability, says it is naïve to expect scores of institutions to re-arrange themselves hierarchically, in order to operate cross-institutional (and potentially cross-jurisdictional) concentration schemes.75 The second, from efficiency, says an intra-institutional concentration framework would necessarily vary arbitration agreements, hold up proceedings, and hence discourage resort to arbitration. The third, from principle, says the proposed framework would undermine parties’ substantial rights, e.g., on rule-, arbitrator-, and seat-choice.76 The fourth, an essentialist objection, says, ‘Organize arbitral institutions hierarchically, court-like, and you no longer have arbitration, but something else.’

On examination, however, these objections turn out to be inconclusive. Take, for instance, the argument from practicability. Describing an arrangement as impracticable is simply another way of saying that the ideas underlying it have insufficiently prepossessed those concerned to motivate action. This, in turn, means no more than that those so concerned have judged the purposes to whose realization the arrangement in question tends to be less important than the sacrifices it entails. This is fine as far as it goes. But it still invites the question, ‘At what point does an end stop justifying the means, so that overstepping that point renders outcomes inefficient?’ This question is unanswerable on purely technical grounds. Saying that a proposed measure is inefficient is simply another way of saying that it sacrifices too much to achieve too little. But adjectives like ‘much’ and ‘little’ are value-laden. In the present context, the competing values are presumably inter-award harmony, on the one hand, and speed, economy, confidentiality, and personalized arbitrator choice, on the other—all of which, discussion has already shown, are values whose balancing involves a highly subjective order of preference.77

75 The assumption, of course, is that nor could courts concentrate different-seat claims; on which see Chapter 4.

76 Cf. Schwartz (1990) 355–56 (reference to different rules precludes concentration ab extra, since rule-reconciliation would necessarily undermine someone’s substantial rights).

77 See Chapter 2.
One answer to this may be that, ‘If so, parties must be left to decide for themselves, ad hoc,’ to which the counter would be, ‘But that then is no longer an argument from practicability but something else.’

Take next the argument from principle. This says that the proposed arrangements, whatever their utility, would violate the parties’ substantial rights. Again this merely prompts the question, ‘What makes a right substantial?’ Arguably, a right is ‘substantial’ if it is fundamental either to the ethic animating the relevant social institution or to the operability of that institution. The ethical argument is obviously non-technical; the argument from operability rings hollow when, as discussion has shown, the institution in question systematically excludes effective party choice.

This leaves the essentialist argument, which is obviously non-technical.

But then, if formal argument alone cannot determine the propriety of institutional concentration, the question immediately arises, ‘What could?’ To this question, Chapter 5 proposes an extra-legal answer. First, however, it is appropriate to consider whether joint or separate state action can further inter-award harmony in the way neither private nor institutional initiative seems capable of doing.
I. Introduction

Concentration by legislative fiat in arbitration is a relatively novel development, dating from 1974. The timing of legislation is rarely accidental: private-interest lobbying apart, lawmakers generally act in response to perceived social needs. Statutory concentration is no exception: legislators did not begin to consider it until the consecration, in the 1970s, of what this chapter will argue is an austere due-process style of judicial oversight that has disabled substance-oriented judicial review of arbitral agreements, proceedings, and awards. Once again, the English experience is instructive.

As already noted, the Arbitration Act 1975 took away the English courts’ ability to mitigate inter-award conflict. Almost immediately this Act came into force, judges began deploiring the inconvenience of mandatory stays. And barely three years later, the Commercial Court Committee on Arbitration acknowledged a ‘real need’ for the High Court to be given in relation to arbitrations statutory consolidation powers analogous to those it possessed in relation to actions—a view that subsequent judicial experience with complex arbitrations appeared to confirm. Indeed, such by decade’s end was the

1 See International Arbitration Act 1974, s. 24 (Austral).
2 See discussion on page 5.
3 See cases cited supra note 20, on page 6.
4 See Commercial Court Committee (1978) 211 (para. 56). Even before that, the Mackinnon Committee on Arbitration Law had already recommended, in 1927, a limited form of statutory consolidation in arbitration, viz. in case of interpleader. See Mackinnon Committee Report on Arbitration Law (1927) (para 6). This recommendation has since been enacted as section 8 (2) of the Arbitration Act 1934, re-enacted several times, most recently as section 10(1) of the Arbitration Act 1996. On interpleader, see discussion on page 39.
Chapter Four. Statutory Concentration

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level of support for remedial legislation along those lines, that not only was statutory concentration being described as ‘a fashion whose time has come,’ an ad hoc law reform committee (the Departmental Advisory Committee on Arbitration) could cite the Model Law’s failure to provide for complex arbitration as one ground for recommending against its adoption.7

But then the wind began to blow in the opposite direction. Shortly after it had made the above observation on the Model Law, the Advisory Committee itself found ‘formidable obstacles’ against recommending statutory concentration in England.8 Six years later, it ruled out any remedial legislation along the lines formerly proposed by the Commercial Court Committee on Arbitration.9 As a result, the Arbitration Act 1996 merely restates the parties’ right to vest whomever they wish with the power to compel concentration, while otherwise simply codifying pre-existing case law enjoining tribunals, absent such authority, from doing so themselves.10

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7 See DAC (The Departmental Advisory Committee on Arbitration Law) (1989) 6. DAC is an ad hoc committee, set up in the 1990s, and entrusted with the task of reviewing and consolidating the English law on arbitration. Its work led to what is now The Arbitration Act 1996. The Working Group entrusted with drafting the Model Law had found ‘no real need to include a provision on consolidation in the Model Law.’ See First Working Group Report, A/CN. 9/216 (para. 37).


10 See Arbitration Act 1996, s. 35. See also Great Ormond Street Hospital NHS Trust v Secretary of State for Health and others (1997) 56 Con LR 1 (QB 1997) (‘Section 35(1) is merely permissive (it could hardly have been otherwise); s 35(2) does no more than record existing law.’) For relevant case law, see Abu Dhabi Gas Liquefaction v. Bechtel, [1982] 2 Lloyds Rep., 425; The Eastern Saga, [1984] 3 AllER 8. The 1996 Act, though it discourages courts from intervening except as otherwise expressly provided, does not absolutely
The committee offered two types of arguments in support of its refusal to recommend statutory concentration powers. The first, from principle, said that statutory concentration would vary arbitration agreements, undermine confidentiality, and weaken party control on tribunal choice; the second, from utility, said that such concentration would be inefficient, would prove impractical across frontiers, and would endanger award enforceability. Prima facie, this amounts to a formidable case—and one which no doubt influenced those foreign law reformers who have since either dismissed the entire conflict rigmarole as plainly unsuitable for legislation, or simply recommended hortatory legislation à l’anglaise.

The time will come for examining this apparently overwhelming case against legislating in pursuit of inter-award harmony (III). First, however, it might be helpful to examine extant legislation allowing the concentration of related claims in arbitration (II).

II. Review of Legislation

The following review of conflict-averting legislation distinguishes between multiple-(A) and single-reference (B) relatedness.

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11 See Davidson (1991) 258 (note 98) (reviewing the Scottish Dervaid Committee’s brief flirtation with statutory concentration); Berger (1998) 47 (noting how, in Germany, the committee entrusted with preparing what eventually became Book 10 of the Zivilprozeßordnung (ZPO) avoided the issue, for fear of undermining the legislation’s user-friendliness); Hoellering (1997) 48 (observing how the Swedes’ concerns over party autonomy and the general complexity of the subject matter led to its exclusion early on from the review process that eventually led to the Arbitration Act 1999. Section 23 though allows the midway submission of new claims that satisfy the twin conditions of party identity and common contractual origin.) In 1999, the UNCITRAL accorded the subject ‘low priority’ on its review agenda. See A/CN.9/460, paras. 51–61 (UNCITRAL’s 32nd session).

12 See Arbitration Act 1998, s. 9 (Ir.).
A. Legislation Governing Cases of Multiple-Reference Relatedness

Once again, the focus of discussion will be on four criteria central to the debate on statutory concentration—namely, consent (1), conditions \textit{ratione materiae} and \textit{ratione persona} (2), territorial scope of relevant power (3), and office of decision-maker (4).

1. Consensual Credentials

Generally speaking, a consensual act is one that is taken at the behest, with the concurrence or at least with the acquiescence of the actor. This definition applies in arbitration, except consent then includes prior consent that is subsequently contested. On this definition, existing statutory concentration provisions are divisible into five types, namely, hortatory, consensual, presumptive, and sham provisions (all of which feature in legislation \textit{intended} to govern international arbitrations (a)), and non-consensual provisions (which feature in legislation \textit{residually} applicable to international arbitrations (b)).

(a) Legislation Intended to Govern International Arbitration

'Consensual legislation' is legislation that recognizes the \textit{principle} of conditional concentration, that is, legislation which assumes that parties have agreed that, subject to conditions which the legislation itself prescribes, all or some of the parties may seek leave to have related claims heard in cognizance of one another. An example is section 24 of \textit{Australia's International Arbitration Act 1974}. Applicable strictly on an opt-\textit{in} basis, it reads:

(1) A party to arbitral proceedings before an arbitral tribunal may apply to the tribunal for an order under this section in relation to those proceedings and other arbitral proceedings (whether before that tribunal or another tribunal or other tribunals) on the ground that: (a) a common question of law or fact arises in all those proceedings; (b) the rights to relief claimed in all those proceedings are in respect of, or arise out of, the same transaction or series of transactions; or (c) for some other reason specified in the application, it is desirable that an order be made under this section. (2) The following orders may be made under this section in relation to two or more arbitral proceedings: (a) that the proceedings be consolidated on terms specified in the order; (b) that the proceedings be
heard at the same time or in a sequence specified in the order; (c) that any of the proceedings be stayed pending the determination of any other of the proceedings... (8) This section does not prevent the parties to related proceedings from agreeing to consolidate them and taking such steps as are necessary to effect that consolidation.\(^\text{13}\)

Comparison with this type of conflict-averting legislation is probably the best way of illustrating the specificity of the remaining types. For instance, what distinguishes consensual legislation from the hortatory type (e.g., England’s), is that, in the former case, there is already included in the legislation a detailed concentration framework to which the parties may, if they wish, simply accede; this framework the parties must themselves establish in the latter case.

Similarly, what distinguishes consensual legislation from the ‘presumptive’ type is that, in the latter case, concentration is permissible in default of contrary agreement. A case in point is the Netherlands’ Arbitration Act 1986, which allows consolidation absent contrary agreement.\(^\text{14}\) Another is Florida’s International Arbitration Act, which allows consolidation when ‘not prohibited by the arbitral law or the rules otherwise applicable to the separate disputes.’\(^\text{15}\)

Finally, what distinguishes consensual legislation from the ‘sham’ type is that, unlike the former, the latter requires agreement, not just to the principle of concentration, but also, and curiously enough, to its every application. Article 27 of British Columbia’s International Commercial Arbitration Act 1986 is an example:

Where the parties to two or more arbitration agreements have agreed in their respective arbitration agreements or otherwise, to consolidate the

\(^{13}\) On the opt-in condition, see section 22 of said Act. See also Arbitration Act 1996, 2nd Sch., cl. 2 & s. 6(2)(a) (NZ).

\(^{14}\) See Arbitration Act 1986, art. 1046(1)-(2). For the legislative history of this legislation, see van Haersolte-van Hof (1997) 427. A handful of arbitrations, predominantly but not exclusively construction-related, are consolidated every year under this provision. See Ibid., (suggesting an average of three per annum). But see Sanders (1992) 271 (who, five years after the passage of the Act, could only cite two such cases).

\(^{15}\) See Fl. Stat. Ann. s. 684.12
arbitrations arising out of those arbitration agreements, the Supreme Court may, on application by one party with the consent of all the other parties to those arbitration agreements, ...order the arbitrations to be consolidated on terms the court considers just and necessary....

Strictly, this means that, notwithstanding prior consent, a signatory to the arbitration agreement, including one not before the tribunal, could obstruct concentration. Of course, this is doubly unusual: because it neutralizes prior agreement; and also because judicial confirmation is superfluous when all concerned are already in agreement.

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16 (Emphasis added.) The balance of the provision reads: "b) where all the parties cannot agree on an arbitral tribunal for the consolidated arbitration, appoint an arbitral tribunal in accordance with section 11(8); c) where all the parties cannot agree on any other matter necessary to conduct the consolidated arbitration, make any other order it considers necessary. (3) Nothing in this section shall be construed as preventing the parties to two or more arbitrations from agreeing to consolidate those arbitrations and taking any steps that are necessary to effect that consolidation." Other examples include International Commercial Arbitration Act, s. 8 (Can.); Civ. Proc. Code, s. 1297.272 (Cal.). At last count, six states have adopted legislation virtually identical to the last cited (Cal.), viz: Georgia, North Carolina, Ohio, Oregon, and Texas. See GA. Code Ann. s. 9-9-6; 9-9-30 (Ga.); International Arbitration Act, N.C. Gen. Stat. s. 10567.57(b) (1995) (NC); International Commercial Arbitration Act, Ohio Rev. Code Ann. s. 2712.52 (Oh); International Commercial Arbitration and Conciliation Act, Oh. Rev. Stat. Ann. se. 36.506(2) (Oh); Act Relating to Arbitration or Conciliation of International Commercial Disputes, Tex. Rev. Civ. Stat. Ann. art. 249-27-2 (Tx).

17 See Law Reform Commission of Hong Kong (1987) 42 (para. 4.42); ILRA (Institute of Law Research & Reform, Edmonton, Alberta) (1987) 69. One way around these objections is to treat prior consent to concentration as presumptive and, on estoppel grounds, incontrovertible, consent to the principle of concentration. But clearly that is not what the statute actually says.
(b) Legislation Residually Applicable to International Arbitration

This section deals with legislation residually applicable to ‘international’ (i.e., ‘non-domestic’) arbitration. Such legislation includes both general rules on civil procedure (i), and ‘domestic’ arbitration statutes, i.e., statutes enacted principally to govern arbitrations not considered ‘international’ under the applicable law (ii). 18

(i) General Rules on Civil Procedure

One way of explaining how civil procedure rules sometimes justify concentrating related international arbitrations is to review the American experience with rules 42 and 81 of the Federal Rules of Civil Procedure, both of which provisions that courts in the United States have used, either alone or in conjunction with section 4 of the Federal Arbitration Act, to do just that.

Section 4 instructs courts:

...upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue,...[to] make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

Rule 42 (a) provides:

18 To these one might have added legislation that did once allow the concentration of international arbitrations, notwithstanding a party’s objection, e.g., the Arbitration Ordinance 1982, Laws of Hong Kong, Chapter 341. From its passage in 1982 until 1989, this legislation distinguished little between domestic and international arbitrations, both of which courts had the power to concentrate. id. s. 6B. But an amendment adopted in 1989 confined the relevant concentration provision, along with most of the 1982 Ordinance, to domestic arbitrations; thenceforward, the Model Law governed international arbitrations in Hong Kong. See Arbitration (Amendment) (No. 2) Ordinance (No. 64 of 1989). Citing various objections, the Hong Kong Law Reform Commission rejected the idea of bolting concentration powers onto this new legislation. See Law Reform Commission of Hong Kong (1987) 42 (4.43). Cf. Miller (1987) 87; and Kaplan (1986) 10. See generally Morgan (1997) 6—12; (1998a) 18.
When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. 19

Rule 81(a) (3) reads:

In proceedings under Title 9, U.S.C., relating to arbitration [i.e., under the Federal Arbitration Act] ... these rules [i.e., the Federal Rules of Civil Procedure] apply only to the extent that matters of procedure are not provided for in those statutes.

Whether, conjointly, rules 42 and 81 entitle courts to consolidate related arbitrations depends on whether the word ‘proceedings’ in rule 81 refers to FAA-subject arbitrations—in which case the answer is, yes—or to court petitions to consolidate FAA-subject arbitrations—in which case the answer is, no.

In Compania Espanola de Petroleos v. Nerus Shipping (1975), the Second Circuit approved the first reading, on the ground that ‘the liberal purposes of [the FAA] clearly require that [that Act] be interpreted so as to permit and even to encourage the consolidation of arbitration proceedings in proper cases.’

19 (Emphasis added.)

20 See Compania Espanola de Petroleos v. Nerus Shipping, 527 F2d 966, 975 (1975). Though Nerus is the leading authority for this proposition, the first court to adopt this rationale seems to have been the New York Court of Appeals. See Vigo Steamship Corp. v. Marship Corp., 257 NE 2d 624, 626 (NY CA, 1970). For other pre-Nerus decisions directly or indirectly supporting this rationale, see Latino Shipping v. Santall Cecilia Co., 1972 AMC 2454 (SDNY, 1972); Matter of Arbitration Between Chilean Nitrate & Iodine Sales and Intermarine Corp., 1972 AMC 2460 (SDNY, 1971); Robinson v. Warner, 370 F. Supp. 828 (DC RI, 1974); Inso Lines v. Cypromar 1975 AMC 2233 (SDNY 1975). To buttress their position, courts would at times invoke other considerations; e.g., they would that their undisputed power to enforce arbitration agreements imports the power to regulate the method of enforcement, and thus the power to consolidate arbitrations arising out of that agreement. See, e.g., Litton Bioethics Inc. v. Glen Construction Company, 437 A2d 208 (CA
In *Weyerhaeuser v. Western Seas Shipping* (1984), the first of several Circuit-level decisions to approve the second reading, the Ninth Circuit decided that courts can do no more than "determine whether a written arbitration agreement exists, and if so, enforce it "in accordance with its terms." In *Government of the United Kingdom of Great Britain v. Boeing Company* (1993), the Second Circuit overturned as much of *Nerus* as had relied on the authority of both Rule 81 and Section 4. Rule 81, the Second Circuit now said:

... merely allows the application of the Federal Rules of Civil Procedure to judicial proceedings that are before a court pursuant to U.S.C. Title 9, to the extent that Title 9 does not provide appropriate procedural rules. [It]... clearly does not import the Federal Rules of Civil Procedure to the private arbitration proceedings that underlie the Title 9 proceedings pending before a court.

Reasoning that post-*Nerus* Supreme Court case law (identifying the rigorous enforcement of arbitration agreements as the FAA’s foremost intent) has undermined *Nerus*’ claim that consolidation best serves the Act’s liberal purposes, the Court concluded that federal legislation does not authorize consolidation of arbitration

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21 *Weyerhaeuser, Weyerhaeuser Co v. Western Seas Shipping Co*, 743 F2d. 635, 637 (9th Cir. 1984). On this view, courts can only consolidate separate court petitions filed for (or against) consolidation. See Wright & Miller (1987) 66-67 (s. 1015) (vol. 4).

22 998 F. 2d 68 (2d Cir. 1993).


proceedings, unless doing so were ‘in accordance with the terms of agreement.’ And of course once the Boeing Court had admitted as much, it became a forgone conclusion that it would also hold (as it did) that a ‘district court cannot order consolidation of arbitration proceedings arising from separate agreements to arbitrate, absent the parties’ agreement to allow such consolidation.’

Obviously, the road from Nereus to Boeing was not as direct as this account makes out: several Circuit-level decisions intervened, four siding with Weyerhaeuser, one with Nereus; trial-level courts handed down scores of decisions, some allowing consolidation, others disallowing it; and all the while the Supreme Court held aloof.

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25 Ibid., at 71-72.
26 Ibid., at 75.
28 Only the First Circuit accepted Nereus’s conclusion, if not its logic. See New England Energy v. Keystone Shipping, 855 F2d 1 (1st Cir. 1988), motion denied 489 US 1007, cert. denied 489 US 1007. But Keystone and Nereus are distinguishable: unlike Nereus, Keystone concerned a state (Massachusetts) statute that sanctioned consolidation expressly. For another Second Circuit decision, see Cable Belt Conveyors v. Alumina Partners of Jamaica, 857 F2d 1461 (upholding consolidation order by district court, without written opinion) (2nd Cir. 1987).
29 See, e.g., P/R Clipper Gas v. PPG Industries, 804 F. Supp. 570 (SDNY 1992) (consolidating arbitrations between vessel owner and each of two charterers); Rio Energy Int’l, Inc. v. Hilton Oil Transport, 776 F. Supp. 120 (SDNY 1991) (consolidating arbitration under a charter party with another under a sub-charter party); North River Ins. Co v. Philadelphia Reinsurance Corp., No. 90 Civ. 7002 (CSH), 1991 WL 90735 (SDNY May 23, 1991) (consolidating reinsurance arbitrations); In re Benship Int’l, Inc., 771 F. Supp. 87 (SDNY 1991) (consolidating two arbitrations between same parties, where both parties were seeking consolidation, but one sought broader consolidation with third party as
Nor did Boeing necessarily settle definitively all questions relating to the authority of American courts to consolidate related arbitral proceedings. Just as it seemed the matter had been settled, the Second Circuit handed down two further decisions which, while strictly consistent with Boeing, call into question the Court's commitment never to consolidate related arbitration absent consent.

In North River Insurance v. Philadelphia Reinsurance, the Second Circuit, recalling its refusal in Boeing to 'disturb Neres to the extent that decision was based on the general equitable powers of the court and principles of contract law,' held that, regardless of consent, courts could use their 'general equitable power' to order what it called 'discretionary' consolidation.\(^{32}\)

Strictly, North River and Boeing are distinguishable: the former concerned an award rendered in consolidated proceedings; the latter treated the question whether, absent consent, courts could actually consolidate related arbitrations. Moreover, four post-North-River decisions have actually confirmed the central holding in Boeing, with the most


\(^{32}\) See, e.g., Klein v. Drexel Burnham Lambert, Inc., 737 F. Supp. 319, 324 (n.14) (noting that 'with the exception of one Second Circuit case ... the overwhelming weight of authority is opposed to court-ordered consolidation') (ED Pa. 1990); Huber, Hunt & Nichols, Inc. v. Architectural Stone Co, 625 F2d 22 (FAA pre-empts state case law prohibiting court-ordered consolidation) (5th Cir. 1980). For a rare pre-1993 Second-Circuit decision supporting Weyerhaeuser, see Ore & Chemical Corp. v Stinnes Interoil, 606 F. Supp. 1510, (Rule 42 (a) provides authority to consolidate actions before the court, not arbitrations) (SDNY 1985). See also Baron (1987) 81.

\(^{31}\) See In re Ore Sea Transport, 454 US 966. This was a refusal to grant certiorari from 661 F2d 910 (2d Cir., 3 June 1981) (Table no. 81-7118). For a reference to the (unpublished) district-level decision (cited as Matter of Burmah Oil Tankers Ltd) to which the refusal refers, see Hascher (1984) 143, who describes refusal to grant certiorari as winning 'the supporters of consolidation ... a decisive round.'

important among them (because a Second-Circuit decision), *Glenmore Ltd. v. Schnitzer Steel Products Co.*, extending that holding to joint (as distinct from consolidated) hearings.\(^3\)

Still, *North River* involved the court invoking its potentially open-ended ‘general equitable powers’ to justify granting an inherently indefinable discretionary consolidation. As later events seem to confirm, this indicated something less than a determination to block all but consensual concentration.

In *Hartford Accident and Indemnity Co. v. Swiss Reinsurance America Corp.*, the Second Court held that *Boeing* did not preclude the ‘consolidation of similar claims arising between the same parties under a series of nearly identical contracts that are silent on the question of consolidation.’\(^4\) This, too, only qualifies *Boeing*, which otherwise remains good law. Nevertheless, there is clearly here forming a line of decisions, perplexing for its lack of theoretical direction, that is steadily undermining the central holding of *Boeing*, itself a weakly argued decision that probably made too much of the Supreme Court’s post-*Nedus* case law.\(^5\)

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\(^3\) 189 F3d 264, 267–68 (2d Cir. 1999). The other decisions involved both the District Court of the Southern District of New York, the Second Circuit’s most influential, citing *Boeing* twice to deny applications to consolidate related references, and the Seventh Circuit, one of the few Circuit Courts that had hitherto remained above the fray, citing *Boeing* to similar effect, without so much as mentioning *North River*. See *Connecticut General Life Insurance Co v. Sun Life Assurance Co of Canada*, 210 F3d 771 (denying that courts have power to consolidate arbitrations absent prior consent, but interpreting ambiguous arbitration clause as allowing consolidation) (7th Cir. 2000); *Home Insurance v. New England Reinsurance*, 1999 WL 681388 (denying reinsurer’s motion to consolidate four arbitration claims against same insurer) (SDNY Aug. 31, 1999); *Hartford Accident and Indemnity Co v. Swiss Reinsurance America Corp.*, 87 F. Supp.2d 300 (refusing to consolidate several insurance claims between insurer and re-insurer) (SDNY 2000). See also *Champ v. Siegel Trading Co*, 55 F3d 269, 277 (pre-*North River*—refusing to certify a class for purposes of arbitral proceedings where the agreement makes no provision for one) (7th Cir. 1995).

\(^4\) 246 F3d 219, 230 (2d Cir. 2001).

\(^5\) None of these Supreme Court decisions, *supra* note 24, involved questions of consolidation; the conflict they all presented lay between arbitration and litigation, or more specifically, between policies favouring strict respect for arbitration agreements,
(ii) Domestic Arbitration Statutes

This section reviews arbitration statutes residually applicable to 'international' references. These statutes warrant concentration in three situations. First, parties to an otherwise 'international' reference may exercise their right to opt into a concentration-enabling 'domestic' arbitration regime. In Hong Kong, for instance, parties to a Model Law-governed 'international' reference may elect to have their proceedings governed by the Arbitration Ordinance 1989, which allows the Court:

... where in relation to two or more arbitration proceedings it appears to [it] that some common question of law or fact arises in both or all of them, or that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or that for some other reason it is desirable to make an order under this section, ... to

and those favouring the efficient disposal of disputes. The Supreme Court's pronouncements, concerning the FAA's overriding objectives, must be understood within this limited context. As one federal court put it, 'Nor do we find any necessary inconsistency between Nerens and the Supreme Court's decision in Byrd. To be sure, in Byrd the Court `reject[ed] the suggestion that the overriding goal of the Arbitration act was to promote the expeditious resolutions of claims. But this was said in the context of rejecting claim that a party could be deprived of its contractual right to arbitrate in order to avoid interference with judicial determination of the same or similar claims. The court was not dealing with—and its language does not seem necessarily dispositive of—the question presented in Nerens, namely, whether the Arbitration Act should be construed to promote convenience and consistency in arbitration proceedings concerned with identical factual and legal issues. The Court's decision in Nerens does nothing to thwart the 'strong federal policy in favour of arbitration' which the Court in Byrd sought to protect.' See In re Shoyo Shipping Co v. Shipmaur, B.V., 1986 AMC 2374, 2376 (SDNY 1986) (citations omitted). See also New England Energy Inc. v. Keystone Shipping Co, supra note 28, at 4; Sociedad Anonima de Navegacion Petrolera, supra note 29, at 808. More than that, the very notion of a 'pro-arbitration' policy that the FAA endorses, is probably unsound. As critics have convincingly argued, there is no policy favouring arbitration in the United States—merely one mandating the enforcement of the parties' agreement. See Walt (1999) 400-01; Craig et al. (2000) 592-93. For criticism of Boeing, see Wallace (1993) 5.
order those arbitration proceedings to be consolidated on such terms as it
thinks just or may order them to be heard at the same time, or one
immediately after another, or may order any of them to be stayed until
after the determination of any other of them.36

Second, parties may opt out of a default ‘international’ arbitration regime but omit to
designate alternative foreign legislation capable of applying ex-territorially, in this way
triggering the default application of the forum’s concentration-enabling ‘domestic’
arbitration regime. An example would be parties who opted out of Bermuda’s
International Conciliation and Arbitration Act 1993 but failed to designate an ex-territorially
applicable alternative, e.g., Egypt’s Law on Arbitration No. 27 of 1994, in this way
triggering the default application of Bermuda’s concentration-enabling Arbitration Act
1986.37

The third situation is peculiar to federal jurisdictions, particularly to those in which
state law sanctions concentration and federal law is silent on the matter. The United
States is a case in point. Three types of arbitral legislation jostle for application in that
jurisdiction: the Federal Arbitration Act (which governs, inter alia, ‘non-domestic’
references);38 state arbitration statutes (re-enactments of the 1955 Uniform Arbitration Act

36 See Arbitration Ordinance, Hong Kong Laws ch. 341, ss. 6B & 2M. Courts will not lightly
infer such agreement though, which in any event must be in writing. See Ananda Non-
1 HKC 204 (CA). See also Morgan (1997) 70-71.

37 See International Conciliation and Arbitration Act 1993, s. 29 (Berm.); Law on Arbitration No.
27 of 1994, art. 1 (Eg.). Only express exclusion of the ‘non-domestic’ legislation (rather
than mere cursory reference to the domestic one) will usually produce this result though.
See, e.g., I. SA v. T. SA, 115 II ATF 390 (Trib. Féd. 1989); s. AG v. H. Ltd, 116 I ATF
721 (Trib. Féd. 1990). Both these cases deal with the conflict between the Concordat and
the Private International law Act. See PIL Act, art. 176(2), which requires an agreement in
writing ‘excluding the provisions of Chapter Twelve [i.e., of the PIL Act.’ For more
examples of legislation that gives parties opt-out rights, see International Arbitration Act
1974, s. 21 (Austl); Private International Law Act (1992), art. 176(2)(Switz.).

38 The FAA, first enacted on February 12, 1925, codified in 1947 (as Title 9 USC ss. 1–
16, 201–08, 301–07), and amended several times since, applies to any ‘written provision

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that govern domestic arbitrations in the relevant state); and state-enacted 'international' arbitration statutes (which govern non-domestic arbitrations in the relevant state). Except for a handful of domestic- and international-arbitration statutes, American law today does not mandate extra-consensual concentration of international references. But this is set to change now that a Revised Uniform Arbitration Act mandating default court-ordered concentration is awaiting adoption by states—giving new urgency to the question whether state legislation allows courts to concentrate related 'international' references.

The answer to this question depends (a) on what inference courts draw from federal silence, and (b) on which, in case of conflict, trumps—state or federal law. As discussion will now show, the answer to these questions is currently uncertain.

On the one hand, there is Supreme Court authority, *Mastronono v. Shearson Lehman Hutton, Inc.*, for the proposition that an express choice-of-law clause in favour of a given state includes that state's arbitration statutes, which thus control to the extent they do in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction.' See 9 USC s. 2. Technical (and for present purposes irrelevant) qualifications aside, the FAA applies to all commercial arbitration agreements, and to all arbitral awards, except those that bear no reasonable relationship to any foreign jurisdiction or involve only American citizens.

See, e.g., *Mass. Gen. L. Ch. 251, ss. 1–19.*

For examples of such legislation, see *supra* note 16, on page 109.


not render arbitration agreements wholly unenforceable.\textsuperscript{43} Consistently with this ruling, the Supreme Court upheld Californian state legislation that mandates the judicial stay of arbitrations pending the conclusion of related litigation. Such legislation, the Supreme Court said, is ‘fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward.’\textsuperscript{44}

But if state-mandated stays are consistent with federal legislation—legislation that aims to ‘ensur[e] that private agreements to arbitrate are enforced according to their terms’\textsuperscript{45}—then so \textit{a fortiori} are state-mandated consolidation orders, which merely require their joint hearing. Certainly, this is compatible with extant Circuit-level authority for the proposition that concentration-enabling state legislation controls no less when applicable incidentally to forum-choice than when applicable pursuant to an express choice-of-law clause, even if the FAA were equally applicable to the case, and even if the agreement were silent on consolidation.\textsuperscript{46}

The grounds for this last decision are three. First, there is ‘no compulsion of law or policy barring a district court from issuing [a consolidation order], at least when the agreement between the parties is silent and the pertinent state law specifically provides for such.’\textsuperscript{47} Second, ‘an order not contradicting the contractual terms regarding arbitration is ‘in accordance with [those] terms, … certainly … when the language of the arbitration clause is broad and in no way suggests limits on the subjects or parties to the agreed-upon arbitration.’\textsuperscript{48} Finally, ‘arbitration is still arbitration even if it is consolidated arbitration.’\textsuperscript{49}

\textsuperscript{45} For the parenthetical proposition, see \textit{Ibid.}, at 479.
\textsuperscript{47} \textit{Ibid.}, at 3.
\textsuperscript{48} \textit{Ibid.}, at 5.
\textsuperscript{49} \textit{Ibid.}, The Massachusetts provision that formed the subject of \textit{Keystone} is particularly notable for \textit{peremptorily} proscribing agreements that exclude the court’s jurisdiction to
On the other hand, there is strong Supreme Court authority for the proposition that, absent controlling positive federal law, state law applies to international arbitration, but only to the extent that it neither limits nor moots contractual agreements. 50 *Prima facie,* this is much more restrictive than the test in *Mastrobuono*—that an express choice-of-law clause in favour of a given state includes that state’s arbitration statutes, which thus control to the extent they do not render arbitration agreements *wholly unenforceable.* 51 Either way, in what relation does state-mandated concentration stand *vis-à-vis* the FAA? Does it supplement the Act’s objectives? Or does it actually impede them?

As already noted, the matter is contested. In 1995, the Seventh Circuit intimated that a consolidation order actually ‘limits’ contractual agreements, and on this basis denied consolidation. 52 But was this the right test to apply?

Five years later, the *RUAA* Drafting Committee said that state law regulating ‘purely procedural aspects’ of the arbitral process (in which the Committee included concentration) ‘likely will not be subject to the pre-emption.’ 53 But considering the authorities, this seems more a wild guess than an informed conjecture.

compel concentration of related arbitrations. In *Keystone,* the majority declined to say whether federal law trumps state legislation purporting to nullify *express* agreements precluding concentration. *Ibid.,* at 2 (fn. 3). When considered against the background of Supreme Court’s case law prohibiting legislation that limit or moot arbitration agreements, Massachusetts’ peremptory prohibition seems particularly vulnerable. For an example of a state statute that creates a non-waivable right to impale third parties in construction arbitrations (the converse of Massachusetts’), see New Jersey’s *Municipal Construction Statute,* ch. 371, Laws of 1997 (s. 913).


51 See *supra* note 43, on page 123.

52 See *Champ v. Siegel Trading Co,* 55 F3d 269, 275 (fn. 2) (7th Cir. 1995).

53 See *RUAA* Drafting Committee’s Prefatory Note and Comments (2000), published at <http://www. law.upenn.edu/blil/ulc/ulc_frame.htm> (Emphasis added.)
In the same year, Craig *et al.* started by saying that it ‘depend[s] on perspective,’ but then several pages later added, somewhat inconsistently, that ‘consolidation remains problematic in the United States, except … when conducted in a state that explicitly provides for joinder of related claims.’

For the court that eventually decides the issue, this clearly will be a case of first impression.

2. Substantive Conditions

With the exception of the ‘hortatory’ and ‘sham’ types, statutory concentration provisions typically include tests of propriety that determine (a) who has standing to apply, (b) whether party identity in related references is essential to their concentration, and (c) what substantive conditions must be satisfied before the decision maker grants leave to concentrate.

No two statutes agree on all these matters.

On standing, for instance, some require that at least one party in each of the related arbitrations file the application; others are silent on the matter, suggesting that anyone may do so. The same applies to conditions *ratione personae*. Some statutes allow concentration between different parties; others require at least a common party; and others still insist on total party identity. Same, too, with conditions *ratione materiae*. Some statutes include detailed criteria, e.g., common question of law or fact, rights to

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55 In case of ‘sham’ provisions, the requirement of double consent is sufficient; in case of hortatory provisions, parties must in any event agree the whole procedure.


59 See, e.g., *Revised Uniform Arbitration Act* (RUAA), s. 10 (a)(1) (US).

60 See, e.g., *Arbitration Act 1986*, s9 (Bermd.).
relief arising out of same transaction;\textsuperscript{61} others provide vaguer tests, e.g., subject-matter relatedness;\textsuperscript{62} others still refer to the rules governing the concentration of actions;\textsuperscript{63} and a fourth group is simply silent on the matter.\textsuperscript{64}

Notwithstanding these differences, certain commonalities are discernible. Substantively, an applicant typically must show (a) a common question of law or fact, (b) a common ‘enterprise,’ project, transaction, or series of transactions, and (c) an overriding prejudice risk of inter-award conflict.\textsuperscript{65} Procedurally, standing usually depends on whether one or several tribunals are involved. If only one is involved, at least one party in each of the references must apply; otherwise, one party in each of the references must apply to ‘his’ tribunal, and the tribunals so seized must then consult with one another, before each independently deciding the application before it.\textsuperscript{66} If two tribunals are involved but only one grants the application, a party in any of the proceedings usually can apply to the court of competent jurisdiction for such order as the two tribunals acting in concert might have made.\textsuperscript{67}

\textsuperscript{61} See, e.g., Uniform Arbitration Act, s. 24 (Austl); Arbitration Act 1996, 2\textsuperscript{nd} Sch., art. 2 (NZ); Arbitration Ordinance 1996, s. 6(b) (HK).

\textsuperscript{62} See, e.g., Arbitration Act 1986, art. 1046 (NL).

\textsuperscript{63} See, e.g., Mass. Gen. L. Ch. 251 s. 2A (Mass.).

\textsuperscript{64} See, e.g., Cal. Civ. Proc. Code, s. 1297.272 (Cal.).

\textsuperscript{65} See, e.g., Revised Uniform Arbitration Act 2000, s. 10 (US). This provision sets out expressly, for the first time, that which has arguably always been an implicit part of the test, namely, a balance of prejudice: ‘prejudice resulting from a failure to consolidate,’ the provision says, must not be ‘outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.’ Where a statute recognises only some of the criteria in the text above, (usually the first), the remaining ones are usually implied. See, e.g., Arbitration Act 1986, art. 1046 (NL). See also van den Berg et al. (1993) 71.

\textsuperscript{66} See, e.g., Arbitration Act 1996, 2\textsuperscript{nd} Sch., art. 2 (NZ).

\textsuperscript{67} Ibid.
3. Territorial Scope of Application

With one exception, statutory concentration regimes do not claim ex-territorial application; indeed, some go to the unnecessary trouble of disclaiming any such pretension. The exception here is Florida: a tribunal sitting in that state may consolidate its proceedings with another located elsewhere, provided the following conditions are satisfied. First, the proceedings in Florida must be considered ‘non-domestic’ under Florida law. Second, the related proceedings must be pending before the same tribunal. Third, neither the rules nor the law applicable to either set of proceedings should prohibit concentration. Finally, concentration must serve ‘the interests of justice and the expeditious resolution of the disputes.’

A provision like this, unilateral but comity-sensitive, pro-active and yet anxious not to thwart party expectations, attempts to overcome both the structural limitations of a world organized around independent polities and the practical limitations of an arbitral system based on the ex ante clause. On the one hand, it sanctions default concentration beyond its political frontiers; on the other, it respects comity (by deferring to foreign prohibitions) and the arbitral ideal of voluntariness (by deferring to contrary agreements).

Nevertheless, such legislation, however laudable its purpose and sensitive its execution, is still ill conceived, for several reasons. First, it is only useful when related claims are before the same tribunal. Second, it prompts delicate questions about what amounts to preclusive prohibition, questions on which both courts in Florida and elsewhere may come out differently; e.g., whether absence of express authority does so; whether a statutory (or an institutional) rule is prohibitive that requires courts (or arbitrators) to enforce arbitration agreements ‘according to their terms’; whether a contract is prohibitive that expressly restricts concentration to ‘persons substantially

68 See, e.g., Arbitration Act 1986, art. 1046 (which applies exclusively to arbitrations ‘commenced’ in the Netherlands); International Arbitration Act, N.C. Gen. Stat. ss. 1-567.57(b), 1-567.31(a) (1995) (which applies only to international arbitrations conducted in North Carolina).

69 See Fl. Stat. Ann. s. 684.12 (Fl.). Related references that do not satisfy the above conditions may also be concentrated if ‘[a]ll affected parties agree.’ Ibid.
involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration,' etc.70 Third, such legislation is not universalizable, at least outside a formal treaty system—just consider the implications of several courts answering the foregoing questions differently in the same case. Fourth, such legislation begs the question, 'By what right force one who has agreed to arbitration (say) in Switzerland, under Swiss procedural law, to do so instead in Florida, under Florida law, when he has never been a party to the Florida arbitration?' No amount of inferential reasoning will justify it.

4. Office of Decision-maker

An application to concentrate related arbitrations, if to a court, is typically made to the court of the seat,71 and if to a tribunal, is usually made to the tribunal with jurisdiction over the related references,72 or if two (or more) tribunals are involved, to one of them, which must then communicate its substance to the other(s).73 If application

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70 See General Conditions of the Contract for Construction of the American Institute of Architects (AIA Document A201-1997) para. 4.6.4 (15th ed. 1997). For cases in which similar tests were contested, see, e.g., Maxum Foundations Inc. v. Sales Corp., 817 F2d 1086 (4th Cir. 1987); Higley South, Inc. v. Park Shore Development Co, 494 So.2d 227, 229 (Fla. App. 2Dist. 1986).

71 See, e.g., Arbitration Act 1986, art. 1046 (NL).

72 See, e.g., International Arbitration Act 1974, s. 24(4)(a) (Austl.) ('If all the related proceedings are being heard by the same tribunal, the tribunal may make such order under this section as it thinks fit in relation to those proceedings and, if such an order is made, the proceedings shall be dealt with in accordance with the order.') See also Arbitration Act 1996, 2nd Sch., art. 2(2)(c) (NZ).

73 See, e.g., International Arbitration Act 1974, s. 24(5)–(7) (Austl.) ('(5) If two or more arbitral tribunals are hearing the related proceedings: (a) the tribunal that received the application shall communicate the substance of the application to the other tribunals concerned; and (b) the tribunals shall, as soon as practicable, deliberate jointly on the application. (6) Where the tribunals agree, after deliberation on the application, that a particular order under this section should be made in relation to the related proceedings: (a) the tribunals shall jointly make the order; (b) the related proceedings shall be dealt
is to the court, the decision is usually as reviewable (or not) as any other by that court; if it is to the arbitrators, a reviewing court usually can make such order as one tribunal alone, or more than one acting in concert, might have made.\textsuperscript{74}

B. Legislation Governing Cases of Single-Reference Relatedness

This section reviews legislation prescribing third-party arbitral proceedings. As ever, the focus of discussion will be on subjective (1) and objective (2) conditions for exercising the relevant third-party rights.\textsuperscript{75}

\begin{itemize}
  \item[(a)] with in accordance with the order; and 
  \item[(c)] if the order is that the related proceedings be consolidated, the arbitrator or arbitrators for the purposes of the consolidated proceedings shall be appointed, in accordance with Articles 10 and 11 of the Model Law, from the members of the tribunals. (7) If the tribunals are unable to make an order under subsection (6), the related proceedings shall proceed as if no application has been made under subsection (1)).
\end{itemize}

\textsuperscript{74} See, e.g., \textit{Arbitration Act 1996}, 2nd Sch., arts. 2(1)(b), (2)(d), 2(8).

\textsuperscript{75} No need here to dwell on the office of the decision-maker, beyond observing that, apart from Iran (whose law is silent on the matter), the decision on third-party participation usually resides expressly with the arbitrators (as opposed to the courts). See, e.g., \textit{Arbitration Act 1986}, art. 1045(3) (NL); \textit{Code Judiciaire}, art. 1696 \textit{bis} (3) (Belg.); \textit{Concordat}, art. 28 (Switz.); \textit{Utab Code Ann.} s. 78-31a-9; \textit{S.C. Code Ann.} s. 15-48-60; \textit{Law on International Commercial Arbitration}, of 17 September 1997, art. 26 (Iran). But see Jafarian \& Rezaeian (1998) 39 (who suggest, curiously, and without citing authority, that notwithstanding Iranian law's silence on the issue, courts (not tribunals) are competent to decide requests for third-party participation). Nor is the territorial scope of that discretion worth lingering on either, since rare exceptions apart, the consent of all concerned (parties, third parties, and arbitrators) is invariably required. Cf. \textit{Utab Code Ann.} s. 78-31a-9 and \textit{S.C. Code Ann.} s. 15-48-60 (SC) (both limiting third-party participation, \textit{inter alia}, to 'a person who is subject to service of process for the subject matter of the arbitration.') The choice of words is unfortunate, for an arbitral tribunal derives its jurisdiction, not from process service, but from the parties' agreement.
1. Consensual Credentials

Legislation recognizing third-party rights in arbitration typically subordinates the exercise of those rights to the express or implied consent of the parties concerned. Depending on jurisdiction, express consent requires either acceding to a pre-existing arbitration agreement (as in the Netherlands)\(^{76}\) or concluding a new agreement with those parties already before the tribunal (as in Belgium).\(^{77}\) Implied consent, on the other hand, is deducible either from acquiescence (as in Iran)\(^{78}\) or, less frequently, from forum choice (as in Switzerland).\(^{79}\) As already noted, consent to third-party participation is

\(^{76}\) See, e.g., Arbitration Act 1986, art. 1045(3).

\(^{77}\) See Code Judiciaire, art. 1696 bis.

\(^{78}\) See, e.g., article 26 of the Law on International Commercial Arbitration 1997, which allows intervention ‘provided such intervention is not objected to by either party.’ For criticism of article 26, see Jafarian & Rezaeian (1998) 39 (calling it ‘inappropriate’); Seifi (1998) 27–28 (on the one hand, describing the provision as ‘very peculiar,’ calling the idea of intervention in arbitration ‘alien to the concept of the privity of the arbitral agreement and of the arbitral award’ and ‘against the private and contractual character of arbitration, and on the other, suggesting ‘article 26 may turn out to be the beginning of a development in allowing multi-party arbitration.’)

\(^{79}\) At present, consent by implication from seat-choice is possible in only three jurisdictions whose domestic arbitration regimes recognise third-party rights potentially applicable to international references, namely, Switzerland, Utah, and (less likely) South Carolina. Under Swiss law, parties whose arbitrations would normally be considered ‘international,’ and thus subject to Chapter 12 of the Federal Law on Private International Law 1987 (LDIP), may exclude the LDIP, provided they agree to abide by the Concordat, an inter-cantonal convention that allows consensual third-party proceedings. See LDIP, art. 172(2); Concordat, art. 28. Under the law of the State of Utah, subject to various substantive conditions, parties may petition the arbitral tribunal for leave to implead third parties proper. See Utah Code Ann. s. 78-31a-9. If United States federal law does not preempt such state-sanctioned impleader (see discussion on page 122), parties electing to arbitrate in Utah would become subject to that state’s third-party regime. One reason Utah’s third-party arbitral regime bids fair to survive a challenge alleging federal pre-
further divisible into consent to arbitrate with another, and consent to arbitrate with another as, or with that other himself as, third party.\textsuperscript{80} Finally, different legislation gives different classes of third parties different rights.\textsuperscript{81} In Utah, for instance, only signatories to the arbitration agreement benefit from the third-party regime—a reasonable arrangement when you consider that, under Utah law, the intervening party need not procure the original parties’ consent to his intervention.\textsuperscript{82} In the Netherlands, by contrast, the benefit of third-party participation extends to all, be they signatories to the arbitration agreement or not, which in turn is also consistent with the requirement under

emption is that it only warrants impleader of ‘third parties proper,’ which is exactly why South Carolina’s third-party regime, a regime that would let in ‘strangers,’ irrespective of the original parties’ wishes, in fact irrespective of the strangers’ own wishes—is unlikely to weather a similar challenge. See \textit{S.C. Code Ann.} s. 15-48-60. See also Stipanowich (1986-87) 522 (calling the omission to require the stranger’s consent to joinder a ‘serious oversight’). For a definition of these classes, see discussion on page 35. For completeness’s sake, something ought to be said about Lebanon, another jurisdiction whose domestic arbitration legislation allows third-party intervention subject to the original parties’ agreement. See \textit{New Code of Civil Procedure}, art. 786. But Lebanese legislation on international arbitration contains no comparable provisions; and it is difficult to see how the domestic legislation could apply residually to international references in that jurisdiction.

\textsuperscript{80} See text accompanying note 13, on page 52.

\textsuperscript{81} For a definition of these classes, see discussion on page 35.

\textsuperscript{82} See \textit{Utah Code Ann.} s. 78-31a-9 (Supp. 1985) ((1) Upon motion to the arbitration panel by any party, a person who is subject to service of process for the subject matter of the arbitration, and \textit{who is a party to the arbitration agreement}, shall be joined as a party in the action if: (a) in his absence complete relief cannot be accorded among those who are already parties; or (b) he claims or the motion alleges he has an interest relating to the subject of the action and the disposition of the action in his absence impedes his ability to protect that interest or subjects of the persons already parties to a substantial risk of incurred multiple or otherwise inconsistent obligations by reasons of his claimed interest. (2) Any person joined as party to the arbitration shall have the same time to answer which was given the initial respondent in the case.’) (Emphasis added.)
Dutch law that the intervening party secure the consent of the original parties to the reference.83

2. Substantive Conditions

But all-round party consent, while often necessary for exercising third-party rights in arbitration, is usually insufficient: arbitrators (sometimes every last one of them) must also give leave to intervene.84 Failing arbitration-specific criteria for deciding applications, arbitrators will often refer to the rules governing third-party proceedings in court.85 Typically, these limit participation to cases in which the connection between the main claim and the third-party claim is sufficiently close to warrant their joint hearing.86 Only those who are ‘interested’, i.e., possess a ‘juridical interest,’ in the outcome of

83 In the Netherlands, third parties may (a) intervene in a reference (voeging), (b) join it (tussenkoms), and (c) have an indemnitee implead them therein (vrijwaring), but only if the third party in question ‘accede[s] by agreement in writing between himself and the parties to the arbitration agreement.’ See Arbitration Act 1986, art. 1045. (Emphasis added.) If the intention were to limit participation to ‘third parties proper,’ accession would have been meaningless (since third parties are already signatories). If, instead, the purpose were to benefit ‘third parties proper’ only and to require the agreement of those already involved in the reference (as opposed to those who have signed the underlying agreement), the requirement of a new agreement should have been limited to that group. The requirement that a third party ‘accede by agreement in writing between himself and the parties to the arbitration agreement,’ suggests that total strangers benefit as well.

84 See, e.g., Code judiciaire, art. 1696 bis (3) (Belg.) (according to which the arbitrators’ decision must be unanimous). Contrast this with Switzerland, where arbitrators decide procedural applications (including for third-party participation) following customary procedures, i.e., chair-determination or majority voting. See Lalive et al. (1989) 154.

85 For an example of arbitral legislation that refers to the rules governing third-party litigation, see, e.g., Concordat, art. 24(2) (Switz.). See also Lalive et al. (1989) 134.

86 See, e.g., Federal Civil Procedure, arts. 15–17, 24(2) (Switz.).
proceedings, may intervene.  In civil law jurisdictions, actionable interest is usually deducible from the type of permissible intervention (e.g., intervention principale or intervention accessoire). In common law jurisdictions, on the other hand, legislation usually spells out who has standing, e.g., by limiting participation to someone without whose participation ‘complete relief cannot be accorded among those who are already parties,’ or who:

... claims, or the motion alleges, ... has an interest relating to the subject of the action and the disposition of the action in his absence impedes his ability to protect that interest or subjects the persons already parties to a substantial risk of incurred multiple or otherwise inconsistent obligations by reasons of his claimed interest.

87 See, e.g., Code Judiciaire, art. 1696 bis (Belg.); Federal Civil Procedure, art. 15 (Switz.), respectively.

88 Thus, in the Netherlands, for instance, the law specifically allows both Tussenkomst, which requires a direct interest, and Voeging, which merely requires an indirect interest. See Arbitration Act 1986, art. 1045 (1). In Switzerland, the Concordat sanctions l'intervention and l'appel en cause; but Swiss writers were quick to point out that these two categories must be read to include l'intervention principale, l'intervention accessoire, and la substitution volontaire de parties. See Lalive et al. (1989) 152 et seq. For a definition of these procedures, see on page 36. For an exception to the civilian tendency to let actionable interest be deduced from type of intervention, see article 26 of Iran’s Law on International Commercial Arbitration 1997, which explicitly allow third-party interventions from all who consider they have ‘an independent interest in the subject matter of the arbitration’ or ‘an interest which may be affected by the decision in favour of one of the parties.’ The first kind of interest presumably covers both in rem interest, e.g., claims of title to, or lien on, goods in dispute, and contractual rights; the second kind presumably covers indirect interests, e.g., the indemnitor’s interest in seeing his indemnitee prevail. Although article 26 does not expressly distinguish between the standing of the two types of intervenients, their position may be ultimately different under general procedural law.

89 See Utah Code Ann. s. 78-31a-9. This is obviously a rehash of Rule 19 of the Federal Rules of Civil Procedure. As often happens with such legislative cannibalization, the wording of the original clause has been retained without regard to the specificity of the arbitral
Typically, legislation on concentration is subject-matter insensitive; that is, it does not limit third-party participation to particular types of transactions. Apparently, the only exception to this is the Dutch Arbitration Act 1986, which excludes quality arbitration from its third-party regime. The exclusion, at first odd (considering the high incidence of third-party claims in quality arbitration), is appropriate in its context. Quality arbitrations in the Netherlands are typically governed by trade-association rules that grant associations concentration powers well in excess of the statutory standard. But for the exclusion, those powers would have had to go.

Finally, legislation typically lays down no further express conditions for third-party participation, and in general affects to treat third parties no differently than it does those parties originally before the tribunal. Perhaps the only express exception to this is Iran, which only allows into pending references third parties who accept both the arbitrators who have already been appointed and the procedural rules that have already been settled. But express distinctions are only part of the story. For instance, it is not entirely clear, and in view of the discussion in Chapter 1 of the different uses and implications of various third-party procedures in different jurisdictions unlikely, that a third party who intervenes, for example by way of intervention accessoire, accedes everywhere to exactly the same rights as the original parties.

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context. For instance, the words 'shall be joined' suggest that joinder (but not intervention) is contemplated, which, though consonant with the words 'upon motion to the arbitration panel by any party,' and with condition (a) in the text, is dissonant with condition (b), contemplating third parties 'claim[ing], suggesting he might be seeking to intervene). For similar criticisms, see Stipanowich (1986-87) 473.

92 See Arbitration Act 1986, art. 1047 (NL).

91 Cf. Jafarian & Rezaeian (1998) 39 (suggesting, but once again with neither argument nor authority, that third parties in Iran should 'be considered as one of the parties to the arbitration,' and that the whole process 'would not be considered an intervention as meant in the court proceedings'; which suggests that, irrespective of how they intervene (Iranian law allows direct and indirect intervention), third parties would enjoy full standing.)

III. Statutory Concentration: A Critique of the Critique

This chapter began by reviewing legislative attempts whose aim has been to secure a procedural framework in which substantively related but procedurally distinct arbitral claims could be settled in cognizance of each other and therefore consistently. The time has now come to consider the propriety of legislative initiative in this area.

Few issues have engaged modern arbitral literature as much, and yet with as little profit, as statutory concentration has done. Depending on whether the writer was friend or foe of the procedure, one finds statutory concentration hailed as wise and proper or denounced as a usurpation of the parties' prerogative. This is not a case of writers failing to agree criteria against which to decide the matter: writers simply drew different conclusions from criteria they all agreed were relevant. Already Chapters 2 & 3 have examined some of those criteria—namely, due process, efficiency, confidentiality, and tribunal choice—and the results of those enquiries will once again become relevant later on in the argument. For now, however, the focus will be on the central but hitherto largely neglected criterion of consent.

Technically, disagreement over statutory concentration generally reflects differences, not so much over the desirability of forum concentration as such as over the nature of arbitral justice and, by extension, the appropriate limits of public action in modern arbitration. And yet—and this is perhaps one of the most perplexing features of the debate—rather than let their position on these fundamental questions determine their attitude towards the propriety of pursuing inter-award harmony by legislative means, most writers use makeshift arguments to justify stances on this derivative issue whose real motivation would appear to lie elsewhere. So whether they use inferential tests to finesse the tension between public and private regulation in this area or maintain that a combination of legal principle and technical considerations clearly decides the issue one way rather than the other, the argument suffers a characteristically retrospective quality, and the central questions—namely, the nature of arbitral justice, the degree of state control it elicits and, by extension, the role and limits of party autonomy in arbitration—either remain unasked or receive conclusory answers.

Before backing up these claims, it might help avoid confusion once again to repeat an earlier disclaimer: nothing in what follows is meant to suggest that statutory concentration is practical, and that states should take immediate steps to bring it about.
Rather, the hypothesis that the balance of this chapter means to test merely says that neither value-free technical argument nor appeals to criteria intrinsic to law could establish the propriety or otherwise of concentration by legislative fiat.

A. Party Autonomy in Arbitration: Myth & Reality

If modern arbitration had to reveal its central feature, its life-giving principle, party autonomy would be paramount. Because they are treated as autonomous, the parties are largely free to structure their arbitration as they please. Because they are regarded as free, they take responsibility for their choice. Autonomy thus presents itself as a double-edged sword, backbone and point faible. These antinomies are the heart of the theory and practice of modern arbitration. Together, they raise the question common to virtually all arbitration scholarship—"To what extent should arbitration function independently of state power?" Whether one is concerned to define the arbitral institution; or to determine the extent to which the parties should be free to manage it; or to investigate the authority, role, and power of arbitrators or judges over it; or to scrutinize the conduct of arbitral organizations; or to study the reviewability or enforceability of awards: the central issue, always and everywhere, is the relationship between state and process. This section investigates the different ways in which this relationship has hitherto been conceptualized in arbitral scholarship (1), and considers the manner in which the dominant conceptualization has influenced legal doctrine (2).

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93 See Grigera Naón (1999) 275 ("The counterpart to allowing the parties to decide freely on whether to resort to arbitration or not and how to fashion their arbitration proceedings is that they are primarily responsible for making the right choices and adopting the right attitudes so as to create a proper cooperative atmosphere for the smooth running of the arbitration from beginning to end"). Cf. Park (1988) 629 ("The wishes of the parties themselves are not always served by arbitral autonomy.")

94 See Chukwumerije (1992) 382 ("One of the recurring themes in international commercial arbitration is the tension between the will of the parties and the ability of States to regulate the conduct of arbitration proceedings.")
1. Party Autonomy: The Theories

A preoccupation of writers beginning the 1820s, this relationship between state and process was long thought deducible from the nature of the process itself. What, writers asked, does the nature of arbitration dictate that its relationship to the state should be? In answer, they initially produced two theories, each purporting to reduce arbitration to a single familiar juristic model to whose settled doctrinal rules the writer would then appeal to settle both the nature and limits of public regulation on any given issue; e.g., on the (now dated) question whether foreign awards are enforceable as foreign judgements or as contractual undertakings.\(^95\)

The first of these theories, so-called ‘contractual,’ saw arbitration basically as the product of a private exchange of wills, and on this basis denied forum law any significant influence on either proceedings or awards.\(^96\) By its excess of emphasis, that theory produced its own corrective, the so-called ‘jurisdictional’ theory. This now so emphasized the role of forum law, it not only denied parties any significant influence over the process itself but, at its most extreme, also required arbitrators to behave almost like judges.\(^97\)

Both these theories proved to be descriptively inaccurate as well as jurisprudentially problematic: inaccurate because they ill accounted for a situation marked by a mix of private and public ordering; problematic because they led to untenable conclusions. To give an example: although there is undoubtedly a sense in which the obligation to arbitrate arises \textit{ex consensus}, it is clear that consent itself binds only because of an underlying non-consensual principle, to the effect that \textit{pacta sunt servanda}. Talk as one might of a ‘consensual obligation’ to resort to arbitration, all one really means is that the

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95 For summaries of these theories, see Lew (1978) 51-59, Grigera Naón (1992) 15-18.

96 See Merlin (1827–30) 142; Balladore-Pallieri (1935) 291–317; Klein (1955) para. 106; (1958) 479. See also Sauser-Hall (1952) 516–20; Fourchard (1965) 8–11; Rubellin-Devichi (1965) paras. 11–13, 84.

97 See Lainé (1899) 641; Pillet (1924) para. 659; Bartin (1930) paras. 217-18; Niboyet (1950) paras. 193-95; Mann (1967) 158. See also Balladore-Pallieri (1935) 295-317; Bernard (1937) paras. 470-72; Sauser-Hall (1952) 520-522; Klein (1955) paras. 105-112; Fourchard (1965) 7–9; Rubellin-Devichi (1965) 12, 111–12, 114–15.
occasion out of which that obligation arises is the mutual consent of the parties—without, however, implying that consent itself is the ultimate basis of obligation. Were it otherwise, were the obligation in question entirely consent-dependent, one could not, without being false to one’s premise, hold another to be bound to arbitrate who has ceased to consent. One could not then invoke that party’s consent against him because, by assumption, he consents no longer. To protest that ‘the expression of mutual assent, and not the assent itself, is the essential element of contractual liability’ merely begs the question why, if not for a positive rule of pacts sunt servanda, would mutual consent bind any more than would the unilateral kind.99

98 See Williston (1921) 887.
99 Despite these limitations, and despite of alternative ways of conceiving the arbitral process since propounded (and presently to be discussed), the contract/jurisdiction dichotomy has continued to exercise a powerful influence on arbitral scholarship. Perhaps nothing better testifies to this enduring influence than the manner in which possibly the single most influential treatise on arbitration to appear in the last twenty years, Mustill & Boyd’s Commercial Arbitration, has treated the relationship between state and process. In a much-quoted paragraph, the authors, two particularly distinguished English lawyers, described the following alternative ways of conceiving that relationship: ‘Essentially, those who devise a law of arbitration may choose between alternative views of the relationship. First, they may regard arbitration as an aspect of public law. The arbitrator is a delegate of judicial powers which are essentially the property of the State. The powers of enforcement or control are attached to the arbitral process because that process belongs to the state, even if called into existence by a private bargain. The State has the right and duty to ensure, through the medium of the courts, that the reference is conducted in accordance with procedural norms which the State itself lays down. Alternatively, the legal system may treat arbitration as a branch of private law. Recognising the value of the institution, the State will lend its own coercive powers to reinforce the process at points of weakness. Nevertheless, the formulation of the rights, duties and powers of the arbitrator, and the mutual obligations of the parties in relation to the conduct of the reference, are created and regulated by the private bargain between the parties, and are no concern of the State. It is essential to an understanding of the English law of arbitration that throughout its history the law has approached the relationships between the parties and
To avoid such problems, and at the same time to account for a reality characterized by mixed public/private regulation, a Swiss jurist, Sauser-Hall, argued that arbitration was ‘a mixed juridical institution, *sui generis*, that has its origin in the [parties’] agreement and [that] draws its jurisdictional effects from the civil law.¹⁰⁰ But this new ‘hybrid’ theory, whatever its merits, did not fulfil the purpose of characterization for the formalist—assimilating arbitration to a *single* juristic category to whose familiar doctrinal arrangements regular appeals would determine public regulatory capacity.¹⁰¹ Saying that arbitration was a mix of contract and *juridictio* left unanswered the crucial question, ‘In which aspects is it the one, and in which aspects is it the other?’ As it stood, the hybrid theory merely pushed the difficulty one level higher.

The next attempt to grapple with the question occurred in 1965, when a French scholar, Rubellin-Devichi, preserved Sauser-Hall’s idea of a *sui generis* institution, to which she now added the utilitarian notion that arbitration’s social function must be the lodestar of its regulation. In a much-quoted paragraph, she wrote:

> The question is to know whether arbitration does not transcend its two constituent parts—contract and *juridictio*—to form an autonomous institution whose nature must be defined by reference to neither, and whose juridical regime would find its justification both in its purpose and in the guarantees essential for those who desire to settle their disputes otherwise than by litigation.¹⁰²

The trouble with this way of putting the matter is that it immediately raises the question of arbitration’s purpose. *That*, Rubellin-Devichi said, rests in safeguarding the legitimate interests of its user community.¹⁰³ Clearly, however, this will not do by itself,

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¹⁰² See Rubellin-Devichi (1965) 17–18 (my translation).

for two reasons: first, because it assumes that users of the arbitral process have identical interests on all matters of common concern; and secondly, because it begs the question of what makes an interest legitimate to begin with. Rubellin-Devichi addressed neither of these concerns, preferring instead to focus on how best to safeguard those interests which she simply assumed were communal as well as legitimate. On this, she was as brief as she was unequivocal: by giving free reign to private preference, was her basic answer. On how this assumed that *laissez-faire* is *ipso facto* in the interest not only of all arbitration users but also of society, Rubellin-Devichi had virtually nothing to say.

This hypothesis of providential identity between public and private interest, this readiness to subsume the 'social' into the 'individual,' is a hallmark of a system of thought which will be discussed at length in Chapter 5. For now, it is enough to note that Rubellin-Devichi’s rejection of her predecessors’ essentialist formalism, in favour of what at first seems like innocent technocratic functionalism, turns out, on scrutiny, to be no more than the first step in what Lew has called, an agenda ‘to acknowledge the denationalisation of arbitration as a reality and unlimited party autonomy as its controlling force.' Regardless of whether one accepts this agenda, one has to conclude that Rubellin-Devichi has left unanswered the central question animating the debate in which she had decided to intervene—namely, how to resolve potential tensions between private and community interests in arbitration.

2. Party Autonomy: The Legacy of the ‘Autonomous’

Of the foregoing theories, Rubellin-Devichi’s is today by far the most popular. The reason for this is not hard to see. Rubellin-Devichi may not have solved the riddle of public regulation. But she did provide both a seemingly principled justification for some otherwise befuddling arbitral doctrines (about which more presently) and a license to consider every case on its merits. As discussion will now show, the effect on arbitral scholarship has not been salutary.


105 See Lew (1978) 60.

106 See, e.g., Li (1993) 32 ("Le droit matériel de l'arbitrage est un droit fonctionnel qui vise à en assurer l'efficacité.")
Today, writers confronted with the question of the relationship between state and process either prevaricate or mystify, however unwittingly. Prevaricating typically involves defining the competing interests in question, highlighting their tension, recognizing the importance of reconciliation, but ultimately leaving it to others to figure out how best to effect the same. To give an example: one first observes how ‘[t]he primacy accorded to party autonomy in the determination of applicable substantive and procedural law meshes neatly with the private nature of arbitration.’ One then adds that, ‘[n]evertheless, it should always be remembered that arbitration can never be entirely privatised, for it must continually respond to the policy demands of those jurisdictions whose legitimate interests are implicated in the proceedings.’ Finally, one admonishes that ‘the survival of international commercial arbitration as a system of dispute resolution depends not only on its responsiveness to the needs of the participants but, perhaps more crucially, on its respect for vital juridical interests.’

Sometimes the last move is omitted. Instead, one simply reads that ‘alternative patterns for judicial [review of arbitral awards] … implicate competing values that do not yield to facile analysis,’ followed by a solemn reminder that ‘[t]he commercial community desires finality in private dispute resolution … [but] national judicial systems may wish to further rival goals, such as the integrity of the adjudicatory process and respect for the rights of third parties.’

Mystification, on the other hand, involves recourse to anything from specious argument to logical fallacy, in order to justify siding with the interest that best sustains the institution’s apparently pre-set goal of formal neutrality and relative self-sufficiency. The section immediately below gives an example of speciousness; the best example of a logical fallacy is the twin doctrines of compétence-compétence and severability. Compétence lets an arbitrator decide whether he has jurisdiction to enter on a matter in respect of which a party has challenged his right to do so. Severability, on the other hand, disjoins the fate

108 Ibid.
109 Ibid., at 434–35.
110 See Park (1983) 22.
111 Ibid.
of the arbitration clause from the fate of the underlying contract, allowing an arbitrator to decide issues of invalidity and termination.\textsuperscript{112} Judged on merit, these doctrines fare poorly; for they combine to allow an arbitrator to ask a question to which a negative answer would mean that he had no warrant to ask it in the first place—namely, the question whether the substantive contract is invalid \textit{ab initio}. \textit{Ex nihilo nil fit.}\textsuperscript{113} All the

\textsuperscript{112} On \textit{compétence}, See generally Craig et al. (2000) 161–71, 512-14. On separability, see generally Li (1993) 11-26; Schwebel (1987) 1–60; Samuel (1986). On the theoretical distinctness of both doctrines and the tendency erroneously to conflate them, e.g., by treating one as the other’s corollary, see Craig et al. (2000) 515-16, 536–37; Walt (1999) 383 (esp. n. 46).

\textsuperscript{113} See Mustill & Boyd (1989) 108–10 (who, with characteristic succinctness, show the logical impossibility of \textit{compétence-compétence} in matters of initial invalidity); Craig et al. (2000) 48-49 (describing separability as ‘a conceptual cornerstone of international arbitration,’ but conceding that it ‘is not easy to justify as a matter of pure logic’); \textit{Ibid.}, at 516 (arguing that ‘under \textit{compétence-compétence} principles standing alone, without the sister doctrine of separability, the arbitrators could not declare the main contract void for illegality without thereby undermining their jurisdiction to do so’); Craig et al. (2000) 49–50 (arguing that ‘the theoretical construct that an arbitration clause is to be viewed as a second independent agreement is not in fact a justification for the autonomy \textit{[i.e., separability]} principle but simply a way of describing the result one wishes to reach. In other words, \textit{the true justification for the autonomy principle is practical rather than theoretical.’} (Emphasis added.) See also Shalakany (2000) 438-39. On the contradiction inherent in severability of the arbitration agreement, on the one hand, and the cognate question of the arbitration agreement’s ‘\textit{caractère accessoire},’ on the other, see Legros (1999) 81-82. Evidently, the text above deals with issues of validity, which, it is understood, are distinct from the question whether a contract has been prematurely terminated either for breach or by frustration. For decisions denying the right of arbitrators to decide on their jurisdiction where the underlying contract is alleged to be invalid \textit{ab initio}, see Heyman \textit{v. Darwins Ltd} [1942] AC 356 (HL, England) (esp. the speeches by Viscount Simon LC, at 366, by Lord Macmillan, at 370–71, and by Lord Porter at 392); \textit{Ashville Investments Ltd v. Elmer Contractors Ltd} [1988] 3 WLR 867; \textit{Codelfa Construction Proprietary Ltd v. State Rail Authority of New South Wales}, (1982) 149 CLR 337 (\textit{obiter dictum} by Mason J. at 365) (HC
same, both doctrines have now insinuated themselves with complete success into its modern theory. Why? Because they are central to the ‘efficacy’ of the modern arbitral process. But what about the interest of non-parties who are mistakenly held bound to arbitrate in having that decision reconsidered by a judge at the earliest moment? They can wait until the award is published. What matters is that arbitral proceedings should proceed.\[14\]

Australia); IBM Australia Ltd v. National Distribution Services Ltd., (1991) 22 NSWLR 466 (NSW CA) (obiter dicta by Clarke and Handley JJA, at 485-86 and at 487, respectively). For the contrary view, see QH Tours Ltd v. Ship Design Management (Aust.) Pty. Ltd (1991) 105 ALR 371 (Fed. C. of Australia). For decisions upholding the right of arbitrators to rule on the continued existence of the underlying contract (as well as on the implications of its premature termination), see Heyman v. Darwins Ltd [1942] AC 356 (HL, England); Dalmia Dairy Industries Ltd v. National Bank of Pakistan [1978] 2 Lloyd’s Rep. 223. For decisions recognising the enforceability under the New York Convention of awards containing rulings on the initial validity of the underlying contract on the ground that the curial law governing the arbitration gave arbitrators the power to make such rulings, DST v. Rakool [1987] 2 Lloyd’s Rep. 256 (CA England) (where the court held enforceable in England an award in circumstances where the proper law of the arbitration agreement was Swiss law, a law that empowered arbitrators to rule on questions of initial invalidity). See Boyd (1990) 77 (note 6). For the view that arbitrators, for considerations of policy, ought to be able to rule on the initial invalidity of contracts, see Boyd (1990). For modern legislation allowing arbitrators to rule on the validity of the arbitration agreement, see Arbitration Act 1996, s. 30(1) (Eng.).

\[14\] One could marshal similar anomalous doctrines, e.g., the virtual abandonment of the notion that arbitration is an obligation assumed inmutum personae, a notion that nevertheless continues to ground much thinking about arbitration, e.g., on confidentiality. See Treanning Research Laboratories v. O’Brien, [1990] 64 ALJR 211 (HC Austl); Banque Worms v. R. Bellot & SNTM-Hyproc (Cass. Civ. (Fr.) 5 January 1999) repr’d (2000) Revue de l’arbitrage 85 (holding French bank, the assignee (under a simplified form of assignment that, under French law, does not require the debtor’s consent) of commercial agreement containing an arbitration clause, bound to arbitrate); Banque générale du commerce v. SNTM Hyproc (Cass. Civ. (1\textsuperscript{st} chamber) 19 October 1999), repr’d Ibid., See also Arbitration Act 1996, s
Now, it may be possible to show, empirically, that these two doctrines ultimately serve the public interests; as would be the case if, for instance, alternative arrangements turned out to leave society worse off. Such an enquiry, even if it had to leave open ultimate questions of value, would help ground the debate on the independence of the arbitral process in its social reality. But no such study has ever been attempted.

B. A Critique of Technocratic Scholarship on the Question of Statutory Concentration

The foregoing section has sought to question the coherence of doctrinal formations whose relevance to the debate on statutory concentration this section will now try to establish. Specifically, this section will attempt to demonstrate that neither appeal to inferential logic (1), nor recourse to legal principle (2), nor arguments from technical considerations (3), singly or combined, could determine the propriety of statutory concentration one way or the other.

1. Abuse of Deduction: The Myth of Implied Consent

Does an agreement by word or deed to arbitrate in a given forum imply acceptance of the forum law, including any forum-mandated concentration regime?\(^1\) The question has elicited three different responses. The first is that, \textit{ceteris paribus}, seat-choice implies submission to curial law, and so forum-choice implies submission to any forum-mandated concentration regime.\(^2\) At its extreme, this view equates direct with vicarious

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8(1) ('Unless otherwise agreed by the parties, an arbitration agreement is not discharged by the death of a party and may be enforced by or against the personal representatives of that party'). See also Cohen (2000) 87. See generally Cohen (1997) 471.

\(^1\) See Mustill (1991) 398.

\(^2\) See, e.g., van den Berg (1986) 368; (1987) 258. Cf. Guarin (1993) 522 (arguing that 'the availability vel non of consolidated arbitral proceedings may play a significant role ... in the parties' ex ante choice of situs and governing law); the \textit{Institut de droit international}'s Resolution: \textit{Arbitration in Private International Law: Articles Adopted at Amsterdam} (1957) (art. 1: 'Parties shall be free in the arbitral agreement (submission or arbitral clause) to exercise their free choice and to indicate the place where the arbitral tribunal must sit; \textit{this choice shall imply that they intend to submit the private arbitration to the law of the seat of the country of arbitration.}') (Emphasis added.) For the full text of the resolution, see
choice. The second response says, forum-choice is random and therefore legally insignificant. This response condemns the inferential reasoning characteristic of the first, which it accuses of feigning respect for private will while in fact upsetting bargains struck following mutual concessions and careful risk-allocation. The third response says, forum-choice implies submission to forum law, except on concentration.

For different reasons, all these responses are unsatisfactory. The first response relies on a technical fiction (implied consent) to get round a requirement which cannot be strictly upheld but which is much too valuable bluntly to flout, namely, the requirement of express consent. This kind of formally deductive reasoning can justify much any outcome. Take next the counter-argument. On the one hand, this


See, e.g., Jarvin (1987a) 255, Hoellering (1997) 47; McDonnell (1984) 296; Schwartz (1990) 372. It is naïve, according to this view, to suppose that any opt-out mechanism, bound to go unnoticed in most cases, could avoid this objection. See Jarvin (1987a) 255.

See, e.g., Mayer (1989) 53–54 (conceding that ‘le fait de fixer le siège du tribunal arbitral dans un pays donné avant acceptation d’une éventuelle intervention d’une autorité judiciaire locale dans les cas prévus par la loi locale,’ but noting that this principle’s applicability to court-ordered concentration remains ‘controversial.’)

This is not to deny that legal fiction has its place in legal reasoning; Cohen, who calls it ‘the mask that progress must wear to pass the faithful but bleary-eyed watchers of our ancient legal treasures,’ warns that while ‘useful in … mitigating or absorbing the shock of innovation, [legal fiction] work[s] havoc in the form of intellectual confusion’). See Cohen (1967) 126. To pray legal fiction in aid of an acknowledged policy objective, to use neutral decisional criteria intrinsic to the legal system to justify express substantive choice is harmless enough; to pretend that fiction/formal argument forces outcomes is disingenuous.

condemns the disingenuousness of inferential reasoning; on the other, it engages in refinements clearly at variance with the plain facts of practical life, now claiming that parties often choose forums randomly—which by popular report is true—now maintaining that they nevertheless deliberate the balance of their arbitration agreement—which by similar report is false, and in any event is incompatible with the first claim. Finally, take the view that forum-choice implies submission to forum law, except when it comes to concentration. This arguably exemplifies the struggle to reconcile faith in deductive logic with what seems to be a largely a priori hostility to extra-contractual conflict-avoidance initiatives. The result is incoherence.

Significantly, all three views attempt to justify preference on grounds of private choice. None pauses to consider whether, regardless of party intent, there might be a case for public action. The question does not even arise. Something sees to it that it does not.

2. Party Autonomy & the Benevolent Stratagem

The reason [the power to order arbitrations concentrated] does not exist is that this form of dispute resolution depends on the agreement of the contracting parties that their disputes will be arbitrated by a private tribunal, not litigated in the public courts. It follows that unless the parties otherwise agree, only their own disputes arising out of their own agreement can be referred to that agreed tribunal. In our view it would amount to a negation of the principle of party autonomy to give the tribunal or the Court power to order consolidation or concurrent hearings. Indeed it would to our minds go far towards frustrating the

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122 For the view that, considering users’ failure generally to tailor procedure to circumstance, default of agreement on concentration should not be taken to signify negative choice, see Huleatt-James & Gould (1999) 40; Goldstein (1997) 104.
agreement of the parties to have their own tribunal for their own disputes.\textsuperscript{123}

This section argues that the passage above, an excerpt from the Final Report of the English Departmental Advisory Committee on Arbitration Law, is logically as well as practically problematic.

To begin with, the committee says that statutory concentration powers do not exist in arbitration because arbitration is ‘a form of dispute resolution [that] depends on the agreement of the contracting parties that their disputes will be arbitrated by a private tribunal, not litigated in the public courts.’ But, first of all, concentrated proceedings are arbitral proceedings. Secondly, the privacy of arbitration admits of exceptions.\textsuperscript{124} Thirdly, the power to concentrate related claims or related references could well rest with arbitrators or institutions.\textsuperscript{125} And finally, arbitral justice does not preclude judicial oversight; only the limits of such oversight are ever at issue.

Then the committee says, ‘It follows that unless the parties otherwise agree, only their own disputes arising out of their own agreement can be referred to that agreed tribunal.’\textsuperscript{126} Now, even if one were to assume, for argument’s sake, that the first proposition is valid, such conclusion would still not follow. It would not follow, unless were also to assume that a private tribunal is private, not just by virtue of its non-official composition and its in camera proceedings, but also because the proceedings themselves are exclusive to those who have signed the arbitration agreement. But then that would be assuming what the argument was meant to prove.

\textsuperscript{123} See DAC (1996) 42 (para. 179–80) (Emphasis added.) The remaining part of the quote goes as follows: ‘Further difficulties could well arise, such as the disclosure of documents from one arbitration to another. According we would be opposed to giving the tribunal or the Court this power. However, if the parties agree to invest the tribunal with such a power, then we would have no objection.’ \textit{Ibid.}

\textsuperscript{124} See discussion on page 60.

\textsuperscript{125} See discussion on page 128.

\textsuperscript{126} (Emphasis added.)
Finally, the committee adds, 'In our view it would amount to a negation of the principle of party autonomy to give the tribunal or the Court power to order consolidation or concurrent hearings.' But this not only begs the question whether private will is sovereign, it also ignores how the double move from *ex post* to *ex ante* arbitration agreement and from *ad hoc* to institutional arbitral proceedings has largely disabled practical party control of the arbitral process.

*Pace* the committee, freedom of contract and party autonomy are highly malleable concepts, dependent on normative economic, sociological, and political theories. This is why pleading either as a bar to public action is unhelpful and tends to be question-begging.

Leaving aside for now a longer (if no more satisfactory) explanation that the same committee had previously given of its position on concentration,\(^{127}\) it might be helpful to consider another reason for questioning the committee’s appeals to party autonomy in the excerpt above. For after it had once relied on that autonomy in order to support a staunchly individualistic conception of the arbitral process, the Committee went back and used that same autonomy once again to justify retaining a statutory right that (discussion will now show) is only justifiable on a more communitarian view of that institution, namely, the excludable right of appealing awards on points of law. ‘It seems to us,’ the Committee said:

> ... that with the safeguards we propose [subject-matter specificity, and opt-out rights], a limited right of appeal is consistent with the fact that the parties have chosen to arbitrate rather than litigate. For example, many arbitration agreements contain an express choice of law to govern the rights and obligations arising out of the bargain made subject to that agreement. It can be said with force that in such circumstances, the parties have agreed that that law will be properly applied by the arbitral tribunal, with the consequence that if the tribunal fail to do this, it is not reaching the result contemplated by the arbitration agreement.\(^{128}\)

\(^{127}\) See discussion on page 189.

Obviously, however, this neither justifies appeals absent an express choice-of-law clause nor explains why mistakes of law but not of fact are incompatible with the tribunal’s mandate.\textsuperscript{129} If so, then the whole passage begins to seem like an attempt to dress-up in consensual garb a decision motivated by unstated considerations. And if that is indeed the case, the attempt would be significant. For had the committee been willing to say (as the Commercial Court Committee on Arbitration had said, as far back as 1978) that a right of appeal on a point of law makes for legal certainty and allows the judicial development of English commercial law, the attempt would have been unnecessary.\textsuperscript{130} By 1996, however, such systemic arguments were suspect. (Recall Grigera Naon’s anti-systemic claim.) Arguably, the desire to uphold the systemic ends but without pleading systemic considerations made the committee’s appeal to inferential reasoning inescapable.\textsuperscript{131} 

The point bears emphasis. Just as appeals guard against the inequity of misapplying the law, so concentration guards against the inequity of conflicting awards. Both remedies serve broadly similar systemic ends. But for its reliance on obliging inferences, the committee would have had to stick either to a communitarian conception of arbitration—and hence take account of the systemic implications of both review and

\textsuperscript{129} Significantly, those who had lobbied to have appeals on points of law abolished had framed their argument in terms redolent of the committee’s own earlier position on the private nature of the arbitral process, and the primacy of party autonomy in arbitration. ‘[B]y agreeing to arbitrate their disputes,’ the ‘abolitionists’ argued, ‘the parties were agreeing to abide by the decision of their chosen tribunal, not by the decision of the Court, so that whether or not a Court would reach the same conclusion was simply irrelevant.’ See DAC (1996) 59 (para. 284).

\textsuperscript{130} See Commercial Court Committee (1978) 203 (para. 16).

\textsuperscript{131} Compare this with the much more positive assessment in a standard treatise, according to which, in holding on to optional appeals, coupled with a non-excludable right to judicial review of fundamental procedural irregularities, the Act ‘balances the rival aspirations of finality and fairness in arbitration by supplementing the principle of party autonomy with reasonable default rules and mandatory safeguards for procedural integrity.’ See Craig et al. (2000) 532. Why certain default rules, but not others, should be considered ‘reasonable,’ is not clear.
concentration—or to a thoroughgoing individualistic conception of that process—and take account of neither. In other words, it would have had to treat arbitration either as strictly consensual—in which case concentration absent consent would have been unthinkable—or as quasi-judicial, i.e., as a private process admitting of broader public considerations—in which case standard elements of judicial power might more plausibly have come in. In the event, the committee simply took refuge in a principle that, when expedient, it seemed to bend to its will.

3. Concentration, Sovereignty, and Autonomy (Again)

Discussion has already alluded to an earlier committee report listing further arguments against statutory concentration. These were arguments from autonomy, efficiency, confidentiality, tribunal choice, enforcement, and jurisdiction.\(^{132}\) Discussion has already shown how the first four on this list are relative, and hence inconclusive. The argument from enforceability—concentration is supposed to endanger enforceability under the New York Convention—if sound—and there are reasons for thinking it otherwise\(^{133}\)—might rule out national concentration regimes; but it cannot condemn international concentration initiatives.\(^{134}\) This section deals with the argument from jurisdiction, national as well as international.

Concentration by legislative fiat generally presupposes a third-party decision-maker with jurisdiction over all the related claims. National legislation, on the other hand, is either territorial and hence inapplicable to different-forum situations, or extra-territorial and (as discussion has already shown in the case of Florida) ill-conceived.\(^{135}\) This is hardly surprising: legal institutions, like arbitration, that operate across independent

\( ^{132} \) This was DAC’s *Second Report*, published some six years before its Final Report. See DAC (1991) 390–91.

\( ^{133} \) See generally van den Berg (1986) & (1987).

\( ^{134} \) In fairness, the committee was reporting on national legislation, and in this context was entitled to consider arguments from enforceability.

\( ^{135} \) See text accompanying note 69, on page 127.
governance structures assume a measure of international cooperation. The question is whether international ordering could succeed where national initiative must fail, namely, in creating a viable framework in which substantively related but procedurally distinct arbitral claims could be settled consistently.

Joint state action in pursuit of inter-award harmony could take one of two forms: that of an international judicial authority that determines when, where, and how concentration would be appropriate; or that of a treaty system that requires national courts, acting according to a pre-determined order of jurisdictional precedence, to make such determinations themselves. Both schemes are open to four obvious objections. The first, from practicability, says that it is naïve to think that states would go to so much trouble in order to remedy so minor an institutional shortcoming. The second, from efficiency, says that both schemes would hold up proceedings, and therefore undermine the attractiveness of arbitral justice. The third, from principle, says that revising arbitral agreements against either some ideal of systemic efficiency or some exogenous notion of substantive justice would undermine the parties’ substantial rights, e.g., as regards choice of rules, of arbitrators, or of the seat. The fourth, an essentialist objection, says, ‘Set up a state-sponsored hierarchical review structure, and mandate active state involvement going well beyond due-process oversight, and you no longer have arbitration but something else.’

136 See Reisman (1992) 139 (‘International Commercial Arbitration is a form of private international dispute resolution based on a network of public international agreements. It is neither self-sustaining nor autonomous, nor is it driven by some sort of inherent logic which can persuade states to support it’).

137 Cf. Grigera Naón (1999) 271–72 (on the possibility of an international judicial system forming, ‘international commercial arbitration may not become such [a] ... system unless it becomes something different from what it presently is, by going through a radical modification of its defining traits, including some which are at the core of today’s success and expansion of international commercial arbitration.’)

138 See Ibid.
Mutatis mutandis, the answers that Chapter 3 gave to these objections (in the context of institutional concentration) apply here with equal force.¹³⁹ Very briefly, these were as follows. The argument from practicability involves an exercise of judgement between competing values, which when pushed to the hilt yields preferences indefensible on purely technical grounds. The argument from efficiency imports a highly subjective order of preference. The argument from substantial rights rings hollow when the institution in question systematically excludes effective party choice. The essentialist argument is simply non-technical.

If this is right, it would seem to follow that neither legal logic nor value-free technocratic considerations could determine the propriety of either institutional or statutory concentration. If so, what could?

Chapter 5 attempts to locate the answer to this question in the fundamental political commitments of modern international arbitration.

¹³⁹ See discussion beginning on page 104.
Chapter Five. The Limitations of a Neo-Liberal Institution

I. Introduction

They said that the thing just couldn’t be done,
But he smiled and he said that he knew it.
He tackled the thing that couldn’t be done,
And he couldn’t do it.

The ‘thing’ here stands for ensuring inter-award harmony between substantively related but formally distinct arbitral claims, in the absence of a clear and comprehensive provision for concentration consented to by all relevant parties. The inspirational verse quoted above apparently crept up in conversation between Lords Saville and Mustill.¹ It basically expresses their lordships’ common conclusion that the ‘thing’ is essentially doable by contract or not all.² Considering the dismal and (for the reasons that Chapter 2 has advanced) likely un-improvable record of private initiative, this conclusion amounts to an admission that the risk of inter-award conflict will continue to threaten what Cardozo once called ‘the serene and impartial uniformity which is of the essence of the idea of law.’³

This dissertation originated in the (perhaps naïve) belief that the thing simply had to be done. But as study of the subject progressed, the focus of enquiry shifted to the following puzzling feature of the literature on the subject. Writers, as already noted, agree that the usual position of the arbitration clause among the tail-end boilerplate provisions in a contract very nearly represents its importance to the parties, who, accordingly, rarely give its detail more than cursory attention.⁴ But on the other hand, writers—sometimes the same ones—also declare, after sustained good-faith attempts at finding an extra-contractual solution to the problem of complex arbitrations, that respect for private will—the selfsame will they moments earlier had conceded to be merely formal—put paid to their efforts. This disjunction between premise and conclusion is troubling, not least because it seems to have gone undetected.

¹ See Mustill (1992) 6.
³ See Cardozo (1921) 36.
⁴ See Craig et al. (2000) 185.
At this point in the enquiry, two things are clear. First, as the inspirational verse has foretold, nothing more than imperfect palliatives is possible before the evil of inter-award conflict. Second, as the preceding discussion has shown, formal argument alone cannot explain why that is so. Immediately one concedes as much, however, a whole range of questions arise: why does arbitral scholarship carry on as though negotiated arbitration agreements were paradigmatic, when in fact the standard institutional clause predominates? If most arbitration users in no real sense choose the details of the arbitral procedure that will govern the settlement of their differences, what precludes states or institutions revising those details against extra-contractual considerations, be these ideals of fairness or models of systemic efficiency? Why is a process practically so weighted against autonomous action at the same time doctrinally so hostile to extra-contractual initiative?

These fundamental questions are the outcome of an investigation into what at first appears to be an isolated issue, namely, the risk of inter-award conflict. The argument leading up to these questions comprised two moves: the first, showing how systemically induced reliance on the ex ante standard clause seriously undercuts faith in negotiated solutions to the problem of inter-award conflict; the second, establishing how technical argument alone cannot discredit alternative ex-contractual solutions. Together, these moves leave open the question of how to account for the general hostility towards ex-contractual conflict-avoiding initiatives, and more generally, how to explain arbitration’s inability to satisfy a social objective like inter-award harmony. The present chapter attempts to locate the answer to these questions in the political or ideological commitments of modern international arbitration.

There are five parts to this chapter. Part 2 is a very general statement of the basic argument (II). Part 3 includes three fairly lengthy preliminary remarks concerning the argument’s meaning, scope and definition (III). Part 4 provides a thumb-nail sketch of the origin and development of the mode of thought which, this chapter claims, modern international arbitration internalizes (IV). Part 5 attempts to show how, as currently practiced and advocated, international commercial arbitration institutionalizes the abovementioned political commitments—and how these in turn (rather than logic or technical considerations) account for the hostility towards extra-contractual conflict-avoidance initiatives (IV).
By connecting doctrine to ideology, the particular to the universal, the formed routine to the formative framework, this chapter aims to increase our insight into the politics of modern arbitration.

II. The Argument

Very generally, this chapter claims that, as presently practiced and advocated, modern arbitration stands fundamentally as the expression of neo-liberal commitments in international adjudication. Now, if neo-liberalism has a single foundational commitment, it is to institutional arrangements and principles of social life whose aim is greater freedom for the individual. Yet freedom for neo-liberals is not any old freedom, but freedom as the absence of constraint, specifically, of public constraint, constraint by state actors. To realize this essentially negative ideal of freedom, neo-liberalism enjoins the state to adopt a posture of formal neutrality. The state must ensure formal equality between private actors, but must otherwise fight shy of redistributive or rehabilitative justice.

In arbitration as in politics more generally, these commitments encounter localised resistance from a slightly more communitarian strand of liberal thought. Call this Centrist liberalism. But in arbitration if nowhere else, the outcome of the resulting encounter is still fundamentally individualist and laissez-faireist.

On this view, arbitration’s move from the compromis to the ex ante clause, increased public deference to private will, the prevalence of an austere (almost antiseptic) due-process conception of judicial oversight and the rights-based confrontationalism now characterising arbitral practice, all must be understood in the context of a moral and political shift that saw neo-liberalism rise to become the tone of the times.

By depicting the activist state as meddlesome and its influence on dispute settlement as prima facie pernicious, neo-liberalism legitimated the privatisation of commercial justice as an idea. By fostering arbitration’s image as this neutral, private, technocratic process that ensures equitable claim-adjustment according to neutral normative principles, neo-liberalism promoted arbitration as this untainted alternative to state justice. Effectively to play its ideologically assigned role, arbitration had to be both strengthened and cleansed: strengthened by sacralizing arbitration agreements and prescribing deferential enforcement procedures; cleansed by ridding itself from compromising state influence, defined as anything beyond strict due-process judicial oversight. Both these tasks were accomplished by legislation passed beginning 1975. A by-product of this ideologically
inspired double-act turned out to be a heightened risk of inter-award conflict. Within the ideological bright lines circumscribing public action, that risk to be proved irremediable.

Neo-liberal ideology begot a problem whose potentially effective solutions it also proscribed.

### III. Ideology, Essentialism & Partiality

Three somewhat lengthy prefatory remarks now will help avoid confusion later. The first concerns the meaning of the concept of ideology and its relationship to law (A). The second disclaims any essentialist pretensions potentially associable with the claim that modern arbitration stands as the expression of neo-liberal commitments in the field of international adjudication (B). The third establishes the relationship between this claim and potentially confusing parallels (C).

#### A. Law & Ideology: Relation & Definition

Evidently the basic argument of chapter concedes little autonomy to law. Against a legal orthodoxy that posits a fundamental distinction between law and politics, and ascribes considerable autonomy to the legal enterprise, this chapter rejects the notion that law in general, and arbitration law in particular, is an autonomous systems of rules substantially immune to the underlying pressures of social, political, and economic forces. But for the claim that arbitration law is in the final analysis influenced by ideology to make any sense, the meaning of ideology needs first to be made clear.

This section comprises two parts. Part 1 sets out the different conceptions of ‘ideology’ contesting legal scholarship today. Part 2 defines which of these conceptions this chapter adopts, and why.

1. **One Orthodox & Two Critical Accounts of Ideology**

   People use the word ‘ideology’ differently. Eagleton identifies over a dozen such uses, including:

   ... a body of ideas characteristic of a particular social group or class; false ideas which help to legitimate a dominant political power; forms of

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5 This section draws heavily on the work of William Lucy, on the subject of ideology and its role in the enterprise of lawmaking and law-applying. See Lucy (2000); (1999). On the relationship between law and ideology, see generally Sypnowich (2001).
thought motivated by social interest; the medium in which social actors make sense of their world; and the indispensable medium in which individuals live out their relations to a social structure.\(^6\)

These definitions appear to reflect either a clear orthodox usage (ideology as the neutral and unavoidable ideal matrix people use to comprehend their phenomenal existence) or a clear heretical usage (ideology as an obfuscatory and exploitative intellectual project). But this dichotomous schematization both overstates the internal unity of the heretical position and exaggerates the difference between certain heretical and orthodox accounts of ideology. In fact, the heretical position has two dimensions. The first, epistemological, focuses on the obfuscatory nature of the social system at issue; that is, it focuses on the possibility that social actors could systematically misapprehend the well-springs of their actions. The second dimension, consequentialist, concentrates on the harmful effects of such a belief system. Emphasizing either dimension marks the legal scholar out as a kind of heretic, disapproving both of the existing social order and of the role of law in legitimating this order. But the two dimensions are not interdependent: while the epistemological includes the consequential, the opposite is not true. Ultimately, a belief system masks the reality of social life in order to legitimate patterns of social intercourse that would otherwise encounter resistance. But beliefs about social life, independently of their truth-value, could still systematically harm identifiable groups of social actors.

The qualification in the last phrase defines the difference between ‘critical’ and ‘non-critical’ accounts of ideology. Despite the labels, both accounts are critical of the present social order, and of the role of the enterprise of lawmaking and (particularly) law-applying in propping up that order. Only, ‘epistemologists’ believe that our understanding of social life is significantly corrigible; ‘consequentialists’ simply accept (as do the orthodox but for different reasons) that ideology is the inevitable medium through which we comprehend our social world, while maintaining (against the orthodox) that certain social practices, when considered from their (admittedly ideological) standpoint, are nevertheless harmful.

Unlike ‘epistemologists,’ many of them Marxists, ‘consequentialists’ are often post-modernists wary of ‘truth’ claims, sceptical about the possibility of non-ideological

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positions, and queasy about anything that sounds like a claim to 'represent' social reality. In particular, consequentialists attempt to avoid the four-fold orthodox accusation that a critical account of ideology implies:

... commitments to, *inter alia*, a theory of truth; an account of language such that it can in some way represent or mirror the world; an ontological claim about the constituents of the real world; and a methodological position designed to yield less corrigible beliefs about the world, if not justified true beliefs (that is, knowledge).\(^7\)

To this, the epistemologists' answer is three-fold. First, non-critical accounts of ideology are no less vulnerable on harm and causality, problematic notions central to the consequentialist claim. Second, problematic accounts of an 'Enlightenment project' apart (post-modernists often maintain that the project's failure has de-legitimated its central concepts—truth, representation, and causality), consequentialists have never given a satisfactory account of what they mean by concepts like 'truth,' 'representation,' and 'causality,' let alone given an account so pointed as effectively to put the critical position on ideology out of court. Such an account, while perhaps possible, looks no less problematical when compared with what epistemologists supposedly must prove. The critique, therefore, though partly legitimate, is part exaggeration and part condescension. Finally, and perhaps most powerfully, non-critical accounts of ideology are redundant, for they use the concept 'ideology' as a substitute for perfectly adequate notions of class interest and political program. Used in this way, the concept of ideology adds nothing.

But if despite their differences critical positions have one thing in common, it is the belief that ideology is a powerful analytic of dominant class hegemony. Conversely, if, despite their commonalities, the orthodox and the heretical consequentialists differ on one thing, it is on the (orthodox) claim that critical uses of ideology are nothing but barren reductionisms of a world characterized by endless variation.

2. Ideology for Present Purposes: Its Definition & Import

The orthodox position on ideology, which rejects even so much as the consequentialist claim of systematic harm, and disparages ideological analytics, stands in fundamental opposition to the central argument this chapter presents. Instead, this

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\(^7\) See Lucy (1999) 297.
chapter adopts the critical heretical account of ideology, for two reasons: first, because, on the grounds already emphasized, it takes it to be superior to its non-critical variant; and second because only the critical account recognizes the epistemological dimension of ideology, so central to an argument (such as the present one) whose basic concern is to propose a novel way of conceiving actuality.

For present purposes, then, ideology will be taken to mean:

... a system of concepts and views which serves to make sense of the world while obscuring the social interest that are expressed therein, and by its completeness and relative internal consistency tends to form a closed system and maintain itself in the face of contradictory or inconsistent experience.¹

Specifically, this section puts forward three distinct but intimately related claims. First, it claims that modern arbitration—understood as the dynamic interaction of rules, principles, doctrines, and shared beliefs in a given field—makes certain fundamentally counter-factual assumptions about social life—namely, it assumes, against all the evidence, that parties genuinely will the detail of their arbitral arrangements. To put the same thing differently, modern arbitration internalizes an ideologized user-image that excludes many, perhaps a numerical majority, of its actual users, namely, the image of (so far as concerns arbitral undertakings) the rational, autonomous, self-regarding, responsible chooser. Second, this section claims that, by fostering this ideologized user-image, modern arbitration secures our allegiance to a correspondingly ideologized notion of freedom that, in fact, ignores the lived experience of real social actors, namely, the negative notion of freedom as lack of interference. Third, this section claims that modern arbitration’s ideologized user-image, and its concomitant commitment to an ideologized notion of freedom, systematically privileges, however unwittingly, social actors who actually fit arbitration’s ideologized user-image, probabilistically, the holders of economic power.

*Prima facie,* only the second of these claims (the claim from negative freedom) is essential to establishing the link between ideology and hostility to ex-contractual concentration initiatives. But then that claim cannot stand by itself. Conceptually, the

argument from negative freedom supposes that modern arbitration is an ideologized mode of dispute settlement, which, on a critical account of ideology, requires proof of all three claims.

Nor is that requirement particularly burdensome. On the one hand, discussion above has already established that arbitral scholarship internalizes a systemically counterfactual account of user-behaviour. In a society that reflexively associates responsibility with freedom, this chasm between theory and practice, the anomaly of a process that systematically denies practical freedom and just as systematically exacts real responsibility, needs only pointing out for people to begin asking questions about the implicit attachments of arbitral scholarship: for instance, about its implicit commitments to values like individualism and self-reliance. On the other hand, to admit the claim of

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9 It is difficult here to do better than quote Ramsay: ‘Consciously or unconsciously,’ she says, ‘[people’s] political and moral beliefs reflect an acceptance of liberal ideas. Most people do not ask themselves the abstract questions of political philosophy and come up with liberal answers. They do not ask, what is the truth about human nature and how does this determine the form social organization can or should take? What is the meaning of freedom? In what sense are people equal and how can inequality be justified? What is justice? Are there any human rights? What is the role of the state? What is the nature of the good life for the human beings? Can there be an adequate moral basis for social and political organisation? But, implicitly, most people assume the validity of the liberal answers to these questions and their views demonstrate the pervasiveness of liberal ideals. Think about the statement, ‘it’s only human nature’ or that ‘you can’t change human nature’ and how often this is said in a context which is supposed to explain some obvious fact about human behaviour, the consequent state of the world and the need for social policies which accommodate, control, channel and regulate it. In these everyday discussions, it is taken for granted that people are self-seeking, acquisitive, and greedy, that they always want more, and that competitiveness and conflict are given facts about human nature. Think about how often it is assumed that people are autonomous, rational moral agents, when they are urged to take responsibility for their lives and praised for or blamed for their actions or behaviour. ‘It’s his own fault.’ ‘It serves her right.’ ‘He deserved it.’ Think about how inequalities in wealth and income are accepted on the grounds that some people deserve greater rewards because of their superior skill or hard work, or because they need these as incentives to work in more important and
systematic harm, one needs only to allow (a) that the counterfactual user-image best suits the holders of economic power, and (b) that procedure influences outcome.  

B. An Anti-Essentialist Reservation

The final preliminary concerns the claim that arbitration institutionalizes neoliberal commitments in the field of international commercial adjudication. This sounds suspiciously essentialist. But in fact nothing here is intended to suggest that arbitration inherently reflects the commitments of any political program or system of thought. As intellectual artefact, law consists of basic, irreducible, sociologically neutral concepts. These concepts, though remarkably stable in their basic outlines, are periodically co-opted for the purposes of a socio-political cause, whose commitments they may temporarily reflect—until reclaimed by the next cause, and so on. This is as true of arbitration as it is of other legal institutions.

If anything, the attempt to establish a link between, on the one hand, modern arbitration’s practical, doctrinal, and institutional characteristics, and on the other, the political and philosophical commitments of a political program, is radically anti-essentialist. Properly understood, it is a direct reaction to the tendency in modern scholarship to date arbitration to time out of mind—to suggest that while doctrinally ‘evolved,’ modern arbitration somehow answers to age-old psychological, sociological, technical needs—the tendency subtly, obliquely to insinuate that arbitration is trans-historical, neutral, non-ideological, innocent, an undisputed good.

10 See Cohen (1967) 128 (‘Students of legal history know the truth of the statement that the substantive law is secreted in the interstices of procedure, nor need practitioners be reminded how frequently changes in procedure affect the substantive right of parties.’)

11 See, e.g., Redfern & Hunter (1999) 3 (‘The modern arbitral process has lost its early simplicity. It has become more complex, more legalistic, more institutionalised. Yet in its essentials it has not changed’). Cf. Mustill (1989) 43 (‘Commercial arbitration must have existed since the dawn of commerce.’)
C. Ideological Partiality & the North-South Debate

The final observation is related to, but distinct from, the foregoing anti-essentialist reservation. Claims of ideological identity are easily assimilable to charges of systematic distributional bias; that is, one could easily read a claim such as that which this chapter advances as basically and fundamentally charging the arbitral system with somehow systematically distorting outcomes in favour of some definable user constituency. Such reading, while seductive, is both dangerous and inaccurate. It is seductive, partly because true, up to a point (arbitration does indeed indulge those who fit its ideologized user-image, i.e., the economically powerful, who could and would seek preventive legal advice), partly because it appears conveniently to fit into the longstanding ‘North-South’ debate about the biases of the international arbitral process (since it does allege at least an acquired procedural bias). It is dangerous because it de-emphasizes that which is really central to the present claim, \( \forall x \) the ideological origin of modern arbitration’s hostility to extra-contractual initiative. It is inaccurate because it appears vitally to dissent from an extant theory of bias that, as discussion will now show, the present author substantially supports. This is the theory, propounded by Shalakany, which rejects both the ‘Northern’ claim for arbitral neutrality, and the ‘Southern’ identification of bias, now with international legal doctrine, now with some ‘indispensable characteristics’ of the arbitral process, and instead locates bias in the professional sensibility of the arbitrators themselves. Reared in liberal political ideology, most arbitrators (Shalakany argues) inhabit a moral and intellectual world in which private property is sacrosanct and contracts are inviolable. This (Shalakany argues), not legal logic or inherently partial procedural characteristics, accounts for arbitration’s disempowerment of Third-World post-colonial public economic initiatives.\(^{12}\)

It is unnecessary to say more about the anti-essentialist nature of the claim that this chapter presents. But it is worthwhile trying to settle that claim’s relationship both to Shalakany’s argument and to the North-South debate more generally. Nothing here is meant to detract from Shalakany’s basic phenomenological insight,\(^{13}\) namely, that in


\(^{13}\) Of course, the beauty of the argument lies in its compatibility with arbitrator good faith. As Shalakany points out though, the term ‘disciplinary bias,’ and arguably the article’s phenomenological approach to partiality, builds on David Kennedy’s longstanding engagement with the subject, in the context of international legal
transactions involving conceptual collisions over the legal boundaries between the public and private spheres,\textsuperscript{14} bias against public initiatives originates in a disciplinary sensibility that acts in an intermediary capacity, skewing the institutional application of international law doctrines toward a conservative set of ideological preferences founded on a deep and enduringly intuitive loyalty to a public/private distinction.\textsuperscript{15}

Instead, the claim here is merely that Shalakany has defined both bias and ‘indispensable characteristics’ too narrowly to detect an institutional partiality which, if it does not skew outcomes anywhere near as much or in the same way as the disciplinarity sensibility that he has identified does, arguably skews them all the same and, much more importantly for present purposes, reflects an ideologized vision of dispute-settlement hostile to all ex-contractual \textit{procedural} initiative. Shalakany exoneration’s of arbitration and his indictment of arbitrators are analytically distinct. His indictment against the decision-maker is proper in its context. The purpose of the present argument is simply to reconceptualize the institution, without essentializing it.

The present claim, then, does \textit{not} aim to make a direct contribution to the North-South debate, a debate both vitally concerned with arbitration’s apparent hostility to ex-contractual \textit{substantive} initiatives (e.g., nationalizations), and essentially focused on disputes that, as already noted, substantively, lie across the private/public conceptual fault-lines. By contrast, the present claim seeks fundamentally to account for arbitration’s hostility to ex-contractual \textit{procedural} initiatives, and encompasses in its purview both ‘transactions involving conceptual collisions over the legal boundaries between the public and private spheres’\textsuperscript{16} and (what Shalakany calls) ‘straightforward private law disputes with no controversial public policy dimensions.’\textsuperscript{17}

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\textsuperscript{14} See \textit{Ibid.}, at 429.

\textsuperscript{15} See \textit{Ibid.}, at 424.

\textsuperscript{16} See \textit{Ibid.}, 429.

\textsuperscript{17} \textit{Ibid.}
IV. Liberalism: Its Theory and Development

A. Introduction

The account below outlines the development of a mode of thought that, more than any other, has influenced the shape of modern social life in the industrialized and industrializing West.18 Evidently, real-life liberalism is more diverse, more patterned, less one-dimensional, than any synoptic account like that which follows can reveal. For instance, while liberalism followed different historical trajectories in Great Britain, Continental Europe, and the United States, the account below does not attempt a series of country-specific histories of that development, and instead tracks four phases of liberal thought that, while conceptually distinct, historically were neither self-contained nor sequential—namely, classical, welfare, centrist, and neo-liberalism.

Similarly, liberal thought was differently preoccupied at different times in its four-century history. For instance, seventeenth- and eighteenth-century liberalism was primarily political, concerned with emancipating the individual from the authority of the feudal state and the religious establishment. Nineteen-century liberal thought took the conception of the individual and of social life implicit in this political program, and developed an economic theory that, modified, retains its power even today. Twentieth-century liberalism displayed more variety. Recognizing the limitations of its earlier analytic model, turn-of-the-century liberalism assumed a distinctly social aspect. This it did, partly the better to respond to the challenge of competing ideologies, partly to maintain relevance in a changed social and political landscape. By century’s end, however, the disappearance of the political threat of communism and the attending decline of ideological stakes has arguably caused liberal thought once again to emphasize economics.

But no matter its primary preoccupation at any given time, liberal thought—certainly beginning the nineteenth century—has been at once political, social, and

18 The following account does not rely on a single source, but consists in a selective synthesis of various reviews of, and contributions to, liberal thought. In writing this synthesis, I have relied on: Ivison (2002); Rawls (2001); Rawls (2000); Chomsky (1999); MacEwan (1999); Barry (1996); Wallerstein (1995); Gray (1995); Strauss (1995); Hayek (1994); Spencer [1994]; Manent (1994); Rawls (1993); Mill [1991]; Raz (1986); Sandel (1984); Nozick (1975); Strauss & Cropsey (1973); Smith (1968); Friedman (1960).
economic. In part, this explains why no single definition exists today that captures the commitments of all self-styled liberals; in part, it justifies glossing over points of detail that divide liberals, and instead focusing on clusters of belief, fundamental aims, and common assumptions generally associated with liberal thought.

The account below, then, is, confessedly, a condensed, summarized, abridged—in short a potted—history of the subject. Inevitably, it contains generalizations that would be objectionable in a study primarily aimed at social or political scientists. But the account below simply aspires to give lawyers a brief primer by which to judge the argument that this chapter presents. When that is purpose, generalizations become less objectionable. Generalizations abstract from the rich detail of complex events—that is their function. Their strength lies in highlighting key aspects of the phenomenon they expound. Their weakness rests in leaving out much of lesser but nonetheless significant importance.

B. The Development of Liberal Thought

Liberalism stands as a commitment to institutional arrangements and principles of social life whose aim is greater freedom for the individual. A liberal political order respects this by allocating individuals a sphere within which to pursue, each in their self-determined way, their autonomously chosen goals. Indeed, if liberal thought has a single touchstone, it is this apportionment of human life between public and private spheres, between state and civil society. For liberals, civil society is an arena in which self-directed individuals pursue self-regarding aims, in which contract is the primary mode of social engagement between self and other. In this arena, the state, if it intervenes at all, does so largely as a value-neutral coordinator of individual action.

Liberalism renounces perfectionism as a goal, opposes special privilege, and assumes pluralism of purposes. In abstracting individuals from their cultural and historical settings, in claiming neutrality between alternative conceptions of the good, in holding the state to the minimal task of securing an institutional framework of equal access and procedural justice, liberalism cannot help but claim universality.

To understand present-day liberalism, a rough sketch of its development is necessary. The following sections outline the development of classical (1), revisionist (2) neo-(3) and contemporary (4) liberal thought. This division, it bears reminding, is more heuristic than historical.
1. Classical Liberalism

As a doctrine and political program, liberalism began, in seventeenth-century England, as a limited appeal for religious liberties, toleration, constitutional guarantees, and political rights. By century's end, it had substantially achieved several of its fundamental political objectives: right of opposition, rule of law, and separation of powers. But this success, rather than deprive it of motive, freed liberal thought to pursue further freedom struggles.

As already noted, the political, social, and economic aspects of classical liberalism are related. As a socio-political program, classical liberalism set itself against the notion of social design—indeed, against all external moral values. For classical liberals, the form of society had to be the outcome of interactive processes open to all. And since process 'functions' only when free, the state, classical liberals argued, had to avoid interfering in social life beyond what was necessary to maintain unhindered access to, and to safeguard the procedural integrity of, social processes.

For classical liberals, the marketplace stood as the exemplar of free interactive processes. Led by Ricardo and Adam Smith, eighteenth-century English liberal (also called 'classical') economists preached the virtues of self-regulating monopoly-free markets, the virtues of freedom of contract, of the rule of law, and of voluntarism more generally. They argued that, since the 'invisible hand' of the exchange system aligned public good with self-regarding activities, there is little for government to do, beyond preserving law and order, protecting private property, maintaining the value of money, and enforcing contracts.

Acting on these convictions, classical liberals emphasized the negative aspect of liberty: freedom from government. Negative liberty is concerned with the area in which individuals should be free unimpededly to pursue their own self-directed interests. Considering the intrinsic value of each, all are entitled to an equal freedom to pursue such interests, consistently with a similar freedom for all. To secure such freedom, all the state has to do is to maintain the procedural integrity of social intercourse, while itself remaining neutral between different substantive conceptions of the good.

Understood this way, classical liberal equality came to mean formal procedural parity, guaranteed by rules of social life allowing actors equal opportunity to pursue self-determined versions of the good. The distinction between freedom to do something and ability to do it, characteristic of classical liberal thought, excluded any more substantive a
view of equality. For classical liberals, then, freedom meant the absence of coercion, not
the ability to fulfil needs or to realize desires.

This understanding of freedom led classical liberals to emphasize civil and
political liberties at the expense of economic equality or welfare provision. One
consequence of that has been the belief that, whereas market-based wealth distribution
became inherently just, whereas state-sponsored redistribution stood in need of special
justification.

Although the teachings of classical economists had enormous influence, they
initially lacked a secure philosophical foundation. Clearly, they were already based on the
image of man as abstract, rational, autonomous, self-serving, responsible chooser. But it
is to the nineteenth-century English Utilitarians that we owe the first well-articulated
liberal philosophical program. Uniting for the first time the political and economic
strands of liberal thought, these Philosophical Radicals (as Utilitarians, among them
Bentham and James Mill, came to be known) combined the hedonistic calculus and the
equality principle to advocate 'the greatest good of the greatest number.' As much in law
as in politics, they advocated a maximum of choice and liberty for all, consistently with
general utilitarian principles.

2. Revisionist Liberalism

As a self-consciously rational theory, liberalism has constantly striven to respond
to challengers, now purging discredited elements of its intellectual equipment, now
bolstering its own moral foundation. So, when both the image of man as abstract,
rational, autonomous, self-serving, responsible chooser and the understanding of
freedom that this image entailed came in for some particularly harsh leftist criticism in
the nineteenth-century, liberal thought responded. Critics of liberalism (mainly Marxists)
had emphasized the connectedness of man and the communal nature of social life. Man,
they said, exists in society. His life is the product of group interaction, institutions, and
cultural influences. He realizes himself only by participating in social life. To participate,
he requires more than a pledge of non-interference: he needs positive resources with
which to engage in communal life. These resources are the product of educational,
social, political, and economic influences. No doctrine or political program is moral that
ignores those influences or excludes those resources from the field of socio-political
contestation.
Liberals responded differently to this criticism. Some, like Herbert Spencer, clung to the image of rationalistic, individualistic man, sticking by non-intervention and the free-market. Others, like T. H. Green and John Maynard Keynes, accepted the gist of the criticism, and sought to re-orient their theory and practice towards a more positive ideal of liberty. Influenced no doubt by the severe 1930's social and economic dislocation (which they considered chargeable to laissez-faire), theirs now became an image of man as social being, in constant need for self-development and re-incorporation. Increasingly less concerned with impediments placed by state officials on individual freedom, and more and more so with giving people the means with which to carry out their life plans, these 'revisionist' liberals rejected the idea of self-correcting markets, and instead called for the state to take direct responsibility of the general interest. Invoking collectivist means in aid of individuals and disadvantaged groups, they made short work of the idols of classical liberalism—economic freedom, absolute property rights, and inviolable contracts. And so if the Spencers' was the Nightwatchman State, theirs now became the Welfare State.

On the moral front, twentieth-century liberalism moved steadily away from its nineteenth-century utilitarian precepts, towards a more explicitly ethical conception of equality based on a theory of justice. Of the many contributions made in this direction, Rawls's *A Theory of Justice* has probably had the most influence. Kantian in his insistence on the inviolability and separateness of individuals, Rawls used the contractarian method to ask individuals ignorant both of their natural endowments and of their social circumstance, to define principles of social and economic organization by which they were willing to live in society. True to his liberalism, he required that they never sacrifice liberty except for the sake of preserving liberty. In answer, Rawls claimed that in addition to civil and political liberties, rational individuals, reasoning that they might turn out to be the least advantaged in society, would choose a redistributive rule that would allow such inequality as would most benefit the least advantaged. This, he called the 'difference principle.' Against Utilitarians, Rawls maintained that the general interest is irreducible to an aggregate of individual preferences. (The only apparent concession he made to utilitarianism, the difference principle, Rawls has justified by subtle appeal to somewhat vague notions of fairness.) Against conservatives, Rawls claimed neutrality between different ways of life. In a Rawlsian world, the state, rather than favour a single

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19 See Rawls (1971).
conception of the good, has only to promote basic conditions of wellbeing: freedom, equal opportunity, and self-respect.

3. Neo-liberalism

Despite his influence, Rawls never stamped out opposition: like Keynesianism and welfare economics had once suppressed but never extirpated classical liberalism, Rawls' *Theory of Justice* continued to share the ideological field with the descendants of Herbert Spencer. For long marginal and considered reactionary, Spencer's views had nevertheless survived in the writings of philosophers like Robert Nozick and the scholarship of free-market enthusiasts like Milton Friedman and Frederick von Hayek. Neither epigones nor exegetes, these scholars produced regular and sometimes original screeds, decrying increased government as a threat to liberty. Ineffective at first, their work, eventually picked up by politicians frustrated with sluggish economic growth in the post-1973 era, championed a theory of political economy that continues to dominate public policy thinking as no other theory has done since the Second World War (except, perhaps, Keynesian economics, which it displaced).

'Neo-liberalism' (or 'libertarianism', 'supply-side economics', 'monetarism', 'new classical economics', as it is variously called) is ultimately a revival of classical liberalism; indeed, there is little agreement on when it decisively outgrew its parent (although Von Hayek's *The Road to Serfdom* is widely acknowledged as an important milestone). Neo-liberalism teaches that economic growth is quickest when the movement of goods, services and capital, is unhindered—and that growth therefore lies in leaving private initiative the most freedom consistent with the minimalist state, protector of the value of money, guarantor of property rights, and enforcer of contracts. Typically, this translates into policy prescriptions designed to foster entrepreneurialism and investment—including trade liberalization, wholesale privatisation, lifting of capital controls, promotion of private investment (domestic and foreign), and generally, building down the state's regulatory apparatus. Several of these prescriptions were first advocated by classical liberals. So, what justifies the creation of a new 'ism'?


21 According to Rittich, 'the central element of neoliberal development theory is that there is an identifiable set of 'best practices,' consisting of strategies, laws, institutions and policies, which constitute the optimal route to economic development and prosperity
Ultimately, the difference between classical and neo-liberalism is ultimately one of degree: when belief in markets hardens; when market transactions dwarf by huge multiples the actual production of goods and services; when finance capitalism rules; when prisons and schools and every social and material institution in between (railroads, highways, bridges, electricity grids, etc.) are said to be best left to the private sector; when public expenditure on social services is reduced as a matter of public policy; when an economic logic fundamentally based on competition and efficiency is clearly distinguished from a social logic governed by rules of fairness; when ‘individual responsibility’ replaces ‘public good’ or ‘community’ as the basic referent in the political program of a self-styled liberal—, then one speaks of ‘neo-liberalism.’

4. Modern Liberalism(s)

Few terms are more contested in contemporary socio-political theory than the term ‘liberal’. Perhaps this is to be expected, considering the long and varied history of liberal thought. The attendant confusion certainly rules out any heuristically useful definition of liberalism that would also be acceptable to all self-styled liberals. Still, it is possible to identify two relatively well-defined socio-political programs now contesting and which are generally applicable to all economies.’ See Rittich (1998) 16. Neo-liberalism plays out differently in developed and developing countries, domestically and internationally. In industrialized countries, it has arbitrated differences between Left and Right: witness New Labour and the rightward Democratic drift during the Clinton years. In the non-industrialized world, it has meant ‘structural adjustment programs,’ policy prescriptions designed and dictated by the Bretton-Woods institutions, under the watchful gaze of the United States and other capital-exporting countries.

22 The need for some stronger terminology begins to assert itself though when the Pentagon creates a futures market involving investors betting small amounts of money on the likelihood of a terror attack or an assassination occurring, supposedly, as a way of harnessing the power of private enterprise for the benefit of national security. The program, called the Futures Markets Applied to Prediction (FutureMAP), created in 2003 by the Pentagon’s Defense Advanced Research Projects Agency (DARPA), was axed at the last minute, following an outcry in Congress. See <http://edition.cnn.com/2003/ALLPOLITICS/07/29/terror.market/index.html>. That it was so much as even proposed is telling.
the direction of modern liberalism. One of these—the neo-liberal program—has been discussed in the section immediately above. The other, the centrist liberal program, is a program committed to a 'softer' version of revisionist liberal policies, a version purged of the 'excessive' welfare politics characteristic of the fifties and sixties.

Unlike neo-liberals, supporters of this centrist liberal program reject that the free operation of the market economy constitutes anything like a complete answer to the challenge of social organization—and instead insist that social control of the workplace and public support for the aged, sick and generally disadvantaged sections of the community are all essential complements to an economy fundamentally based on private ownership of the means of production. In a sense, then, centrist liberals stand midway between neo- and revisionist liberals. Like the former, they would all but exclude government from the cycle of production. And like the latter, they are committed to tax-and-transfer programs designed to help the disadvantaged help themselves in a marketplace based on capitalist relations of production and more generally in a society whose system of credit and reward is fundamentally based on individual responsibility and personal merit.

In a sense, too, the differences between centrist and neo-liberal programs are ultimately also differences of degree—the degree to which the marketplace ought to be the measure of value and the extent to which it should serve as the mechanism of social distribution of money, power, and recognition. Admittedly, the differences in this case are considerable, when compared for instance to differences between the classical and the neo-liberal programs. But as long as two political programs share a fundamental commitment to the same social organization of the relations of production, their differences, however pronounced on individual issues, remain quantative.

This is perhaps to be expected in the case of political programs that continue to contest a single epithet. But expected or not, the overlap between programs complicates analysis significantly, leaving several analytical categories capable of accounting for a single social phenomenon. Of course this is no reason to abort categorisation altogether; but the observation does serve as a warning against expecting an explanatory account in which individual social phenomena fit one category of analysis, and fit this category perfectly as well as exclusively.

In contest both among themselves and with other (less influential) political programs, each of the two liberals programs described above leads and lags by turns,
depending on context and circumstance. For instance, neo-liberalism may be the gospel of Treasury officials; but its policy dictates encounter fierce resistance—including in capital-exporting countries—both from the traditional Left and from a civil society mainstream displaying clear centrist liberal commitments. Context-dependent and invariably localized, the outcome of the constant skirmishes between these rival liberal programs is never conclusive. Neither is allowed total victory. After rhetoric and hyperbole have died down, a compromise is always worked out—pragmatically, piecemeal, ad hoc, always aiming for the most that can be hoped for, never indulging idealist fantasies, never acknowledging an immutable conception of the good—all in the best liberal tradition.

In what follows, the terms ‘neo-liberalism' and ‘centrist liberalism' (and their derivates) are used in their respective senses above. ‘Liberal,' on the other hand, when used without qualifiers, or when qualified by ‘modern,' is meant to include both those programs.

V. Arbitration, Neo-Liberalism, and Inter-Award Conflict

Discussion will now attempt to show how modern arbitration stands mainly as the expression of neo-liberal commitments in the field of international adjudication: how it internalizes the neo-liberal image of the individual, neo-liberal priorities, neo-liberal biases, and neo-liberal concerns (all of which have been previously discussed in the sections on centrist and neo-liberal programs). The word ‘mainly' in the foregoing sentence serves the important function of signalling two implications of the overlap and the tension between competing liberal programs—namely, that some of the arbitral trends outlined below will inevitably appear to fit more than one such program, while others will seem like the product of a compromise between those programs.

But if so, would not the use of the word ‘liberal’ throughout have been sounder? No, because to do so would suppress a tension within arbitral doctrine that is best brought out by positing a primary and a secondary programmatic influence.' In arbitration, this primary-secondary relation of influence varies depending on context; but as discussion will now attempt to show, on balance, neo-liberalism represents the greater influence—which is why the hypothesis above posits it as the primary programmatic influence on arbitral doctrine. The reader may disagree with this particular assessment
and still accept the analytic framework being proposed—which is what ultimately matters most.\textsuperscript{23}

Methodologically, sweeping socio-legal claims like the one proposed above are extremely difficult to prove, not least since they admit of no direct evidence—only of suggestive correlations. As already noted, the text below offers two such correlations. The first, broad-brush and general in its import, highlights the similitude between central tenets of liberal thought and central features of modern arbitration’s doctrinal, institutional, and scholarly arrangements (A). The second, more precise and conflict specific, underlines the relationship between neo-liberal commitments and the general scholarly hostility to extra-contractual concentration initiatives (B). Some final thoughts on the subject will then follow (C).

A. Neo-liberalism & Modern Arbitration

This section examines, first, a close correspondence between modern arbitral canons and the tenets of neo-liberal thought (1), and second, an uncanny congruence between, on the one hand, the division separating the schools of thought now contesting arbitral scholarship, and on the other, the chasm separating competing modern liberal programs (2). Exhaustiveness in neither case is necessary or attempted: basic themes, guiding ideas, and general trends, are what matters. Proof in both cases takes the form of an almost aphoristic restatement of doctrines and principles either self-evident or previously examined in considerable detail.

1. The Case from Conceptual Correlation I: The Basic Tenets

The fundamental assumptions characterising mainstream arbitral scholarship need only to be restated for their ideological identity to show through.

First, arbitration is above all voluntary. Parties freely agree to refer differences to third-party determination. They do so by contract. Voluntarist institutions (arbitral organizations) help them accomplish what they alone can only imperfectly achieve. The state is in principle excluded, except to the extent necessary to safeguard due-process fairness and to maintain enforcement-directed efficiency.

\textsuperscript{23} This is especially the case in the present context since, as discussion will presently attempt to demonstrate, centrist and neo-liberal positions on extra-contractual forum concentration initiatives in arbitration are not likely to differ. See discussion on page 187.
Second, the core of arbitration doctrine is the appropriate relationship between parties and the state, i.e., the extent to which arbitration users are (or should be) free from state power. By distinguishing, on the one hand, a private sphere in which laissez-faire rules, and on the other, a more restricted public domain in which state ‘intervention’ is acceptable, mainstream arbitral scholarship either sets the individual before society, or defines the social in terms of the individual.

Third, public regulation obeys no fixed rules. Theoretical models are doctrinaire, constricting, and dogmatic. There is merely a simple pragmatically rebuttable presumption in favour of auto-regulation.

Fourth, individual privilege resides in arbitration’s foremost legal principle: party autonomy. Party autonomy assumes rational, autonomous, self-serving, responsible choosers, whose formal freedom of action is essentially sacrosanct. Parties are free to choose. If they choose wisely, they prove themselves worthy of their freedom; otherwise, they assume responsibility.

Fifth, arbitration is a neutral procedure devoid of substantive content. Arbitration merely helps parties realize their own self-determined visions of the good. Procedurally, arbitration provides a judicial framework equally accessible to all, and biased against none. Substantively, arbitration facilitates the application of neutral normative principles, either independently of any national law (neo-liberalism), or as a check on ‘ideologically suspect’ choice-of-law provisions (centrist liberalism).24

Sixth, as a process that neither assumes specific cultural settings nor privileges specific conceptions of the good, arbitration works everywhere: in agrarian Kenya and semi-industrialised Chile; in once-socialist Russia and traditionalist-industrialized Japan; in social-democratic Sweden and Thatcherite Britain. Arbitration’s neutrality is the warrant of its universality.

Seventh, arbitration is essential to trade, which is essential to individual and communal ‘opulence.’ Like free trade in economics, so modern arbitration in dispute-settlement stands as the locus of identity between private and public interest.

24 In technical terms, arbitration is procedurally ‘delocalised’ and substantively ‘internationalised.’ For a condensed account of the relationship between these two doctrines, on the one hand, and arbitration’s ideological commitments, on the other, see note 30 on page 180.
Finally, arbitration is a service industry (market), whose benefits accrue, not just to its users, but also to states that enact friendly legislation (neo- and centrist liberals disagree how friendly is friendly enough, as discussed below), and to individuals who acquire the requisite technical equipment.25

The whole image is one of a neutral adjudicative forum attached to an equally neutral regime of autonomous coercion-free action that is the marketplace. Central to this image are the characteristic liberal conceptual dichotomies. For instance, there is the supposition that dispute-settlement, far from being the state’s preserve, is properly that of the individual. Then, there is the assumption that individuals, once emancipated from state control, become largely self-accountable for the management and outcome of the process, with the state intervening only to enhance procedural efficiency and to maintain formal fairness. This in turn rests on the view of individuals as rational, autonomous, self-regarding, responsible choosers, whose self-realisation requires an essentially negative posture of non-intervention by the state. Any substantive notion of justice (think of the exclusion of de novo judicial review) or of equality (consider how legal doctrine generally, and arbitral doctrine particularly, abstract from actual social relationship the disembodied figure of ‘claimant’ and ‘respondent,’ who, regardless of discrepancy in economic power, have to be treated ‘equally’) is excluded; only due-process judicial oversight is consistent with principle.26 The state should act to stamp out violations of certain narrowly conceived formal procedural rights, but otherwise must fight shy of attempting to instil positive substantive entitlement. Another assumption central to the same image is that maximising freedom-of-contract in dispute-settlement

25 On the economic motive behind various states’ frenzied de-regulatory effort, see Park (1983) 24 (noting that ‘the commercial motive behind the trend toward greater arbitral autonomy in modern arbitration law [is] to increase a country’s attractiveness as a situs for arbitral proceedings). For examples of official recognition of this fact, see 392 Parl. Deb., H.L. (5th ser.) 89–95 (1978) (per Lord Hacking); Ibid., at col. 99 (per Lord Cullen of Ashborne); 398 Par. Deb., H.L. (5th ser.) 536 (per Lord Lloyd of Kilgerran) (1979) (Eng.); SAC (1989) 66 (para. 1.7) (Scot.); Law Reform Commission of Hong Kong (1981) 6 (esp. para. 6.5). See also Berger (1993b) 1. For the differences over the appropriate extent of public regulation of the arbitral process, see supra note 24.

26 But for a condensed discussion of the so-called ‘Second Look’ doctrine in American law, see note 28 on page 177.
benefits commerce particularly and society generally. This assumption of providential coincidence between public and private interest rests partly on the supposition that all would be well if the dispute-settlement ‘market’ were fully liberalized, partly on the assumption that victims of adjudicative *laissez-faire* have only themselves to blame, that their ‘elimination’ in some social Darwinian sense is both inevitable and overall beneficial.

Of course, one is free to accept or to reject the vision of the individual and of social life implicit in these commitments. But one must at least recognize that these commitments are characteristic of a certain mode of thought and not just the dictate of some immanent institutional logic or value-free technical necessity.

2. The Case from Conceptual Correlation II: The Schools of Thought

This section claims that the doctrinal positions contesting contemporary arbitral scholarship on the fundamental question of the relationship between state and process are nothing but the localized doctrinal expressions of the neo-/centrist liberal political divide already outlined. Discount appeals to technocratic efficiency and arguments from party expectations (both of which discussion has shown to be inconclusive), and these doctrinal positions may be fundamentally stated as follows.

On the one hand, there is arbitration as an a-national and wholly voluntary dispute-settlement mechanism, for whose outcomes only the parties are responsible, and with whose functioning states interfere only to the extent necessary to validate the process’s formal neutrality and minimal efficiency: mainly, by upholding arbitration agreements, maintaining due-process oversight, and enforcing awards. On this view, arbitration is a strictly private process animated primarily by the parties’ will, whose only purpose lies in settling the parties’ immediate dispute.

Such radically exclusive and dispute-resolution-oriented model of adjudication assumes that the state must never do for individuals what they could do for themselves. Typically, people who subscribe to this model maintain, first, that dispute-settlement, far from being the state’s preserve, should devolve unto individuals; second, that in consideration for their empowerment, individuals should assume total responsibility for their chosen dispute-settlement mechanism; and third, that maximising contractual freedom in dispute-settlement benefits commerce particularly, and society generally. A fundamental tenet of this credo is that, without totally forfeiting state support,
arbitration must be ‘freed’ from the state’s ‘shackles,’ ideally, to the point where forum-choice becomes an irrelevance.\textsuperscript{27}

On the other hand, there are those who advocate a voluntary adjudicative process, to whose efficiency the state remains purposefully committed, and for whose functioning it retains meaningful responsibility, which responsibility it discharges within its territory by installing appropriate procedural, and where necessary even quasi-substantive safeguards.\textsuperscript{28} On this view, arbitration, while in many ways private, so

\textsuperscript{27} See, e.g., Fouchard (1998); (1989); Paulsson (1981); (1983); (1986); Lalive (1976).

\textsuperscript{28} For an example of a ‘quasi-substantive’ safeguard, see Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). The technical question before the United States Supreme Court in Mitsubishi was whether anti-trust claims arising out of, or in relation to, an international contract were arbitrable. The technical answer the Court gave (5-3) was that those disputes are indeed arbitrable. This was so despite the considerable public significance of anti-trust laws, despite the treble measures of damages that those laws sometimes warrant, and despite the complexity of the issues to which they often give rise. \textit{Ibid.}, at 628. To reach that decision, the court reasoned that, ‘If [international tribunals] are to take a central place in the international legal order, national courts will need to “shake off the old judicial hostility to arbitration,” and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.’ \textit{Ibid.}, at 638 (citations omitted). The court, however, added, significantly, ‘Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The [New York] Convention reserves to each signatory country the right to refuse enforcement of an award where the “recognition or enforcement of the award would be contrary to the public policy of that country.” \textit{Ibid.} (citations omitted). At first, this seems like a pragmatic and judicious compromise between, on the one hand, the importance of upholding the deterrent and remedial objectives of American anti-trust legislation, and on the other, what the court called ‘concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes [all of
which] require that we enforce the parties' agreement', ibid., at 629; certainly, this is how most standard arbitration treatises present the decision. See, e.g., Craig et al. (2000) 67; Redfern & Hunter (1999) 150. But this reading of the case overlooks several difficulties with the majority's reasoning, and as a result misses the theoretical significance of the decision. First, there is simply no warrant for the court's assumption in Mitsubishi that enforcement proceedings would in fact take place in the United States; indeed, the respondent on the anti-trust claims in that instance was Mitsubishi Motors Corporation, a Tokyo-based Japanese corporation that originated in a joint venture between Chrysler International, S.A., a Swiss corporation registered in Geneva, and Mitsubishi Heavy Industries, Inc., another Japanese corporation, also headquartered in Tokyo, Japan. Against this it might be argued that, in Mitsubishi, the party asserting anti-trust violations was itself a Puerto Rican Corporation, and so possibly amenable to the restraining powers of United States courts. But then, to restrain foreign enforcement proceedings United States courts presumably must first review the award—and it is not immediately clear on what grounds those courts might assert the right to review a Japanese award (Japan was the seat of arbitration in Mitsubishi) whose enforcement is being sought (by hypothesis) outside of the United States. In any event, the holding in Mitsubishi is not limited to arbitrations involving parties all of whom are amenable to the restraining powers of United State courts. Second, in justifying its finding that '[t]here is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism [for the resolution of anti-trust claims,' the court said, 'To be sure, the international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate their statutory dictates. The tribunal, however, is bound to effectuate the intentions of the parties. Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim. And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.' Ibid., at 636-37. But such inferential reasoning is problematic. The agreement in Mitsubishi, which, incidentally, made no express reference to anti-trust claims, provided that, 'All disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to ... this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the
rules and regulations of the Japan Commercial Arbitration Association,' *Ibid.*, at 617. Suppose this agreement also contained an equally extensive applicable law clause in favour of Japanese law (the report does not indicate whether the agreement in *Mitsubishi* contained a choice-of-law clause): is it clear that arbitrators would then be duty-bound to apply American anti-trust legislation to the facts before them? In any event, could it with any certainty then be said (as the court in *Mitsubishi* seemed to say) that applying such legislation would 'effectuate the intentions of the parties'? The answer to both these questions seems at best uncertain. Third, to pre-empt the suggestion that it was prescribing a form of compulsory *de novo judicial review* at the enforcement stage, the court said, 'While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.' *Ibid.*, at 638 (citations omitted). But if this means what it actually says, if it means that United States courts will not control the manner in which American anti-trust legislation is applied, then it would seem that the deterrent and remedial objectives of that legislation will be jeopardized. To accept this, you need not even assume that arbitration is an inappropriate forum in which to decide anti-trust dispute. But of course if you do accept it (and therefore agree with the minority opinion, which says, 'Like any other mechanism for resolving controversies, international arbitration will only succeed if it is realistically limited to tasks it is capable of performing well - the prompt and inexpensive resolution of essentially contractual disputes between commercial partners. As for matters involving the political passions and the fundamental interests of nations, even the multilateral convention adopted under the auspices of the United Nations recognizes that private international arbitration is incapable of achieving satisfactory results') then the majority opinion becomes the more doubtful. *Ibid.*, at 665 (citations omitted). Now, if in addition you also accept Oppen's remarks on arbitrators' anti-systematic bias, then you cannot but reject the majority's holding. On this anti-systemic bias, see discussion beginning on page 100. On the other hand, if *Mitsubishi* were eventually to be interpreted as allowing, or even requiring, United States courts to control the correct application of American antitrust legislation, then the review process would prove to be anything but minimal. As between these alternative review approaches, there appears to be no realistic middle ground. *Mitsubishi* is a case in which the public and private are inextricably intertwined, a case which, when properly understood, stands as indictment of the public/private distinction underlying the modern conception of
influences social life that it invites meaningful public oversight. Without fundamentally disagreeing with the first group of scholars, subscribers to this slightly more community-sensitive conception of arbitration consider that total laissez-faire in dispute-settlement is harmful, and regard the centrality of the judicial function to the socio-political conception of the modern state as justification enough for imposing meaningful public control on the arbitral process. On this view, forum law assists and regulates. 29

It is clear that the doctrinal divide posited above is nothing but the localised expression of a broader ideological contestation between neo- and centrist currents in modern liberal thought. 30

arbitration, a distinction whose roots are clearly traceable to liberal theory. For one of the clearest statements of this public/private distinction in arbitration, see note 99 on page 138. In political theory, the public/private distinction, which finds its modern genesis in Locke, specifically, in his Second Treatise of Civil Government [1690], arguably goes all the way back to classical antiquity, specifically, to Plato's Crito and The Politics of Aristotle. Evidently, Marx has been the distinction's most famous critic, especially, in his On the Jewish Question. See Marx (1978 [1843/1844]) 26. For a masterly review of the public/private distinction in political thought, see generally Bobbio (1989). For critique of the public/private distinction in modern (mainly American) legal thought, see generally Fisher et al. (1993), especially chapter 4. Most recently, the distinction has been at the critical core of feminist international legal scholarship. See, e.g., Charslworth (1995); (1992). On the development of the doctrine of arbitrability, see note 34 on page 10.


30 This political divide plays out subtly but decisively in debates over the ‘delocalisation’ and over the ‘internationalization’ of modern international arbitration. Delocalisation essentially means two things. It means that arbitrators holding hearings in national territories do not simply obey the dictates of the local laws but apply established procedural practices reflecting the needs of transnational actors in a global economy. This aspect of the principle is not seriously disputed. More important is another understanding of delocalisation which maintains that forum choice should not be allowed more directly to influence outcome. From this, two implications, both strongly contested,
are sometimes assumed to follow. The first is that the binding force of an award need not necessarily derive from the forum law, and so an arbitration that is set aside in its country of origin remains enforceable elsewhere. For decisions in favour of this position, see *Omnium de Traitement et de Valorisation (OTV) (France) v. Hilmarton (UK)* (Cass. Civ., 3 March 1994), repr'd (1995) 20 Yearbook 663–665; *Chronalloy Aeroservices v. Arab Republic of Egypt*, 936 F.Supp. 907, 1996 (D.D.C. 1996). For decisions against it, see *Baker Marine (Nig.) Ltd v. Chevron (Nig.) Ltd*, 191 F.3d 194 (2d Cir. 1999); *Spier v. Calzaturificio Tecnica, S.p.A.*, 71 F.Supp. 2d 279. For scholarly support of the first position, see Fouchard (1998); Gaillard (1999); Paulsson (1981); (1983); (1986b). For scholarly critique of the same, see Goode (2001); Park (1988) 628–29; (1989) 647; Reisman (1992) 116. The arguments on each side are part conceptual (forum choice is fortuitous, and therefore forum courts have no review priority over enforcement courts v. awards go out in the world carrying the nationality of the forum state, and therefore forum courts undoubtedly enjoy such priority), part practical (arbitration only realizes its pledge of neutrality fully if it protects parties from the not uncommon prejudice of forum courts in favour of nationals v. the public interest in legal certainty requires, and common fairness dictates, that a ‘creditor’ on an award which has been set aside by the forum courts should not be able to harass his ‘debtor,’ by bringing enforcement proceedings in as many countries as the latter has assets). On their respective assumptions, both these positions seem reasonable. In the one case, state influence is assumed to be pernicious, and therefore to be severely circumscribed; in the other, the assumption is that such influence can be positive, and is indeed at times necessary. Two decades after the debate started, both sides remain entrenched in their position. Every argument in the book (arguments from implicit consent, from party expectation, from the nature of arbitral justice, from the interest of trade, etc.) has been tried and found to be inconclusive—in fact was, pressed in support of both positions. Now, could it just be that the disagreement goes beyond laws, rules, and principles, fundamentally to reflect substantially different conceptions of the appropriate relation between state and process, conceptions themselves predicated on different basic assumptions regarding the role of the state in social life? If so, then the perspective that this dissertation advocates, by putting the debate in its proper context, might help increase our insight into the nature of those differences. The same goes for the second (equally contested) consequences derived from the proposition that forum choice must not influence outcome. This is that the forum state may elect to provide no avenue of recourse against arbitral awards
rendered in its territory. For this view, see Paulsson (1981); (1983); (1986b). See also note 14 on page 27, for reference to Belgian legislation that used to so restrict judicial recourse against Belgian awards rendered between non-nationals. For the contrary view—that forum states have an obligation under the New York Convention to serve as ‘primary’ control jurisdictions, see Goode (2001) 19; Park (1988) 628–29; (1989) 647; Reisman (1992) 116. The arguments in favour are (a) that forum choice is typically fortuitous, and so the award, to the extent that it only involves non-nationals, has effectively nothing to do with the forum; (b) that the New York convention does not obligate forum states to provide avenues of judicial recourse against awards rendered on their territory; and (c) that strictly interpreted, the convention recognizes non-national awards. The arguments against are, (a) whatever the textual analysis of the convention suggests, the reciprocal enforcement mechanism that the convention enshrines assumes both primary (forum) and secondary (enforcement) control jurisdictions, with the latter systematically deferring to the former, in the interests of legal certainty and of equity; and (b) considering the invisible trade benefits that accrue to forum states from hosting proceedings, they may reasonably be required to perform those primary control functions. Once again, on their respective assumptions (that the less control states exercise over international arbitration the better all round state influence in arbitration is not all bad, and should not be diluted beyond a certain point), both positions are reasonable. No doubt proponents of each position can appreciate the force of the others’ arguments. Nevertheless, a dozen years after the debate began, neither has been dislodged from his position. Arguably, this is because the starting points, especially in the anti-statist position, are simply immune to logical or prudential contradiction. Once again, this is the hallmark of an ideological position. Internationalization, on the other hand, addresses the dual question whether, and if so to what extent, (a) parties may elect to have their differences settled by rules transcending national legal systems, and (b) arbitrators may decide cases by reference to those rules (variously called lex mercatoria, transnational rules, trade usages, general principles of law, international law principles). There are two sides to this debate. One, the North-South debate, has already been considered. See discussion beginning on page 162. The other side, a ‘North-North’ debate (since it has so far mainly involved northern scholars), concerns mainly the extent to which party may choose, and arbitrators may make use of, transnational rules to decide differences. At one extreme stand those who argue that arbitrators may use transnational rules regardless of express party consent and of choice of law of provision, indeed may do so independently of reference to any legal
B. Neo-liberalism and Inter-Award Conflict: The Heart of the Matter

Against this background, let us now assume, first, the neo-liberal conception of the individual as rational autonomous self-regarding being. Let us then factor in the rational-predictability requirement of the liberal economic system, capitalism. The result is contract as the principal instrument of inter-personal engagement in liberal society. Assume, next, that neo-liberalism has indeed adopted arbitration as its favoured mode of dispute settlement. The result is that arbitration has had to be ‘contractualized’ (reference to the ex ante clause) and the risk of inter-award conflict was exacerbated. Assume, third, that neo-liberal legislation was responsible both for sacralizing arbitration agreements and for promoting a due-process public-oversight ethic. This is how neo-liberalism has

system. At the other extreme stand those who argue that a choice of law provision pointing to such rules exclusively is ineffective, and pointing to them complementarily is largely redundant. Here, too, the arguments and counter-arguments are part conceptual (transnational rules lack the organizational structure traditionally associable with a proper legal order, namely, the presence of general rules capable of generating lower-level prescriptions), general principles of commercial law are everyday becoming more coherent, and so more capable of generating specific prescriptions), part practical (transnational rules are undefined and arguably indefinable), awards based on transnational rules are no less definite than awards based on national laws; indefiniteness in arbitration is due to the absence of a review hierarchy.) For a conspectus of the competing positions, see Gaillard & Savage (1999) 807-813. Here, too, differences on whether, and if so to what extent, arbitrators may apply transnational rules absent express party authority, have remained substantially unresolved two decades later. And here, too, arguments from implicit consent, party expectations, the nature of arbitral justice, the interest of trade, etc., have been pressed in support of both positions—also to no avail. And so, once again, the questions presents itself: could it just be that those differences reflect different basic assumptions about the role of the state in social life. If so, then, once more, the perspective informing this dissertation might help move the debate forward.

rendered this once substantially mitigable risk mitigable no longer. Recall, fourth, how the ex ante clause has been basically responsible for the ‘institutionalization’ of the arbitral process. This is why contractual initiative will not avert inter-award conflict.

Nothing so far is new—all follows from the claim of ideological identity. But from here to showing that ideology excludes extra-contractual initiatives, new arguments follow. The claim here is that characteristic neo-liberal notions of accountability, traditional neo-liberal opposition to social engineering, and typical neo-liberal understanding of freedom, all account for the hostility to extra-contractual concentration initiatives.

Accepting that modern arbitration internalizes a neo-liberal ethic yields insight into the limitations of the institution. Chapters 3 and 4 each applied a five-part test to determine the propriety of institutional and statutory concentration initiatives. Only arguments from ideology could explain why each part of that test seemed relevant in the first place, and why they all ultimately failed.

Take, first, the argument from implication. Does choice of rules amount to acceptance of rule-sanctioned concentration? Or is it rather that rule-sanctioned concentration is unprincipled because inconsonant with party expectation? But how does one discover expectation in the first place? And why does expectation matter anyway? No purely technical argument could settle these questions. But ideology could. Ideology explains the obsession to justify preference in terms of will and expectation. The neo-liberal conception of the individual as rational, autonomous, self-regarding being justifies it. Neo-liberal freedom-based responsibility justifies it. Ideology also explains why the question is never asked whether, regardless of private choice, public action is justified. Neo-liberal suspicion of public initiative explains it. Neo-liberal hostility to social engineering explains it. Neo-liberal understanding of freedom as non-interference explains it.

Take, second, the argument from jurisdictional propriety. Is giving arbitrators the decision on concentration more fitting than assigning it to judges, considering how the alternative subverts the parties’ desire to opt out of the court system? Or is it that arbitrators are unsuited to the task because, a limited conception of international public order aside, they are usually insufficiently sensitive to considerations transcending the immediate interests of those before them? But are arbitrators insufficiently sensitive to
such considerations? If so, why? Is it because arbitration itself aims 'at obtaining a just decision for the instant case'? Does arbitration in fact aim at no more than that?

Again, only arguments from ideology could settle such questions. Neo-liberal understanding of the 'social' in terms of the 'individual,' neo-liberal anti-systematism, neo-liberal hostility to social engineering, all account for the predominance of a predominantly dispute-settlement model of adjudication that, within the limits of narrowly conceived international public order, largely excludes considerations transcending the case at hand.

Take, third, the argument from organizational structure. Does arbitration’s co-archical institutional setting preclude effective institutional concentration? Is arbitration’s co-archical institutional environment mere happenstance? Anyway, is it rationalisable? If it is not, why not? Once again, no formal argument will settle these questions.

As it stands, arbitration’s anarchic architecture precludes developing or enforcing public agendas. But this architecture is neither fateful nor fortuitous: not fateful because non-sectoral institutional hierarchies are conceivable; and not fortuitous because arguably the expression of a laissez-faire ideology that has 'providers' entering the 'free' 'market' of dispute-settlement 'services' and 'consumers' distributing patronage through 'choice' of arbitration clauses.

Of course one could grant as much and yet still object that forum concentration across a rationalized institutional hierarchy would create inefficiencies as well as undermine the parties' substantial rights, e.g., their right to have their arbitrations conducted according to rules of their choice. But, as discussion has shown, arguments from efficiency and from substantial rights, when pushed far enough, either collapse or reveal positions indefensible except on political grounds.

Take, for instance, the 'substantial rights' argument. Two considerations could justify calling a right 'substantial': the right's centrality to either the functioning or to the self-image of the system in question. The functional consideration plainly does not apply when the right in question rarely empowers in practice. The self-image consideration is purely ideological. From an ideological standpoint, a right is 'substantial' regardless of whether it empowers rarely, imperfectly, or even at all. Party-design of proceedings is central to the self-image of modern arbitration. That is the warrant of its 'substantiality.' If so, then arguments from 'substantiality' are nothing but a deus ex machina arbitrarily introduced to justify unacknowledged ideological preference for individualist self-
reliance. Ideology represents the 'ought' as the 'is'. It does so to avoid having to defend its value-judgements.

The same goes for efficiency. As discussion has already shown, claiming that a measure is inefficient is merely another way of saying that its achievements under the prescribed conditions are not worth its costs. But this, once again, is a value judgement. In actuality, party preferences are highly contingent; and so efficiency arguments alone could not possibly de-legitimate extra-contractual concentration initiatives.

But ideology could. Concentration across a rationalized institutional hierarchy would violate the individualistic ethic of an institution that rejects the subsumption of individual interests into larger communitarian concerns. For a neo-liberal, attempting to analyse efficiency systemically, generalizing and totalizing from large-scale conditions, is simply against principle. Individual preference is what matters. Effective institutional concentration is off simply because it involves the kind of social engineering that arbitration's neo-liberal individualist anti-systematism precludes.

This, then, is why arbitration must aim no higher than 'at obtaining a just decision for the instant case.' It must aim no higher because its dominant self-image is such that it can achieve no more. Within the ideological limitations imposed by this image, the most that arbitral organizations could achieve by way of conflict mitigation, is individually to refer same-party, preferably same-contract (and of course same-rules) related claims to a single tribunal—and even that is ideologically suspect.\footnote{Cf. International Arbitration Rules of the Zurich Chamber of Commerce, art. 14 ('A new dispute between parties which already have an arbitration pending under the International Arbitration Rules may be assigned by the President of the Zurich Chamber of Commerce to the existing Arbitral Tribunal. The Arbitral Tribunal may conduct the arbitrations separately, or consolidate them, partly or altogether.') As is clear, the disputes here need not arise from the same contract.}

\textit{Mutatis mutandis}, substantially the same arguments apply to public concentration initiatives.

C. Some Final Thoughts

This leaves room for three final thoughts. The first concerns the extent to which centrist and neo-liberal programs differ, if at all, in their hostility to extra-contractual
concentration initiatives (1). The second is an attempt to understand the curious combination of hostility to statutory concentration and enthusiasm for the institutional alternative, characteristic of some thinking on the subject (2). The third is a literary theoretic attempt at re-reading the rationale underlying the English Advisory Committee on Arbitration’s condemnation of statutory concentration initiatives, a re-reading intended to bring out the ideological commitments that may have motivated the Committee’s decision on the subject (3).

1. Any difference between Centrist and Neo-liberal Positions on Concentration?

As already noted, modern liberal programs share a larger measure of agreement than setting them up apart might initially let suppose. For instance, both assign arbitration to the private sphere of social life. Neither sanctions state ‘intervention’ beyond narrow due-process oversight and enforcement-directed assistance. Both conceive of arbitration as a creature of contract, and accept that contractual terms are in principle un-revisable. Neither troubles much about the system’s counter-factual assumptions regarding party-control of the process. Both oppose systematism (though neo-liberal opposition is admittedly stronger).33 Both renounce perfectionism. Both look to arbitration to provide an institutional framework of formal neutrality.

On all these grounds, singly or combined, both would resist extra-contractual concentration. Both would disown the interference with contractual relations inherent in effective conflict-averting ex-contractual initiative. They would because committed to resisting strategies that entail substantial revisions of arbitration agreements by means of systemically motivated third-party action. They would because the alternative infringes the freedom canon of an ideology that mostly refuses to distinguish between licence and ability. They would regardless of whether arbitral agreements involve an exercise of actual freedom. Modern liberal individualism, neutrality, anti-systematism, and anti-perfectionism, all would see to it.

2. DAC, Ideology, and a Riddle Resolved

Now, recall how, in Chapter 4, The (English) Departmental Advisory Committee on Arbitration condemned statutory concentration as ‘a negation of party autonomy.’ In fact, the text quoted then left out a passage in which the committee also described

33 See supra note 24, and accompanying text.
institutional concentration as the best hope for a pragmatic consensual resolution to inter-award conflict. Technically, this sounds curious: if choice of forum implies no consent to forum law, then nor should choice of institution imply consent to institutional rules either. Parties who are ignorant of the law are unlikely to show foresight and learning when it comes to the rules. Granted a forum is often designated by third parties or elected for considerations of convenience, but so are institutions often nominated about which neither parties nor their lawyers know the first thing. Sophisticated parties investigate both the procedural law and the institutional rules; the rest investigate neither.

There are two possible answers to this last objection. The first is that, while parties rarely choose forum law expressly, they often specify the applicable institutional rules. This argument looses much weight immediately one concedes that parties often know no more about the rules they 'choose' than they do about the laws they 'elect.' The second is that, whereas parties may designate a forum for technically immaterial reasons, there are few motives, apart from the quality of its rules and the reputation of its administration, for choosing an arbitral institution. As to rule-quality, however, this argument suffers the same deficiency as its predecessor. As to reputation of administrators, it begs the question why the standing of the national judiciary should not also justify forum choice.

If so, then on what grounds welcome institutional concentration and at the same time decry the statutory alternative. No formal argument could justify favouring the former. (If anything, 'Ignorant facti excusat, ignorantia juris neminem excurat' might justify the contrary.) But once again, ideology could. Freedom for neo-liberals is not just any old negative freedom: it is negative freedom from the state, from state actors, and from state

34 See the English Departmental Advisory Committee on Arbitration Law (DAC) (1996) 42 (para. 181). For the DAC's position on statutory concentration, see discussion on page 146.
37 See, e.g., the standard ICC arbitration clause (1998).
38 'Ignorance of fact excuses, ignorance of law excuses none.'
processes. Power exercised by non-state actors (e.g., arbitral organizations) is ideologically non-suspect and, if possible, will attract strategically placed arguments (e.g., arguments from implication) that will seek to underplay the difference between actual and formal freedom, express choice and the implied variety.

3. DAC and Ideology: Re-reading a Text

Finally, the reader might recall that Chapter 4 also examined a report in which the same English law reform committee repudiated statutory consolidation as running against principle. At that time, the text also alluded to an earlier report in which the same committee had given a longer explanation of its hostility to public initiative in this case. This explanation has since been both considered and found wanting. One thing the committee did say in that earlier report, however, is revealing. The committee said:

'It is an axiom of the approach of trading nations with developed arbitration systems that the wishes of the parties should not be overridden except on the grounds of cogent reasons of public policy or public interest. A power to consolidate seems to fall in a different category: it could only be justified on the grounds of convenience.'

Both the paragraph structure and the choice of words are telling. 'It is an axiom of the approach of trading nations with developed arbitration systems that the wishes of the parties should not be overridden except on the grounds of cogent reasons of public policy or public interest.' The committee says so, and instead of engaging in the kind of conflicting-considerations analysis one expects to accompany such a statement, it declares, matter-of-factly, that consolidation is merely 'convenient.' If indicative, this lack of a struggle in which tensions lead to contradictions but then reconciliation proceeds by way of subordinating opposing emphases, this silent denial of any systemic stake in inter-award harmony (beyond touching briefly on the 'attraction' of avoiding

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39 This was DAC's Second Report, published some six years before the Final Report. See DAC (1991).

40 See discussion beginning on page 150.

41 Ibid., at 390. (Emphasis added.)
inconsistent findings), might just suggest that the axiomatic principle was simply rhetorical flourish retrospectively added to buttress a largely foreordained outcome.\[42\]

In any event, if the central argument that this chapter has sought to present is substantially sound, then, the paragraph above might more forthrightly be reworded as follows:

It is an axiom of the approach of trading nations with developed arbitration systems that the wishes of the parties should not be overridden except on grounds of formal equality. A power to consolidate

\[42\] The thought is perhaps relevant that the quote in the text above merely echoes a judicial view that Steyn J, the committee Chairman at this stage, had expressed five years earlier. Immediately before the quote above, the report reads: ‘[I]t must be conceded straightaway that consolidation has the attraction of avoiding inconsistent findings of fact and law in separate but related proceedings. These are important considerations. On the other hand, they ought not to be over emphasised. After all, it is a common feature of commercial life that one dispute is governed by an arbitration clause, while another related dispute is not, thereby inevitably involving concurrent court and arbitration proceedings.’ See DAC (1990) 390. Compare this now with the opinion of Steyn J. (as he then was) in Property Investments (Development) Ltd v Byfield Building Services Ltd (1985) 31 BLR 47 (QB 1985) (‘In my judgment the application is squarely based on the grounds of convenience only and this will never warrant an order under section 1. Justice is an elusive concept in commercial relations but it certainly does not require that the court should deprive a party of his contractual right in relation to an agreed method of dispute resolution on grounds of convenience alone. Much emphasis was placed on the fact that it will not be possible to join a third party in the present dispute. This is, however, a fact of life in a great many international domestic arbitrations, and it has never been held or even suggested that this could be a ground for revocation of an arbitrator’s authority. Plainly, when two parties enter into a commercial contract containing an arbitration clause they know, or ought to know, that in multi-party disputes they will be unable to join other parties. This is a risk of future inconvenience which they assume in the interests of the perceived benefits of arbitration.’) Mr. Justice Steyn says, ‘it has never been held or even suggested that [the impossibility of joining a third-party] could be a ground for revocation of an arbitrator’s authority.’ But see cases cited in note 17, on page 5.
seems to fall in a different category: it could only be justified on substantive grounds.

This leaves the word 'axiom.' An axiom is a 'self-evident proposition, requiring no formal demonstration to prove its truth, but received and assented to as mentioned';

'an indemonstrable first principle ... that has found general acceptance or is thought worthy of common acceptance whether by virtue of a claim to intrinsic merit or on the basis of an appeal to self-evidence.'

By definition incapable of proof, an axiom is neither verifiable nor falsifiable by appeal to higher principle. It stands at the apex of a formal system of inferential logic. An axiom simply is. The same, in social and political thought, is true of ideology. An ideology is a 'systematic scheme of ideas ... regarded as justifying actions, esp[ecially] one that is held implicitly or adopted as a whole and maintained regardless of the course of events.' On this definition, an ideology, too, is neither verifiable nor falsifiable by appeal to higher principle. With adherents, an ideology 'has found general acceptance or is thought worthy of common acceptance whether by virtue of a claim to intrinsic merit or on the basis of an appeal to self-evidence.' Much like an axiom, an ideology simply is. If so, then, reworking the paragraph above once again might more accurately represent the (no doubt unconscious) views of its authors:

It is an ideology of trading nations with developed arbitration systems that the wishes of the parties should not be overridden except on grounds of formal equality. A power to consolidate seems to fall in a different category: it could only be justified on substantive grounds.

Once again, none of this means to condemn the system of thought underlying this position; the aim is simply to prove that system's influence.

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45 See Oxford English Dictionary, supra note 43.(Emphasis added.)
GENERAL CONCLUSION

There are two parts to this conclusion. Part I summarizes such contribution as it fell to this dissertation to make in the debate on inter-award conflict particularly, and on arbitration generally. Part II considers possible reactions to the realization that nothing but imperfect palliatives is possible before the evil of inter-award conflict, and offers some thoughts on modern arbitration, its scholarship and politics.

1. Recapitulation

There were five chapters to this dissertation. Chapter 1 comprised two parts. Part 1 sought to define and refine the common-sense intuition that inter-award conflict is sufficiently undesirable to warrant considering remedial action. Part 2 consisted in a comparative survey of half a dozen concentration measures, in each case analysing their uses, misuses, and the pitfalls they each present. Chapters 2, 3 and 4 each dealt with one of three instruments of social-ordering relevant to arbitration—contract, rules, and statutes, respectively. In each case, the central question was whether the instrument in question could effectively promote inter-award harmony, and if not, whether traditional legal argument could explain why not.

Chapter 2 considered both the potential and the limitations of contract. There were three parts to this enquiry. Part 1 expounded two concentration techniques, in each case emphasizing strengths and weaknesses. Part 2 examined the tension between, on the one hand, the dictates of conflict avoidance, and on the other, commitment to values like efficiency, confidentiality, and party control of arbitrator choice. In each case, the text acknowledged the difficult choices parties had to make and, where relevant, suggested compromises. Part 3 questioned the realism of expecting private initiative effectively to promote inter-award harmony, when in practice most arbitration users—including the most powerful and best advised—far from tailoring procedure to circumstance, generally adopt conflict-insensitive standard institutional clauses, either as part of standard form agreements, or reflexively, at the fag-end of otherwise painstaking commercial negotiations.

Chapter 3, on institutional concentration, consisted in two parts. The first, a review of conflict-avoidance institutional rules, showed that institutions only possessed rule-based authority to conflict-manage claims that satisfy the twin conditions of party identity and common contractual origin. The second, a five-part test into the propriety
of institutional concentration, sought to show that technical argument alone could neither validate nor discredit conflict-averting institutional initiatives.

Part 1 queried whether institutional concentration fits the arbitral ideal of voluntariness. Torn between formal and actual autonomy, consent-based arguments proved circular. Part 2 examined whether the ideal of personalized arbitrator choice precluded institutional concentration schemes. With opinion dividing on the main locus of trust in modern arbitral practice, this line of enquiry proved inconclusive. Part 3 investigated the propriety of the attribution of competences that institutional concentration engenders. With plausible arguments both for and against leaving to arbitrators/administrators decisions on concentration, this, too, led nowhere. Part 4, part rehash of its predecessor, considered whether pursuit of inter-award harmony lay outside the scope of arbitral justice. For failure properly to justify the anti-systemic claim underlying this contention, this, too, proved indecisive. Part 5 focused on the structural limitations of arbitration's institutional environment. On examination, these turned out to be value-laden.

Chapter 4, on statutory concentration, consisted in two parts. Part 1, a review of legislation prescribing forum concentration measures, showed that public initiative in this area is generally confined to proceedings pending in the same jurisdiction, with the one exception, namely, Florida, confirming the hazards of attempting anything more ambitious. Part 2 set itself three objectives: (a) to show how only a principled position both on the state/process relationship could ultimately determine whether public action in pursuit of inter-award harmony is legitimate; (b) to demonstrate how contemporary arbitral scholarship, rather than adopt this line of reasoning, instead resorts to stylised argument-bites, now dressing up public prescription as private choice, now dogmatizing party autonomy into this self-validating bar to public action; and (c) to establish that formal argument alone could decide neither the fundamental nor the subsidiary questions at issue.

Hitherto, the general argument was mainly refutatory: contract will not mitigate inter-award conflict, and formal argument alone cannot account for the general hostility towards extra-contractual initiatives. Hitherto, also, the critique was 'internalist,' focusing on the incoherence and indeterminateness of the doctrinal arguments usually deployed to de-legitimate extra-contractual (especially public) conflict-avoidance initiatives. But from that point on, the objective became to identify what, if not legal logic or value-free
technical considerations, accounts for the aforementioned hostility. At that point, the argument became externalist, concerned to show up this hostility as the manifestation of an extra-legal mode of thought that has co-opted the institution of modern international arbitration.

Thus, Chapter 5 claimed that modern arbitration’s inability to secure a social objective like inter-award harmony is a self-imposed ideological limitation. Neither fortuitous nor haphazard, arbitration’s institutional architecture, several of its central doctrinal arrangements, the sensibility of many of its scholars and practitioners are all characteristic expressions of a mode of thought that is fundamentally \textit{laissez-faireist}, averse to most forms of social engineering, and mainly committed to an ideal of formal neutrality—neo-liberalism. At this point, the text acknowledged that this mode of thought occasionally meets with localised resistance from a slightly more communitarian strand of liberal thought (centrist liberalism), but considered that, on the whole, the neo-liberal strand remained dominant.

The three-part argument unfolded as follows. Part 1 settled analytic model, intent, and definition. This involved (a) defining the concept of ‘ideology,’ and settling its relationship to law; (b) disclaiming any essentialist pretensions potentially associable with the claim of ideological identity; and (c) establishing the relationship between that claim and confusingly similar positions in contemporary arbitral literature.

Part 2 outlined the origin and development of neo-liberal thought. Derivative, this set the background against which Part 3, the core of the argument, claimed (a) that modern arbitration stands fundamentally (though not exclusively) as the expression of neo-liberal commitments in the field of international adjudication, and (b) that these commitments (not legal logic or value-free technical considerations) account for hostility towards extra-contractual concentration initiatives.

To back these claims, the text relied on two types of suggestive correlations. The first, broad-brush and general in its import, highlighted both a revealing correspondence between modern arbitral principles and the tenets of neo-liberal thought, and an uncanny congruence between, on the one hand, the division separating the ‘schools’ of thought now contesting arbitral scholarship, and on the other, the chasm separating the political currents now contesting the label ‘liberal.’ The second, more precise and subject-specific, underlined how characteristic neo-liberal notions of accountability, established neo-liberal opposition to social engineering, and typical neo-liberal
understandings of freedom as the absence of public constraint account for the rise, development, and, ultimately, the immutability of inter-award conflict.

In this way the dissertation has sought to re-orient consensus away from a priori and resignations, practically unsupported and politically paralysing, towards reflection on the origin, development, and immutability of inter-award conflict. To achieve its aim, it has tried to show (a) that the debate on complex arbitration is ultimately about the proper relationship between state and process, and (b) that contemporary arbitral scholarship, rather than address this fundamental question head-on, chooses instead to represent hostility to extra-contractual conflict-avoidance initiatives as the dictate of legal logic and technical prudence.

More generally, this dissertation has tried to show that mainstream arbitral scholarship exhibits an ideologized understanding of arbitration’s place in a social life, an understanding configured around an abiding distinction between a private and a public social space. By attributing dispute-settlement to the private side of this dichotomy, and co-opting arbitration as its institutional framework, such scholarship has stamped modern arbitration with its individualist ethic of self-reliance. A key idea that Chapter 5 in particular has tried to vindicate is that, this act of attribution and all that flowed from it are the product of a value-laden idea of the good life and of the role of the state in bringing it about. Specifically, Chapter 5 has time and again represented modern arbitration as the product of a mode of thought that, with few exceptions, favours a minimal state that enforces contractual obligations and protects property rights, as opposed to an activist state which, without commandeering the means of production or creating a command economy, ‘leads the market’ towards achieving social goals that it deems necessary or beneficial. This involved claiming that the way the state/process question is discussed in most contemporary scholarship is never neutral, that the background assumption is always that state action is the exception to the default rule of freedom, and that freedom is then understood as the absence of public restraint.

For an ideology that preaches the separation of politics and economics, to distinguish between licence and ability, to remind that a theory—even a prescriptive theory—cannot preach the obverse of what it practically dictates, to question the ethic of individualism, to appeal to altruistic feelings, is simply outré. It is unprofessionally to politicize and romanticise what is purely technical. It is to transgress the fine lines separating law and morals, law and politics, law and life. It is, in fine, to act un-lawyerly.
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One of this dissertation’s aims has been to collapse such ideologized doctrinal scaffolding in order to reveal the structure of thought beneath.

II. Some Final Thoughts

The purpose of this final section is fourfold: to establish likely reactions to the realization that the ‘thing’ cannot be done (A); to examine those reactions (B); to reflect on the circumstance of arbitral scholarship (C); and to ponder the future of international commercial arbitration (D).

A. Two Likely Reactions

Two reactions are likely immediately one realizes that nothing more than imperfect palliatives is possible before the evil of inter-award conflict. The first is to say that the problem is so grave that default of solution enjoins the staking of a completely new path (1). The second is to maintain that, while lawyers clearly should not shut their eyes to the difficulty at hand, neither candour requires, nor the difficulty at issue warrants, radically questioning what, by all accounts, is a useful social institution (2).

1. The Radical Reaction

Two doctoral students have reacted in the first way.

Despairing of a solution to the problem of inter-award conflict within the confines of the existing arbitral system, Mapara predicted its wholesale substitution by another,

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1 In his dissertation, Mapara examines both ‘praetorian,’ i.e., court-ordered, and contractual solutions, to the problem of inter-award conflict. The praetorian solutions he rejects as running counter arbitration’s voluntary ethic. Mapara (1987) 252–53. The contractual solutions he divides into: (a) the coordination of references using common appointments; (b) multi-party expertise; and (c) consolidation of formally distinct but substantively related references. Solutions (a) and (b) Mapara praises for flexibility but condemns for hazardous dependence on private initiative, as well as for failure actually to unify different parts of fundamentally integral disputes. Ibid., at 284. Solution (c) Mapara discusses both as product of an extensive interpretation of bipartite arbitration clauses and as product of an express complex arbitration clause. The practice of extensive interpretation, he considers occasionally useful but ultimately hazardous to enforceability, as well as detrimental to arbitration’s voluntary ethic. Ibid., at 331, 334–36. Multi-party clauses he divides into ad hoc, which he considers unwieldy and therefore unpromising,
which he called 'un droit judiciaire international autonome,' but about which we know no more than that it would have no room for the refractory principle of party autonomy to work its mischief.\(^2\)

Bourque, too, was equally sceptical of the possibility of locating solutions to the problems of complex arbitration within the existing system.\(^3\) And like Mapara before him, he predicted, with as little evidence as Mapara had adduced in support of his forecasts, first, that the contemporary \textit{ex ante} arbitral system would give way to an international commercial judicial system, and second, that arbitration would thenceforward revert to its old function of helping settle differences whose parties agree \textit{ex post} they should be settled by persons enjoying their mutual confidence.\(^4\) Staffed by judges representing the world's different legal and commercial cultures, Bourque's \textit{juridictions internationales} would exercise exclusive jurisdiction over specifically defined

and institutional, which he pronounces encouraging. \textit{Ibid.}, at 343, 350. The balance of his text Mapara gives over to the question whether \textit{lex mercatoria} might not afford a universalizable means of concentrating related claims in a single reference, to which his answer is that relevant transnational rules have yet to develop. See \textit{Ibid.}, at 440. For Mapara's view on the likelihood of such rules developing, see text above.


\(^3\) Bourque starts his dissertation defiantly rejecting the notion that the risk of inter-award conflict might simply be inmitigable. 'C'est faire preuve de beaucoup de résignation que d'accepter comme une fatalité cette injure au bon sens.' Bourque (1989) VIII. But several hundred pages later, he concedes that, 'il était vain de chercher dans l'arbitrage un moyen de résoudre les litiges multipartites du commerce international.' \textit{Ibid.}, at 582, 584. Bourque identifies two main obstacles to a solution: the right of every party to nominate an arbitrator, and the parties' timely consent to the principle of concentration. His basic conclusion can be summed up as follows. It is unrealistic to expect parties to foresee the need to correlate their arbitral undertakings in a manner that would ensure that related disputes would be settled concertedly. \textit{Ibid.}, at 584. It follows only an outside authority could impose a unified forum for the settlement of related claims. \textit{Ibid.}, at 583. Since no such authority exists, international arbitration is evidently not the appropriate mode for resolving multi-party disputes. \textit{Ibid.}, at 582. For the solution Bourque predicts the future holds, see text above.

\(^4\) \textit{Ibid.}, at 585.
international economic disputes. A little reticent on detail, Bourque apparently has in mind a judicial system operating along some quasi-'federal' lines, possibly with an appellate hierarchy.

Bourque makes clear that the existing arbitral system would not morph into this new worldwide judicial system; instead, the old would exist alongside the new for a while, but any jostling between the two systems would be resolved in favour of the latter (the deference now shown arbitral agreements would disappear). Eventually, history would repeat itself: *ex ante* arbitration, having served its purpose as a transitional institution between national and international commercial justice, would give way to a re-emergent arbitral practice based on the *compromis*.

2. The Conservative Reaction

The other reaction says, while lawyers are right to examine the difficulty at hand, neither candour requires, nor the gravity of the situation demands, that they take refuge in dubious futuristic fantasies, whose practical effect is necessarily to doom to inadequacy what is clearly a useful social institution. Several (mostly hypothetical) arguments may be advanced in support of this position.

The first says moderation in the pursuit of virtue is itself virtue. Not only is there such a thing as worrying overmuch about a given wrong, but justice at all costs is undesirable, and may even be unjust. Ideally, identical standards would determine all international economic disputes, substantively related or not, but life is both too complex and too multifaceted to bring this ideal within the compass of human realisation. The lawyer cannot always afford to gratify his individual taste for justice. He errs if he rushes after a subjective ideal of fairness, trampling alternative conceptions of the good. Every time he identifies a deficiency, two types of solutions will present themselves to him. If he is a reformer, he will laboriously inspect the foundations of the existing system and attend to the cracks, lest crash should follow subsidence. If he is a radical, on the other hand, he will want to bring the whole edifice down in one fell swoop. True wisdom excludes reasoning in simple moralistic terms of absolute good and

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evil, and dictates thinking in relative terms that recognise gradations of utility. One does not help the cause of justice by undermining the institutional framework for doing justice. Policy prescriptions must consider short-term substantive gains as well as long-term costs. Those who study an institution like arbitration must always take the long view of its health. They must shun quick results that sacrifice tomorrow’s real benefits for today’s apparent advantages.

A second argument in support of the conservative proposition says that, as nothing human is flawless, a social institution may be pardoned certain deficiencies if its advantages are much the greater. On this view, it would be foolish to sacrifice the larger and more inclusive good to narrower ends. The particular ought not to be suffered to trump the universal, the lesser the greater. Human welfare depends on trade and investment, which in turn depend on effective dispute resolution. In the present world of independent states, arbitration is the most effective method of international dispute resolution. Let those who want to develop a better system try to do so; but let no-one sacrifice the here-and-now for a possibly unattainable ideal.

A third argument says, ‘[a] legal tool or instrument cannot be blamed for not achieving what it was never planned to achieve or for not going beyond the limits set by its inherent characteristics.’ The matter is neither about right nor wrong but about institutional capabilities. Metaphorically, arbitration acts like a fire-engine because it was never conceived as an integrated security system. A fire-engine acts promptly because it cannot afford a wait-and-see attitude; an integrated security system sells itself in a manner beneficial to the overall protected environment. Fire-fighting here means extinguishing economic differences as quickly as possible—even if it means risking inconsistency sometimes. To coin a phrase, arbitration has the qualities of its defects and the defects of its qualities.

A fourth argument says it is facile to suggest that forum concentration is all-good or that it is something that states could easily do for the commercial community if only they could be brought to see how badly it needs doing. International arbitration operates in the interstices of sovereign political orders, each with its own value-system, its objectives, and its conceptions of the ends and means of dispute settlement.

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8 See Grigera Naón (1999) 276. It is unnecessary to say more on why talk of ‘inherent characteristics’ is unhelpful.
mechanisms involving it with the outside world. Arbitration lacks that unified architecture built around a central authority capable of setting its goals and priorities programmatically; instead, these are worked out by repeat agreements and compromises. Arbitration’s potentialities are confined within the moral possibilities of the present international order and the material conditions of the global market. Its limitations are the limitations of economic globalisation in an age of national sovereignty. Complex arbitration is simply the expression of conflict between an evermore-integrated world-market and an increasingly splintering world political order organized around the independent sovereign state. And so long as the world is run on the present lines, with that state as its epicentre, arbitration, institutionally decentralised and co-archical, will remain the ultimate, if imperfect, form of international commercial justice. Now, should some development, of which one could now do no more than recognize the potentiality, appreciably alter the architecture of the international political order, then one may realistically consider alternative solutions to the risk of inter-award conflict. In the interim, delay will not have been wholly a disadvantage; for it is better to do nothing at all than to let eagerness for a solution outstrip the limits of the possible.

On all of these grounds, it may be maintained, energies would be misspent if dedicated to (some unlikely) root-and-branch reform of what is already a broadly satisfactory system. Instead, efforts should focus on stimulating private initiative, both by increasing awareness of the problem and by expounding contractual techniques using which the parties might fashion appropriate responses. Nothing less than conscious effort would secure this end. The notion that it is possible to go further than this in removing the injustice of inter-award conflict—for injustice it is whether or not admitting of a complete remedy—simply ignores the realities of the situation.

B. Why Both Reactions Are Misguided

These reactions (the reaction that all must change and the reaction that nothing should change), though polar opposites, originate in two common fallacies, namely, the technocratic fallacy (1), and the holistic fallacy (2).

1. The Technocratic Fallacy

The technocratic fallacy is the illusion that all institutional problems are either technical or organizational, and hence either scientifically resolvable or simply irresolvable. This fallacy, when prevalent, has two implications. On the one hand, it
promotes the false impression that one could abstract social institutions from their ideological context and predict their development apart. When indulged, this impression produces hasty superficial prognostications regarding institutional developments, e.g., international commercial judicial systems that develop to right all wrongs and dissolve all problems. If Chapter 5’s central thesis is correct, that is, if modern arbitration stands as the institutional expression of a now-dominant mode of thought, then, excluding an ideological about turn, a mechanism that discountenances private initiative and concentrates into state agents powers previously devolved unto individuals, must be unlikely. To accept this, one need not posit a causal connection between the organizational characteristics of a social institution (a federalized transnational judicial system) and its politics (patrarchal and systemically oriented): a suggestive time-conditioned correlation is sufficient.9

On the other hand, the technocratic mindset, when dominant, reduces social design to mere technique. By confusing value-free ends-means processes with specifically human relationships, it suppresses political consciousness, and thus makes non-violent mass control easy. It does this, not so much by dint of technocratic answers it regularly proffers, but rather by suppressing all but technocratic questions. Thus, rather than ask how modern arbitral ideology produced a problem whose solution it also precluded, it treats the ex ante clause and arbitration’s co-archical institutional structure and its doctrinal arrangements as so many givens, points of start for an enquiry that typically proceeds formulaically and concludes either with a resigned admission that nothing human is perfect or with an escapist ideologically disembedded plea for root-and-branch reform.

2. The Holistic Fallacy

The holistic fallacy underlying both the reactions outlined above is what Unger has called ‘the most influential half-truth of modern politics: the need to choose between

9 Cf. Grigera Naón (1999) 271-72 (‘International commercial arbitration is not such a [international commercial judicial] system today, though its principles, rules and practice may render important contributions for moulding it.’)
reformist tinkering and all-out revolution.”\textsuperscript{10} This is the idea that all programmatic thinking must be organized around a binary view of politics, in which choice lies between readjustments that do not dislocate the central logic of the institution subject of reform, and the total substitution of that institution by another. On this view, politics is either an exercise in problem solving and interest balancing bereft of an overarching vision of the ideal, or a revolutionary process involving breaking up sudden and total changes.

This understanding of political action is both theoretically wrong and practically harmful. Practically, it ‘induces in its adepts a fatal oscillation between unjustified confidence and equally unjustified prostration.’\textsuperscript{11} Reconstructive projects are then easily dismissible either as trifling (if close to present arrangements) or as chimerical (if remote from present arrangements). By reducing politics to a choice between all and nothing, by excluding the possibility a mid-way alternative, ‘institutional fetishism’ turns politics into a series of \textit{ad hoc} compromises of interests and visions.\textsuperscript{12}

But structural alternatives are not necessarily revolutionary. Radical innovation is compatible with gradualism. A middle course exists. It involves bottom-up innovation; strategically selected minor deviations leveraged to produce major deviations; fragmentary but cumulative changes revolutionizing institutional structures via part-by-part gradual substitution of their basic elements. The result is non-violent structural discontinuity.

Theoretically, this binary view of politics rests on the fiction of systemic ‘holism,’ on the now-discredited nineteenth-century typological illusion that every type of social organization has a single institutional form. Granted a certain measure of structural constraint, existing institutional arrangements still form a subset of broader possibilities. In a world organized around sovereign states, modern arbitration is only one of several conceivable adjudicative arrangements; other arrangements are conceivable and, for

\textsuperscript{10} See Unger (1997) 125. I owe this anti-necessitarian, as well as most of its terminology, to Professor Roberto Mangabeira Unger’s lectures on ‘Central Legal Ideas,’ delivered at Harvard Law School, in the spring of 2001.

\textsuperscript{11} See Unger (2001) 78.

\textsuperscript{12} \textit{Ibid.}, at 37 (‘Without imagination of structural variety, the stakes go down in practical politics as well as in theoretical controversy.’)
what it is worth, might have as good a claim as the now-dominant model to the label 'arbitration.' To deny this is to confuse what is intrinsic to arbitration in particular and to international economic life in general, with what is chargeable to a particular set of social arrangements that are the product of a historically contingent mode of thought.

The most familiar type of social innovation involves the attempt to transform variations into standards, heresies into examples. But rather than accept this and genuinely seek to benefit from (say) alternative dispute resolution mechanisms, mainstream arbitral scholarship pays tribute to adjudicative diversity, while at same time upholding the now-dominant arbitral model by means of two subtle techniques. One is an exercise in genealogy that presents the currently dominant model as the culmination of a long historical process of maturation and perfection. The other is a seemingly neutral exercise in subject-definition, that banishes threatening variations from its scope of enquiry: whether by denying the variation's claim to be called 'arbitration,' or simply by committing it to a 'Special Arbitrations' category.

C. Freedom, Dogmatism, and Sloganeering

To contest the definition and subvert the genealogy; to draw attention the contingency of the now-dominant model; to show that alternative arrangements were not just technically different expressions of the same mode of thought but manifestations of alternative ways of conceiving human relations; to demonstrate that past arrangements were not necessarily halting anticipations of the real but autonomous alternatives reflecting now-suppressed modes of thought—to do all this without in the least suggesting that, by itself, inter-award conflict is sufficiently important to justify, much less to drive, a general reworking of the institution of modern arbitration—these

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13 Ibid., at 63.

14 Cf. Mustill & Boyd (1989) 32–34 (Section entitled 'Separate Historical Origins of Arbitration').

were the some of this dissertation's objectives. To accomplish them, it has had to adopt the opposite of the now dominant style of arbitral scholarship.

Present-day arbitral literature involves little critical examination and next to no theorizing. The dominant style of legal analysis is self-involved, autarkic, always appealing to criteria intrinsic to law in order to explain phenomena properly extrinsic to the legal system. Acuity to detail is made to substitute for holistic assessment, logical rationality for theoretically embedded ends-means analysis. Theoretical considerations are either excluded or postscripted to justify decisions often reflecting unacknowledged preferences whose intellectual or affective bases have been shielded from scrutiny. Concepts imperfectly understood are pressed into the service of principles only half believed. Recalcitrant doctrines are taken at a heavy discount. Analyses and conclusions suffer a characteristically retrospective feel. And arguments constantly vacillate between dogmatic idealism and reliance on success as measure of truth.

Partly, much of this is attributable to a style of legal education that (at least outside of North America) remains predominantly formalistic. Partly, it is chargeable to 'practitioner scholarship,' the bulk of the field. This is not meant as a disparaging remark; it merely expresses the common-sense notion that, just as the eye cannot see what is flush up against it, so I cannot perceive my environment if I am totally immersed in it.

Nowhere are all these weaknesses more clearly on display than in treatments of the principle of party autonomy. This principle, though regime-defining, appears not to have been apprehended with that clear and firm grasp that arises from full persuasion. It is unnecessary here to say more about the principle's derivativeness. But it is perhaps worthwhile to remind that, in many respects, modern arbitration law has taken shape during a period in which ideological individualism dominated. Influenced by libertarian principles of contract law during its growth-period, arbitration is now substantially dominated by a contractual ideology that privileges formal freedom and due-process equality. With characteristic ideological indifference to social reality, many of the writers

16 On the influence of arbitral scholarship, see Reisman (1992) 10 ("To a remarkable extent, modern arbitration is less a creature of state initiative and more a creation of the academic and practicing bar").

17 See Mustill & Boyd (1989) 34.
who formed our earliest (and remarkably persistent) views of arbitration seem to have taken insufficient notice of the actuality of their subject-matter, seeking instead to demonstrate, from premises eclectically chosen, that arbitration is, and should be conceived of in, this or that way—and if real-life arbitration is different, then so much the worse for arbitration.

A consequence of this has been that classical-contract theory and libertarian notions of freedom continue to dominate thinking in the field. For instance, formulaic *ex ante* clauses predominate and arbitrators (rather than parties) dominate both substance (*lex mercatoria*) and procedure (delocalisation). And yet, freedom of contract is still considered to be in principle un-mitigable, will theory is treated as if determinate, and private autonomy is regarded as a substantive theory—not simply a policy to be contrasted and reconciled with others having as good or better a claim to determine outcome.

But if the argument on the derivativeness of party autonomy is correct, it would preclude rhapsodising and making a grandiose mystery out of that autonomy. It would do so even if this were the only way that the concept could continue to do duty. It would do so because it is no longer possible to pull the thing off, because intellectual honesty precludes trying to pull it off, and because democratic sentiment and intellectual valour dictate that we expose our premises to practical and theoretical controversy in the struggle for social progress. Party autonomy has a function—much could be said for its doing some of the organizational groundwork that any dispute settlement process needs to operate—but it most must not be taken too seriously. As it stands, that autonomy is often represented as self-applying, self-validating, profound or capable of profundity, the model that social arrangements should approximate and against which they must be ultimately judged. All of these conceptions are questionable. If party autonomy necessarily involved them, it would probably have to go.

D. The Young Marx & the Future of Modern Arbitration

One thing this dissertation has not attempted to do is foretell the development of arbitration or of inter-award conflict. In doing so, it has inevitably opened itself to the charge of having evoked conceptual problems without the resources to resolve them. But this charge ignores the task that this dissertation eventually set out to accomplish. This is the task of showing actual arrangement (including, in this case, the inter-award conflict problematic) to be the expression or implication of a mode of thought that has
become so dominant it has taken on the mask of the natural. When such is the task, confessing ignorance of future trends no longer becomes a weakness. ‘For even if there is no doubt about the ‘whence,’” the young Marx once wrote:

... all the more confusion reigns about the ‘whither.’ Apart from the general anarchy which has erupted among the reformers, each is compelled to confess to himself that he has no clear conception of what the future should be. That, however, is just the advantage of the new [critical] trend: that we do not attempt dogmatically to prefigure the future, but we want to find the new world only through criticism of the old ... [If the designing of the future and the proclamation of ready-made solutions for all time is not our affair, then we realize all the more clearly what we have to accomplish in the present—... a ruthless criticism of every thing existing...\(^{18}\)

This is not nihilism. What eventually determined the lines of this enquiry was a desire to provide an alternative narrative to an official story that never rang quite true. The real purpose of criticism is to combat the arbitrary constraints on human freedom, to demonstrate that the actual is neither natural nor, it follows, immutable—assuming we are willing to question, contest, and re-imagine the basic terms of social life.

Once again, none of this is to suggest that, by itself, the risk of inter-award conflict is sufficiently important to drive a major rethink of the institution. Indeed, it may be that, upon critical examination, the actual also turns out to be also the ideal; in which case, we would have the more reason to defend it, with might and main. But either way, the critical exercise would have given us clarity—no mean reward.

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