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JUDICIALISATION OF INTERNATIONAL COMMERCIAL ARBITRATION

Thesis for the degree of Doctor of Philosophy
presented at the City Law School,
City, University of London

Under the supervision of:
Professor Jason Chuah
and
Dr Steven Truxal

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November, 2016

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LIST OF ABBREVIATIONS

	Cited as:
American Arbitration Association	AAA
Alternative Dispute Resolution	ADR
Association for International Arbitration	AIA
Belgian Centre for Arbitration and Mediation	CEPANI
Commercial Arbitration and Mediation Centre for the Americas	CAMCA
European Convention on International Commercial Arbitration	ECICA
German Institute of Arbitration	DIS
Hong Kong International Arbitration Center	HKIAC
International Centre for Dispute Resolution	ICDR
International Chamber of Commerce	ICC
International Council for Commercial Arbitration	ICCA
International Court of Justice	ICJ
London Court of International Arbitration	LCIA
Non-governmental organisation	NGO
Private International Law Act	PILA
Singapore International Arbitration Centre	SIAC
Society of Maritime Arbitrators	SMA
Stockholm Chamber of Commerce	SCC
Swiss Chambers' Arbitration Institution	SCAI
United Nations Commission on International Trade Law	UNCITRAL
United Nations Convention on Contracts for the International Sale of Goods	CISG
UNCITRAL Model Law	UNCITRAL ML
UNIDROIT Principles of International Commercial Contracts	UNIDROIT Principles
Vienna Convention on the law of treaties	Vienna Convention
Vienna International Arbitration Centre	VIAC

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DECLARATION

This thesis is the result of my own work and includes nothing, which is the outcome of work done in collaboration.

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ABSTRACT

It has been increasingly argued that international commercial arbitration is stripping off its intrinsic features of an *alternative* dispute resolution method and turning into a mechanism that is almost indistinguishable from litigation. The development describing the metamorphosis of international commercial arbitration into a method that is very similar in process and substance to national litigation is referred to as the judicialisation of international commercial arbitration.

The focus of this research is the process of judicialisation. The thesis questions whether it exists at all and, if yes, to what extent it has permeated both international arbitration proceedings and arbitral decision-making. While attempting to answer those questions other salient considerations are raised, such as:

- Which characteristics of international commercial arbitration are fundamental for this method of dispute resolution and should remain intact;
- What are the driving forces of the process of judicialisation;
- Is the judicialised approach entirely consistent with the benefits of international commercial arbitration and to what extent?

The ultimate objective of this thesis is to answer the question whether the judicialisation of international commercial arbitration is a positive development and thus be encouraged. Where negative implications are recognised, an attempt is made to identify the causes of the judicialisation process and offer solutions, if attainable.

CHAPTER 1 INTRODUCTION

Background

It is claimed that the growing popularity of international commercial arbitration¹ is rooted in the flexibility that both parties and arbitrators enjoy in the arbitration proceedings. In particular, some of the characteristics that make international commercial arbitration more attractive to businesses than national litigation are the international enforceability of arbitral awards, the confidentiality of the proceedings and the possibility parties to select a neutral seat of arbitration and to appoint arbitrators to their liking.² According to recent surveys international commercial is not merely a popular choice, but often even the preferred dispute resolution method for some industries.³

According to a survey conducted in 2008, 88% of the participants used international arbitration as the default method for dispute resolution in industries such as insurance, energy, oil and gas, and shipping⁴. Those findings are supportive of a study conducted 2 years earlier, namely in 2006, in which 73% of the respondents indicated that arbitration alone (29%) or in combination with other ADR

¹ See Edward R. Leahy and Carlos J. Bianchi, 'The Changing Face of International Arbitration' (2000) 17 *Journal of International Arbitration* 19–62; Benjamin Hayward, 'New Dog, Old Tracks: Solving a Conflict of Laws Problem in CISG Arbitrations' (2009) 26 *Journal of International Arbitration* 405–436, 405; Elena V. Helmer, 'International Commercial Arbitration: Americanized, "Civilized," or Harmonized?' (2004) 19 *Ohio St. J. on Disp. Resol.* 35–68, especially at 38: "(...) during the last few decades, the number of arbitrations worldwide has increased dramatically. For example, between its founding in 1923 and 1976, the ICC International Court of Arbitration received three thousand requests for arbitration. In 1998 the ICC received its ten-thousandth case. (...) The number of requests for arbitration filed with the ICC in 2002 reached 593 – up 31% from the 452 requests filed in 1997. The international caseload of the American Arbitration Association (AAA) reached 649 cases in 2001 (...). During the 2001-2002 period, the London Court of International Arbitration (LCIA) received 159 cases – an 8% increase over the previous 24-month period."

² See Nigel Blackaby, Constantine Partasides, Alan Redfern, and Martin Hunter, *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) paras 1.86-1.98. See also See QMUL Survey, 'Corporate Attitudes and Practices' (2006), available at: <<http://www.arbitration.qmul.ac.uk/docs/123295.pdf>> 6.

³ QMUL Survey 'International Arbitration: Corporate Attitudes and Practices' (2008), available at: <<http://www.arbitration.qmul.ac.uk/docs/123294.pdf>>

⁴ Ibid 2.

mechanisms (44%) was their choice for resolving international disputes.⁵ Statistical data available on the websites of the major arbitration institutions is also very reassuring as to the rising popularity of international arbitration.⁶

Other studies demonstrate that although litigation remains the primary dispute resolution method in many sectors, there is still a steady increase in the use of arbitration. In one recent survey the percentage of interviewees from UK, USA, Asia Pacific, Central and Eastern Europe, Mainland Europe and Middle East showing preference for arbitration over litigation was respectively 18%, 6%, 14%, 7%, 16%, and 29%⁷, while the percentage of participants involved mostly in litigation was respectively 38%, 81%, 45%, 62%, 25%, 57% (in the same order as above).⁸ Arbitration was the preferred dispute resolution mechanism only in the shipping industry, while litigation dominated in sectors like retail, property, insurance, government and public sector, energy, banking and financial services, aviation, technology and media and telecommunications⁹.

The proliferation of international commercial arbitration is well documented in the literature.¹⁰ In Husain M. Al-Baharna's view:

⁵ 2006 QMUL Survey (n 2) 2.

⁶ For ICC statistics see: <<http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/>>; for SCC statistics see: <<http://www.sccinstitute.com/statistics/>>; for SCAI statistics see: <<https://www.swissarbitration.org/Statistics>>; for SIAC statistics see: <<http://www.siac.org.sg/2014-11-03-13-33-43/facts-figures/statistics/64-why-siac>>; for LCIA statistics see: <<http://www.lcia.org/LCIA/reports.aspx>> etc.

⁷ See participants' responses as to whether they are primarily involved in arbitration or litigation, and in particular the answers that indicate whether the respondents are being mostly involved in litigation with some arbitration, or mostly involved in arbitration with some litigation. Mazars LLP Dispute Resolution Survey 2013 available at: <<http://www.mazars.com/Home/News/Our-publications/Surveys-and-studies2/Mazars-Dispute-Resolution-Survey-2013>> 20.

⁸ Ibid.

⁹ Ibid. The difference between the predominant use of litigation as oppose to arbitration was as follows: retail – 56% to 2%, property – 49% to 14%, insurance – 55% to 10%, government and public sector – 43% to 12%, energy – 35% to 26%, banking and financial services – 52% to 6%, shipping – 34% to 44%, aviation – 36% to 14%, technology, media and telecommunications – 49% to 12%.

¹⁰ Bernard Hanotiau, 'International Arbitration in a Global Economy: The Challenges of the Future' (2011) 28 *Journal of International Arbitration* 89–103, 89: "increased use of arbitration has been stimulated by what were considered its intrinsic qualities: the speed of the process, its privacy and confidentiality, the neutrality of the arbitral forum, the possibility of choosing one's

[t]he phenomenal rise of trade and commerce across national frontiers during the second half of the twentieth century has witnessed a spectacular growth in the law and procedure of international commercial arbitration (hereinafter the "ICA"). Today ICA constitutes by far the most popular method for settlement of international commercial disputes.¹¹

Lord Justice Kerr also maintains that “[i]nternational commercial arbitration appears to be eclipsing litigation in national courts in many parts of the world.”¹² Some authors provide empirical evidence for the growing popularity of international commercial arbitration and explain the latter with the increase of international trade transactions – both in terms of volume and stake. According to a study conducted by

own specialised judge speaking the relevant language(s), the flexibility and adaptability of the procedure to meet the parties’ various expectations, the finality of the award, and the ease of its enforcement. The forces of globalization have fuelled the development of international arbitration all over the world.”; Laurence W. Craig, ‘Some Trends and Developments in the Laws and Practice of International Commercial Arbitration’ (1995) 30 Tex Int’l L J 1–58, 2: “[t]he growth of international commercial arbitration is largely a post-World War II phenomenon, fuelled by the explosive growth of international trade and commerce and foreign investment in both developing and developed countries. While trade and investment were becoming increasingly transnational, and the multinational corporation was developing with an interest in promoting business and profits without regard to national boundaries, national courts, at least from the foreign trader’s or investor’s point of view, remained resolutely local in outlook. In many jurisdictions the judiciary was slow to change, ill-informed about modern commercial and financial practices, and hesitant to abandon local traditions and procedures that often seemed arcane or unbusinesslike to outsiders.”; Gilles Cuniberti, ‘Beyond Contract - The Case for Default Arbitration in International Commercial Disputes’ (2009) 32 Fordham Int’l L.J. 417–488, 417-418: “It is commonplace to state that the essential features of the process make it the most suitable mode of dispute resolution in this context: neutrality and independence of the adjudicators, seriousness and flexibility of the process, higher prospects of enforceability of the decision in the majority of the world’s jurisdictions. It may also be that the development of international trade has led to a significant increase in the number of the cases resolved by way of arbitration. Even though it is almost impossible to assess the number of cases that are arbitrated each year, as the process is both confidential and decentralised, there is some anecdotal evidence that international commercial arbitration has exploded over the last forty years.”; Leahy and Bianchi (n 1), 19: “(...)globalization has contributed directly to the rapid and broad growth of international arbitration. As many businesses have become inherently international, they have sought more effective and efficient means of resolving disputes without having to utilize national litigation systems that are often expensive and slow, and may be rife with national bias and political considerations. Often, these businesses have chosen the dispute resolution mechanisms embodied in international arbitration.”

¹¹ Husain M. Al-Baharna, ‘International Commercial Arbitration in a Changing World’ (1994) 9 Arab L.Q. 144–157, 144.

¹² Lord Justice Kerr, ‘Commercial Dispute Resolution: The Changing Scene’ in *Liber Amicorum for Lord Wilberforce*, Marten Bos and Ian Brownlie (eds.) (Oxford, 1987), 111- 130, 120

Prof Schwenzer between 2004 and 2008 the sales law litigation and arbitration experienced growth of approximately 5% per year and this percentage almost exactly equalled the development of world trade during that period.¹³

Together with the positive attitude towards international commercial arbitration, however, concerns have been continuously raised about the increasing length of international arbitration proceedings and the costs associated with them.¹⁴ The process of “judicialisation” was expressly identified as an adverse development in international arbitration in a survey conducted in 2013¹⁵. According to the study:

[s]ome interviewees have expressed concerns over the ‘judicialisation’ of arbitration, the increased formality of proceedings and their similarity with litigation, along with the associated costs and delays in proceedings. This trend is potentially damaging to the attractiveness of arbitration. In-house counsel value the features of the arbitration process that distinguish it from litigation.¹⁶

Interestingly the respondents in the study also complained about the lack of clear-cut decisions, as well as the shortage of arbitrators with the requisite expertise.¹⁷ The significance of the 2013 QMUL Survey¹⁸ lies in the fact that it is the first empirical study indicating that international commercial arbitration is undergoing some changes that can potentially undermine its own foundations. The study suggests that the judicialisation of international arbitration is not just a warning or a premonition, but an ongoing development that transforms the international commercial arbitration, as we know it. It appears that the fear of judicialisation might be justified.

¹³ Ingeborg Schwenzer, ‘Global Sales Law – Theory and Practice’, available at: <<http://www.law.utoronto.ca/documents/conferences2/IACCL10-Schwenzer.pdf>>

¹⁴ 2008 QMUL Survey (n 3) 2.

¹⁵ QMUL Survey ‘Corporate Choices in International Arbitration: Industry Perspectives’ (2013), available at: <<http://www.arbitration.qmul.ac.uk/docs/123282.pdf>>

¹⁶ Ibid 5. It is interesting to note that despite the fact that interviewees were discontent with the length of arbitration proceedings, they showed preference for appointing arbitrators with relevant experience, albeit a tight schedule, over ones that can guarantee no obstructions due to their availability: “this does not mean that corporations were unconcerned about availability but that, on balance, in-house counsel felt that it is more important to appoint the arbitrator best suited to the case rather than one who could potentially complete the mandate faster” at 5.

¹⁷ Ibid 9.

¹⁸ Ibid.

In fact, although the 2013 QMUL Survey marks a milestone in arbitration users' awareness of the process of judicialisation, it was a book published in the early 90's that was seen as a harbinger of the metamorphosis that international commercial arbitration was about to experience. In *International Arbitration in the 21st Century: Towards 'Judicialization' and Uniformity?*¹⁹ it was suggested that international arbitration is heading towards judicialisation and the preoccupation with the issue of uniformity might not be entirely beneficial to arbitration users. The rising popularity of international commercial arbitration is measured by the increase in the caseload as well as the commensurate growth in the number of arbitral institutions, arbitration rules, arbitration laws and arbitration practitioners.²⁰ There appears to be, however, a downside of this exponential success. According to C. Brower:

[t]wo consequences of this proliferation have become evident. One is the increasing "judicialisation" of international arbitration, meaning both that arbitration tend to be conducted more frequently with the procedural intricacy and formality more native to litigation in national courts and that they are more often subjected to judicial intervention and control. (...) The other consequence is a rising preoccupation with the issue of uniformity, most currently epitomized by national debates over whether or not to adopt the Model Law on Commercial Arbitration prepared by the United Nations Commission on International Trade Law (...).²¹

C. Brower further questions whether "arbitration has become 'an engine of adjudication indistinguishable from its judicial counterpart'".²² In the following years red flags about the impending judicialisation have been raised by several other scholars and practitioners.²³ Redfern and Hunter anxiously noticed that some new

¹⁹ Richard B. Lillich and Charles N. Brower, *International Arbitration in the 21st Century: Towards 'Judicialization' and Conformity?* (Richard B. Lillich and Charles N Brower (eds), Brill 1994).

²⁰ Ibid ix.

²¹ Ibid.

²² Ibid where "the provocative phrase of Professor Carbonneau" was quoted.

²³ See Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration And The Construction Of A Transnational Legal Order (Language & Legal Discourse)* (2nd edn, University of Chicago Press 1998); Fali S. Nariman, 'The Spirit of Arbitration - The Tenth Annual Goff Lecture' (2000) 16 *Arbitration International* 261-278; Edward Brunet, 'Replacing Folklore Arbitration with a Contract Model of Arbitration' (2000)

trends in international arbitration are changing “the simple, almost rudimentary system of resolving disputes”²⁴. They argue that:

[t]he arbitral process (...) has changed, from being a system in which the arbitrator was expected to devise a satisfactory solution to the dispute, to one in which the arbitrator is required to make a decision in accordance with the law; and in reaching that decision, the arbitrator is required to proceed judicially – giving each party the opportunity to present its case and treating each party equally, on pain of having his or her arbitral award set aside for procedural irregularity.²⁵

It is, therefore, suggested that “the creeping legalism”²⁶ is affecting both the arbitral process and arbitral decision-making, which raises the question whether the process of judicialisation is consistent with the characteristics of international commercial arbitration. Although attempts have been made to shed some light on the implications of the judicialisation process on international arbitration proceedings and arbitral decision-making, the analysis is often generalised and thus of limited help to assess the driving factors behind this trend as well as its impact on arbitration users.

74 Tul. L. Rev. 39–84; Katherine Lynch, *The Forces of Economic Globalization - Challenges to the Regime of International Commercial Arbitration* (International Arbitration Law Library) (1st edn, Kluwer Law International 2003); Gerald F. Phillips, ‘Is Creeping Legalism Infecting Arbitration?’ (2003) 58 *Dispute Resolution Journal* 37–42; Andrea Kupfer Schneider, ‘Not Quite a World Without Trials: Why International Dispute Resolution is Increasingly Judicialized’ (2006) 1 *J. Disp. Resol.* 119–129; Charles N. Brower, ‘W(h)ither International Commercial Arbitration?’ (2008) 24 *Arbitration International* 181–197; Alan Redfern, ‘Stemming the Tide of Judicialisation in International Arbitration’ (2008) 2 *World Arbitration & Mediation Review* 21–37; Thomas J. Stipanowich, ‘Arbitration: The “New Litigation”’ (2010) 2010 *U Ill L Rev* 1–60; Thomas E. Carbonneau, ‘Judicialization of the Process’ in *Carbonneau on International Arbitration: Collected Essays* (1st edn, Juris Net LLC 2011); Hanotiau, ‘International Arbitration in a Global Economy’ (n 10); Alec Stone Sweet, ‘Arbitration and Judicialization’ (2011) 1 *Oñati Socio-Legal Series* 1–23; Günther J. Horvath, ‘The Judicialization of International Arbitration: Does the Increasing Introduction of Litigation-Style Practices, Regulations, Norms and Structures into International Arbitration Risk a Denial of Justice in International Business Disputes’ in Stefan Michael Kröll and Loukas Mistelis (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (1st edn, Kluwer Law International 2011).

²⁴ Nigel Blackaby, Constantine Partasides, Alan Redfern, and Martin Hunter, *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) 41.

²⁵ Ibid.

²⁶ Phillips (n 23).

Furthermore, in order to determine whether the judicialisation of international commercial arbitration is an entirely adverse development or it has features that are favourable and a result of natural evolution of the dispute resolution process, it is important to establish what participants' expectations of international arbitration proceedings are. The 2013 QMUL Survey and the available scarce literature on the subject indicate that industries and scholars might have different perception as to what judicialisation of arbitration means and what the consequences of the judicialisation process are.

In businesses' view the process of judicialisation seems to be almost entirely associated with high costs and delays, while scholars raise alerts about the increasingly formalised or legalised process, renewed spur for regulation and over preoccupation with the issue of uniformity. A shared concern about the spreading process of judicialisation in international commercial arbitration appears to be the growing rigidity of the arbitral process. Still, several unanswered questions remain, namely what the other implications of the judicialised international commercial arbitration are, what aspects of the arbitral process and arbitral decision-making have been affected by the process of judicialisation and to what extent. Given the divergent views about what the implications of judicialisation, it is also interesting to examine whether arbitration users have intentionally pursued some of the consequences of this trend or contributed to its development in other ways.

While one survey suggests that the costly arbitration process can be attributed to the high fees for external legal counselling²⁷, some authors argue that the American influence on international arbitration is to be blamed for the lengthy and formalised arbitration proceedings.²⁸ Thus, Bernard Hanotiau contends that:

²⁷ CIArb Costs of International Arbitration Survey 2011 at 10, some of the results of the survey are available at: <<http://uk.practicallaw.com/1-508-6210>>

²⁸ See e.g. Lucy Reed and Jonathan Sutcliffe, 'The "Americanization" of International Arbitration?' (2001) 16 Mealey's Int'l Arb. Rep. 37; Nicolas. C. Ulmer, 'A Comment on "The "Americanization" of International Arbitration?' (2001) 16 Mealey's Int'l Arb. Rep. 24; Susan L. Karamanian, 'Overstating the "Americanization" of International Arbitration: Lessons from ICSID' (2003) 19 Ohio St. J. on Disp. Resol. 5-34; Lynch (n 23); Roger Alford, 'The American Influence on International Arbitration' (2004) 19 Ohio St. J. on Disp. Resol. 69-88; Helmer (n 1); Cesare P. R. Romano, 'The Americanization of International Litigation' (2004) 19 Ohio St. J. on Disp. Resol. 89-120; Eric Bergsten, 'The Americanization of international arbitration'

[t]here is an increasing concern over what is referred to as the “judicialization” of international arbitration. In other words, the arbitration process has changed from relatively informal to increasingly formal and complex. This generates extended delays and increased costs. It is generally considered that this is to be attributed to what is often referred to, rightly or wrongly, as the “Americanization” of international arbitration.²⁹

Due to the globalisation of international trade international commercial arbitration has inevitably become the point of convergence of legal traditions, different cultures, and competing legal principles. Thus, it is justifiable the process of judicialisation to be to some extent associated with the American influence on international arbitration³⁰, however, the latter seems to affect only a few of the aspects of the arbitration proceedings, such as counsel’s requests for disclosure, the adversarialism of the proceedings, etc. This is why some authors search for factors driving the judicialisation process beyond the proliferation of American-style arbitration. They find them in the businesses’ need for legal certainty and predictability and contend that those aspirations have brought overregulation in the international commercial arbitration. Interestingly, it is maintained that what is affected is not only the flexibility of the proceedings but also the way arbitrators reach their decisions. In Elena V. Helmer’s opinion:

[j]udicialization (“legalisation” or “processualisation” in the words of Pierre Lalive) is described as an effort to make arbitration “become more like litigation”, in order to

(2006) 18 Pace Int’l L. Rev. 289–301; William Park, *Americanization of International Arbitration and Vice Versa Arbitration of International Business Disputes: Studies in Law and Practice* (OUP 2006); Kevin T. Jacobs and Matthew G. Paulson, ‘The Convergence of Renewed Nationalization, Rising Commodities, and Americanization in International Arbitration and the Need for More Rigorous Legal and Procedural Defenses’ (2008) 43 Tex Int’l L J 359–397; Bernard Hanotiau, ‘The Conduct of the Hearings’ in Lawrence W. Newman and Richard D. Hill (eds), *The Leading Arbitrators’ Guide to International Arbitration* (2nd edn, Juris Publishing, Inc. 2008); Steven Seidenberg, ‘International Arbitration Loses Its Grip: Are U.S. Lawyers to Blame?’ (2010) 96 A. B. A. J. 50; George M. von Mehren and Alana C. Jochum, ‘Is International Arbitration Becoming Too American?’ (2011) 2 The Global Business Law Review 47–58; Amalia Kessler, ‘Arbitration and Americanization: the paternalism of progressive procedural reform’ (2015) 124 The Yale Law Journal 2940–2993.

²⁹ Hanotiau, ‘International Arbitration in a Global Economy’ (n 10) 98.

³⁰ See e.g. Helmer (n 1) 36, where it is stated “‘Judicialization’ is a term frequently associated with Americanization.”

increase its predictability, reliability, and equity. The result of judicialization in arbitration is ‘formalism, judicial style, and diminished flexibility’, (...)’³¹

It becomes evident from the above that there are conflicting or divergent views as to what judicialisation in the context of international commercial arbitration means, what causes this development and what its implications are. Furthermore, it is not clear whether the consequences of the judicialisation process affect, and as such transform, the whole arbitration process, or only some aspects of it, and to what extent. Further research is necessary to examine whether (and how) the process of judicialisation influences not only the conduct of international arbitration proceedings but also parties’ substantive rights as a result of it.³² Finally, it is to be considered whether the judicialisation process can be pinpointed to particular branches of international arbitration or whether it has a spillover effect. Taking into account the differences in arbitration users’ interests and needs, it could potentially be argued that while in some areas of international arbitration limited judicialisation is beneficial, in other areas (perhaps international commercial arbitration), this may be detrimental³³.

Rationale for the Thesis

This thesis attempts to fill the gaps in the available literature and examine to what extent the process of judicialisation has permeated international arbitration proceedings and arbitral decision-making. The aim is to demonstrate whether the

³¹ Ibid.

³² See Roy Goode, ‘Litigation or Arbitration? The Influence of the Dispute Resolution Procedure on Substantive Rights’ (2007) 19 *Pace Int’l L Rev* 53–62.

³³ In Lillich and Brower (n 19) it is argued that traces of the judicialisation process are spotted in both international commercial and international investment arbitration. Other authors, however, suggest that the judicialisation trend is better manifested in employment, consumers and financial/securities arbitrations rather than commercial ones. See e.g. Allison Anderson, ‘Labor and Commercial Arbitration: The Court’s Misguided Merger’ (2013) 36 *B.C. Int’l & Comp. L. Rev.* 1237–1275; Anthony F. Bartlett, ‘Labor Arbitration: The Problem of Legalism’ (1983) 62 *Or. L. Rev.* 195–230; W. Mark C. Weidemaier, ‘Judging-Lite: How Arbitrators Use and Create Precedent’ (2011) 90 *N. C. L. Rev.* 1091–1146; David S. Schwartz, ‘If You Love Arbitration, Set It Free: How “Mandatory” Undermines “Arbitration”’ (2008) 8 *Nev. L.J.* 400–426; Edward Brunet, ‘Toward Changing Models of Securities Arbitration’ [1996] *Brook. L. Rev.* 1459–1494.

process of judicialisation is consistent with the benefits of international commercial arbitration or not. If certain aspects are considered to be detrimental to the interests of the international arbitration community these developments should be discouraged.

At the beginning of the thesis a working definition of “judicialisation” in the context of international commercial arbitration is adopted in order to clarify the scope and objectives of the research. The latter then continues with an analysis of the sources of law in international commercial arbitration and their role in arbitral decision-making. If the process of judicialisation is found to transform international commercial arbitration into a mechanism akin to national litigation, it is expected that it will have effect on arbitrator’s use and interpretation of the sources of law. In a judicialised arbitration proceedings arbitrators will be perceived and/or encouraged to interpret and apply the sources of law in a way similar to the one employed by national judges. Arbitrator’s approach to the sources of law will be manifested both in the way arbitral tribunals manage arbitration proceedings and reach their decisions. Where arbitrator’s interpretation and application of the sources of law furthers the judicialisation agenda, this will have implications not only on the style of dispute resolution procedure but also on the parties’ substantive rights. In light of the effect that the dispute resolution mechanism has on the substantive rights particular attention is given to the factors driving the process of judicialisation in international commercial arbitration, such as the pursuit of fair and just process, the regulation of international arbitration proceedings and the evolution of arbitrator’s vocation. The analysis on the new developments affecting the conduct of international arbitration proceedings and the mechanics of arbitral decision-making aims to reveal whether the process of judicialisation has transformed international commercial arbitration into a litigation-like mechanism and who is to blame for this.

The importance of this thesis is considered to be three-fold. Being the first in-depth research on the process of judicialisation, this thesis fills gaps in the literature and adds to the level of knowledge of international commercial arbitration. Given that

the transformation of “folklore”³⁴ arbitration into a litigation-like mechanism for resolving disputes causes constantly growing concerns about its implications and the future of international commercial arbitration in general, there is an undoubted need for a detailed analysis that addresses those fears and offers some clarification and guidance. By answering the research questions, this thesis not only provides an explanation as to what causes the process of judicialisation and whether the latter is beneficial to arbitration users, but it also demonstrates how a formalistic approach to the sources of law, the pursuit of fairness, justice and the truth in the arbitral process, the increasing regulation of arbitration proceedings, the introduction of litigation-style practices and the professionalisation of international commercial arbitration are shaping the arbitration system.

Secondly, arbitration providers may find this research informative. International arbitration institutions play a significant role in supervising and regulating international arbitration proceedings. Since the majority of international arbitrations are conducted under the auspices of arbitration institutions, the latter actively participate in fostering new developments in international commercial arbitration. This thesis aims at shedding some light on the effects that these developments have on arbitration users and the arbitration system in general. In addition, the research demonstrates how arbitrators have been approaching decision-making and their perception of the role and function of an arbitrator. In view of the latter arbitration institutions will decide whether they would like to foster the judicialisation process or not. While at the beginning of its Golden Age, modern international commercial arbitration might have benefited from some judicialisation in order to build respect in the eyes of the institutions and arbitration user, this appears to no longer be the case.

Finally, this research informs arbitration users of the effects of judicialised arbitration. The primacy of principle of party autonomy guarantees that the

³⁴ The term “folklore arbitration” established by Edward Brunet in Brunet, ‘Replacing Folklore Arbitration with a Contract Model of Arbitration’ (n 23) 40, describes precisely the halo that surrounds the simplistic model of arbitration: “‘Folklore arbitration’ (...) is characterized by the choice of expert decision makers, a speedy process, privacy, informal presentations of evidence, little or no discovery, no right of judicial review, and the application of equitable rather than legal principles to resolve the dispute.”

arbitration proceedings can be tailored to the needs and requirements of arbitration users. Parties may want to contract out or curb the judicialised aspects of arbitration proceedings in order to maximise the benefits of a speedy and low-cost dispute resolution process. On the other hand, arbitration users that value precision and accuracy over time-efficiency may express preference for a judicialised arbitral process.

Methodology and Limits of the Thesis

This thesis will seek to achieve its objectives in three stages: Chapters 2 and 3 analyse the interaction between the judicialisation process and the sources of law in international commercial arbitration; Chapter 4 examines the factors driving the judicialisation phenomenon in international arbitration proceedings and provides an example of judicialised practices; finally, Chapter 5 considers the mechanics of arbitral decision-making and whether public's and institutions' perceptions of arbitrator's function and the way arbitrators see themselves influence the way arbitrators approach legal and non-legal issues and ultimately reach their decisions.

The methodology followed in this study is: analytical, in the sense of analysing main works in the area of this study, numerous number of articles published in specialised journals and various ICC arbitral awards; critical, by critically analysing the opinions and writings; and comparative, by examining the rules of different institutions and national arbitration acts. In the course of this study a theoretical analysis of different types of sources has been conducted. Primary sources include a great number of published and some unreported arbitral awards, court decisions, and the texts of arbitration rules, arbitration acts and international conventions. The secondary sources include the main works in the area of this study, numerous articles published in journals and reviews, opinions presented at lectures or conferences, guidelines and other non-binding instruments. The analysis will be informed by two other methods of research, namely fact-finding and opinion sourcing, and supporting statistical analysis. Evidence for the fact finding and opinion sourcing will be drawn from newspaper articles, blogs, conference talks, debates, etc., while the statistical data is

obtained from surveys, in particular the 2006, 2008, 2010, 2012, 2013 and 2015 QMUL Surveys, the 2012, 2013, 2014 and 2015 BLP Surveys, the 2011 CIArb Survey and the 2013 Mazars Survey. Institutional reports and statistics published by arbitration institutions and especially the 1997-2013 ICC Statistical Reports will feed the statistical analysis.

Examination of arbitral awards will be of great importance in considering the arbitrator's approach to the sources of law in international commercial arbitration and the mechanics of arbitral decision-making. Despite the great efforts put in finding as many awards as possible, there are some limitations to the research of arbitral awards. Firstly, the pool of arbitral awards is limited due to the confidentiality of arbitral decisions and the fact that only few of the awards are ever published. Of those awards that are published a great number of awards are considerably redacted, which prevents the researcher from conducting a profound and meaningful analysis. In addition, the author of the thesis is proficient in English and Bulgarian only, which limits their ability to conduct research in other languages.

In the examination of the secondary sources the author aims at achieving a balance between analysing materials written by scholars/practitioners/academics trained in the common law systems and such written by scholars/practitioners/academics trained in the civil law systems. It has to be taken into account that the legal and cultural background of the authors may have an impact on their opinion as to whether judicialisation exists and what it is precisely. Then again, differences in the attitude to judicialised arbitration may be related to the occupation of the participants in arbitration proceedings as well. Thus, what industries perceive to be judicialised arbitration might not necessarily be similar to the meaning that arbitrators or academics affix to the same term.

Finally, the methodological approach to the research questions will take into account the fact that the focus of the thesis is international commercial arbitration. What this means is that there may be a need to conduct comparative and interdisciplinary legal research regarding concepts of source of law, *res judicata*, *stare decisis*, issue of jurisdiction, arbitrator's role, etc. With this regard traditional concepts of law, international private laws, national laws, if applicable, and uniform laws are going to

be analysed and compared. Theories about the foundations of arbitration, *kompetenz-kompetenz*, public governance, etc. are also of relevance, as they might have effect of the application of the legal provisions related to the research question.

The scope of the thesis will be limited to international commercial arbitration; however, comparison with other branches of arbitration will be necessary to distinguish how the kind of arbitration correlates with the process of judicialisation. Thus, if it is found, for example, that the judicialisation process is more prominent in shipping and maritime arbitration than in international commercial arbitration it will be important to consider what fosters the judicialisation agenda in former and why the latter is less susceptible to effects of this development.

Throughout this thesis limited references will be made to investment arbitration. This is because international commercial arbitration and investment arbitration have different dynamics and a much greater degree of judicialisation is observed in investment arbitration as opposed to international commercial arbitration. This often makes the comparison between the two branches of arbitration inadequate and inappropriate.

The high degree of judicialisation of investment arbitration is demonstrated by the proposal for establishing a permanent investment court system to replace the existing investor-to-state dispute settlement. In addition, due to the publication of many awards and annulment decisions in investor-state cases *de facto* precedents play a more prominent role in investment arbitration than in international commercial arbitration. Finally, it could be argued that there are difference between arbitrator's role and functions in investment arbitration and international commercial arbitration. As investment arbitration usually involves public interests, arbitrators often help shape the content of substantive investment law through the interpretation of open-ended norms in investment treaties. There are strong supporters of the proposition that arbitral tribunals should make efforts to further the development of international law when writing their awards. In contrast, the principle of party autonomy is of paramount importance in international commercial arbitration and arbitrators are wary of stepping outside their mandate by "making law" through the way they interpret and apply the law. Arbitrator's function is perceived to be deliverance of *ad*

hoc justice in view of the specific facts of the case and arbitration's ambition to develop the law is much more limited. Policy considerations rarely play a role because arbitrators are called to settle private business disputes.

The reasons for examining the process of judicialisation particularly with respect to international commercial arbitration are the following:

- (i) International commercial arbitration is a well-established branch of arbitration characterised by long tradition, strong support for the principle of party autonomy and profound customary practice;
- (ii) International commercial arbitration is a great example of a field where industries opt for procedural flexibility but also want to be guaranteed legal certainty and predictability of the outcome. Hence, it is a suitable area to examine as to whether business' needs boost or suppress the judicialisation process;
- (iii) There is no mandatory commercial arbitration, few mandatory rules and limited public policy considerations in international commercial arbitration. Thus, this will not leverage the results of the analysis towards a presumptive answer to the question as to whether there is a process of judicialisation in international arbitration. Policy considerations do not play a significant role in international commercial arbitration, which is often the case in consumer and labour arbitration and even in international investment arbitration.

With the popularisation of international arbitration, parties have started to resort to it in legal relations that are not typically associated with this method of dispute resolutions; neither did arbitration historically emerge for resolving such conflicts³⁵.

³⁵ See Stipanowich, 'Arbitration: The "New Litigation"' (n 23) 11 "Since arbitration processes took over the territory historically reserved for litigation in the public forum, the character of arbitration has changed."

Terminology – Legalised, Formalised, Contractualised, Americanised, Harmonised or Judicialised International Arbitration?

Apart from “judicialisation”³⁶, commentators use terms like “legalisation”³⁷, “formalisation”³⁸, “Americanisation”³⁹, “contractualisation”⁴⁰ and “harmonisation”⁴¹

³⁶ See e.g. Lillich and Brower (n 19); Dezalay and Garth, *Dealing in Virtue* (n 23); Nariman, ‘The Spirit of Arbitration’ (n 23); Schneider, ‘Not Quite a World Without Trials’ (n 23); Redfern, ‘Stemming the Tide of Judicialisation in International Arbitration’ (n 23); Brower (n 23); David W. Rivkin, ‘Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited’ (2008) 24 *Arbitration International* 375–386; L. Tyrone Holt Esquire, ‘Whither Arbitration? What Can Be Done to Improve Arbitration and Keep Out Litigation’s Ill Effects’ (2009) 7 *DePaul Bus. & Comm. L.J.* 455–480; Stipanowich, ‘Arbitration: The “New Litigation”’ (n 23); Carbonneau, ‘Judicialization of the Process’ (n 23); Vijay K Bhatia, ‘Judicialisation of International Commercial Arbitration Practice: Issues of Discovery and Cross-examination’ (2011) 1 *Lapland Law Review* 15–29; Maurizio Gotti, ‘The Judicialization of Arbitration Discourse in the Italian Context’ in Christopher N. Candlin and Vijay K Bhatia (eds), *Discourse and Practice in International Commercial Arbitration* (1st edn, Routledge 2012); Sundaresh Menon, ‘Keynote Address’ in Albert Jan van den Berg (ed), *ICCA Congress Series No. 17 (Singapore 2012)* (1st edn, Kluwer Law International 2013); Alec Stone Sweet, ‘The Evolution of International Arbitration: Delegation, Judicialization, Governance’ in Walter Mattli and Thomas Dietz (eds), *International Arbitration and Global Governance: Contending Theories and Evidence* (1st edn, OUP 2014); Rémy Gerbay, ‘Is the End Nigh Again? An Empirical Assessment of the “Judicialization” of International Arbitration’ (2014) 25 *The American Review of International Arbitration* 223–247.

³⁷ See e.g. Perry A. Zirkel and Andriy Krahmal, ‘Creeping Legalism in Grievance Arbitration: Fact or Fiction?’ (2001) 16 *Ohio St. J. Disp. Resol.* 243–265; SI Strong, ‘Increasing Legalism in International Commercial Arbitration: A New Theory of Causes, A New Approach to Cures’ (2013) 7 *World Arbitration & Mediation Review* 117–130; Dezalay and Garth (n 23); Helmer (n 1).

³⁸ See e.g. Bruce H. Mann, ‘The Formalization of Informal Law: Arbitration before the American Revolution’ (1984) 59 *New York University Law Review* 443–481; Bernhard E. Meyer, ‘Formalism in Arbitration - Good or Evil?’ in Marcus Wirth and others (eds), *the Search for ‘Truth’ in Arbitration - ASA Special Series No. 35* (1st edn, Juris Net 2011); Christopher Clarke, ‘Formalism in Arbitral Proceedings - Good or Evil?’ in Markus Wirth and others (eds), *Search for ‘Truth’ in Arbitration: Is Finding the Truth What Dispute Resolution Is About? - ASA Special Series No. 35* (1st edn, Juris Net 2011); Jean D’Aspremont, ‘The Emergence of Formal Law-Ascertainment in the Theory of the Sources of International Law’ in *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (1st edn, OUP 2011).

³⁹ See e.g. Reed and Sutcliffe (n 28); Ulmer (n 28); Karamanian (n 28); Helmer (n 1); Romano (n 28); Alford (n 28); Park, *Americanization of International Arbitration and Vice Versa Arbitration of International Business Disputes* (n 28); Bergsten (n 28); Hanotiau, ‘The Conduct of the Hearings’ (n 28); Seidenberg (n 28); Pierre Bienvenu and Martin Valasek, ‘Witness Statements and Expert Reports’ in R. Doak Bishop and Edward G. Kehoe (eds), *The Art of Advocacy in International Arbitration* (2nd edn, Juris Net 2010); von Mehrem and Jochum (n 28); Kessler (n 28).

when analysing the transformation of international commercial arbitration from an informal ADR mechanism into a litigation-like system. It is maintained in the thesis that the forces driving the process of judicialisation in international commercial arbitration also foster the processes of legalisation⁴², formalisation⁴³, Americanisation⁴⁴, contractualisation and even harmonisation⁴⁵. The latter terms, however, fall short of explaining the complexity of factors that contribute to the transformation of international commercial arbitration. Taken separately they present a sketchy picture and indicate just some of the processes that are shaping the system of modern international commercial arbitration.

In contrast, the term “judicialisation” encompasses the characteristics of legalisation, formalisation, Americanisation, contractualisation and harmonisation without overplaying the importance of one factor or another. Thus the concept of judicialisation is not unnecessarily curbed, which allows approaching the research questions from different angles. For the purposes of this thesis the term judicialisation denotes the process of increasing formalisation, legalisation, (self-)regulation and institutionalisation of international commercial arbitration and the ever-growing resemblance to litigation. Judicialised international commercial arbitration stands in contrast to the bygone Golden Age of cheap, fast, efficient and less regulated international commercial arbitration.

Having this working definition of judicialisation in mind, it would still be helpful to distinguish between the various terms and ascertain how each development affects international commercial arbitration. Legalisation, for example, is considered to be a

⁴⁰ See e.g. Brunet, ‘Replacing Folklore Arbitration with a Contract Model of Arbitration’ (n 23); Jack M. Graves, ‘Arbitration as Contract: The Need for a Fully Developed and Comprehensive Set of Statutory Default Legal Rules’ (2011) 2 Wm. & Mary Bus. L. Rev. 227–289.

⁴¹ See e.g. Craig (n 10); Karl-Heinz Böckstiegel, ‘Past, Present, and Future Perspectives of Arbitration’ (2009) 25 Arbitration International 293–302; Daniele De Carolis, ‘The Process of Harmonisation of the Law of International Commercial Arbitration: Drafting and Diffusion of Uniform Norms’ (School of International Studies 2010); Helmer (n 1); Ranata Brazil-David, ‘Harmonization and Delocalization of International Commercial Arbitration’ (2011) 28 Journal of International Arbitration 445–466; Leahy and Bianchi (n 1).

⁴² See p 217, 236, text to n 64, 371, 566.

⁴³ See p 63, text to n 286, 360, 499, 566, 593, 656, 698, 783.

⁴⁴ See text to n 591, 619, 620.

⁴⁵ See n 185, text to n 451, p 221, 228.

particular form of institutionalisation, which is characterised by three components, namely obligation, precision and delegation.⁴⁶ What this means is that states and other actors are legally bound by a set of rules that unambiguously define the conduct they require or prescribe and third parties are granted authority to implement, interpret and apply the rules. Third parties are also delegated the authority to resolve disputes arising out of or in relation to the rules and possibly to make further rules. Thus, legalisation is usually associated with the proliferation of legal norms, on the one hand, and courts and/or tribunals that supervise the application of legal rules, on the other hand. By institutionalising usually informal relations between states or any other actors, the process of legalisation contributes to their formalisation and the development of a hierarchical system.

This is why the term “legalisation”⁴⁷ is often used in international commercial arbitration to describe a process that fosters formality and rigidity in arbitration proceedings. In legalised arbitration precision and accuracy are more highly valued than time-efficiency. This inevitably increases the costs of arbitration and can lead to unnecessary delays. Participants in legalised arbitration proceedings usually have solid legal knowledge and litigation experience. They employ in international arbitration proceedings the same tools they use in litigation. This formalises the arbitral process and leads to proliferation of practices that are not typical for international commercial arbitration, such as prehearing motions, discovery, witness preparation, etc.

The extensive length of legalised arbitration proceedings can also be attributed to the use of legal manoeuvres and dilatory tactics. Together with the lack of cooperation between the parties this makes the arbitral process highly adversarial and cumbersome. The reliance on legal formalities in legalised arbitration is enhanced by

⁴⁶ Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, ‘The Concept of Legalisation’ (2000) 54 *International Organization* 401–419. See also De Carolis (n 41) 69 et seq.

⁴⁷ See Stipanowich, ‘Arbitration: The “New Litigation”’ (n 23) 28: “Similar to litigation, modern ‘legalised’ arbitration tends to work against ongoing relationships. They are both formalised adversary processes aimed at adjudicating rights and obligations, and thus are narrowly and backward focused. Legal counsel, not the parties themselves, drive the process. The question is not whether arbitration will improve an underlying commercial relationship, but how much harm it will do.”

the transposition of the notion of “fair and just process” applicable in litigation to international arbitration proceedings without any adjustment and consideration as to what fairness and justice mean in the context of international commercial arbitration.⁴⁸ The implications are increased formalisation⁴⁹, rigidity, and litigiousness⁵⁰.

⁴⁸ Tom Tyler argues that fairness is dependent on the process and as long as individuals have a voice in the process and are convinced that they have been heard, the process as well as the outcome will be fairer (in Tyler Tom R., Kenneth A. Rasinski, and Nancy Spodick, ‘Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control’ (1985) 48 J. Personality & Soc. Psychol. 72–81, 80). In view of this it is suggested that arbitration users with extensive litigation experience will expect from the arbitral process to provide the same guarantees for the right to be heard as litigation does and will, therefore, actively encourage practices that, in their view, contribute to fair and just arbitration proceedings. See also Schneider, ‘Not Quite a World Without Trials’ (n 23) 127 in which the author argues that “the move toward ADR in the U.S. reflects a substantial interest in letting parties control their own destiny in disputes. (Of course, actual control might be illusory.) Nonetheless, ADR offers parties at least a perception of substantive control through the ability to speak for themselves and be heard in a respectful manner. Parties can decide when and how to settle, and meet their needs for cost savings, quick resolution, and an agreement directly crafted to meet their interests. Recent writing on ADR also focuses on the fairness of the process and the need to give parties a voice in the process. Research indicates that when parties perceive that they have exercised process control, they are also more likely to assume that they have a level of control over the outcome. And, even if the outcome is unfavorable, parties are more likely to perceive that outcome as substantively fair.”

⁴⁹ See e.g. Fali S Nariman, ‘The Influence of Civil Lawyers on International Commercial Arbitration’ in Gerald Aksen and Robert Briner (eds), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (international law, commerce and dispute resolution : liber amicorum in honour of Robert Briner (1st edn, ICC Publishing 2005) arguing that in modern international commercial arbitration arbitral awards have become “tedious, voluminous and too full of legal props in the form of quotations, as in court judgments”, while in the arbitration proceedings “ceremonies’ are multiplying; ‘formalities’ are on the increase; and much time is spent mirroring the arts of litigation, thus often missing the true quest – the ‘discovery of right’”.

⁵⁰ The legalisation of international commercial arbitration appears to adversely affect arbitrator’s conduct as well. Arbitrators are becoming insecure about their inherent powers and hesitant to take a proactive approach in managing the arbitration proceedings in fear of being challenged. Thus, it becomes ever more difficult to limit the negative effect of litigation-like practices, such as pre-hearing motions, discovery, witness examination, etc.: “Arbitrators, intent upon striking a balance between fundamental fairness and efficiency, may be reluctant to push parties to limit such practices or to keep to schedule. Arbitrators’ concerns about having their award subjected to a motion to vacate likely reinforce these tendencies, especially among arbitrators who lack the confidence of long experience. The reluctance to limit discovery may also reflect an arbitrator’s desire to avoid offending anyone in the hope of securing future appointments.” in Stipanowich, ‘Arbitration: The “New Litigation”’ (n 23) 13. With regard to the requirement arbitrators to impartial and independent, see 4.1.1 *Arbitrator’s Vocation and the Double Standard for Arbitrator’s Impartiality and Independence* on p. 188 et seq.

The process of legalisation is often associated with the American influence on international commercial arbitration and considered to be a result of the “Americanisation” of international commercial arbitration.⁵¹ Some authors argue that with the growing significance of Anglo-American law firms, there has been a proliferation of practices borrowed from American style litigation, such as prehearing motion practice, extensive discovery⁵², witness preparation⁵³, sophisticated and eloquent style of pleading⁵⁴, etc.

Although the presence of an “American factor” in international commercial arbitration is undeniable, the arguments in favour of an on-going process of Americanisation are often exaggerated and one-sided. By its very nature international commercial arbitration is a forum where different legal traditions and cultures meet and, as such, the proliferation of certain practices is inevitable. Americanisation, however, appears to be only one of the dimensions of a more complex development changing the face of international commercial arbitration.

While discussions about the Americanisation of international commercial arbitration focus entirely on the area of procedure⁵⁵, attention should also be given to matters concerning the interpretation and application of the sources of law in international commercial arbitration, regulation and harmonisation of the arbitral process, arbitral decision-making, etc. This is why some authors contend that international

⁵¹ See generally Alford (n 28); von Mehren and Jochum (n 28); Helmer (n 1); Ulmer (n 28); Reed and Sutcliffe (n 28); Romano (n 28); Seidenberg (n 28).

⁵² See e.g. Park, *Americanization of International Arbitration and Vice Versa Arbitration of International Business Disputes* (n 28) 8: “one frequently hears complaints about the ‘Americanization’ of arbitration, usually related to aggressive litigation tactics that include hefty boxes of unmanageable exhibits, costly pre-trial discovery and disruptive objections to evidence.”

⁵³ See e.g. Hanotiau, ‘The Conduct of the Hearings’ (n 28) 365 stating that ‘Until a few years ago, however, members of the Bar in various civil law countries were prohibited from having direct contact with a potential witness. In other words, preparing a witness was strictly forbidden and any one who breached the rule would incur disciplinary sanctions. Recently, the rule has been relaxed in international cases to avoid putting civil law lawyers at a disadvantage with English barristers or American attorneys.’

⁵⁴ See generally R. Doak Bishop, ‘United States’ in R. Doak Bishop, *The Art of Advocacy in International Arbitration* (R. Doak Bishop (ed), 2nd edn, Juris Net 2010).

⁵⁵ Helmer (n 1) 37: “The differences between the two legal systems are most visible in the area of procedure, and, not surprisingly, the majority of publications discussing the Americanization of international commercial arbitration concentrate on procedural issues.”

commercial arbitration is not being influenced so much by the Anglo-American style of conducting arbitration, rather the new practices are the result of a process of harmonisation:

(...) American influence on international arbitration is significant, but falls short of Americanization. Rather, the current trends and developments in international commercial arbitration demonstrate an ongoing process of harmonization in many areas of international arbitration. This includes national arbitration laws, rules of major arbitration institutions, and arbitration practices, as demonstrated by the United Nations Commission on International Trade Law (UNCITRAL) and International Bar Association (IBA) documents as well as procedures adopted by international arbitral tribunals.⁵⁶

Undoubtedly, there have been continuous efforts to achieve a greater degree of harmonisation in international commercial arbitration in the last 50 years. The NYC and the UNCITRAL ML are considered as major milestones in the development of international commercial arbitration by contributing to its harmonisation in a number of areas, such as the enforcement of arbitration agreements and arbitral awards, the role of national courts and their supervisory powers, the constitution and challenge of arbitrators, etc. The process of harmonisation of “arbitral procedural law”⁵⁷ is further complemented by the continuous standardisation of institutional arbitration rules. The latter is demonstrated by the regularity with which arbitration institutions have been updating their sets of arbitration rules in the last 10-15 years.

The level of harmonisation achieved in the field of international commercial arbitration has reinforced the primacy of the principle of party autonomy. This encourages greater procedural flexibility, while also providing some certainty and predictability in the parties’ contractual relations. The term “harmonisation” gives an account of the fact that the forces driving this process might be either external or internal. The concept of harmonisation, however, is not particularly helpful when

⁵⁶ Ibid 37, 38.

⁵⁷ The concept of arbitral procedural law is a reference to the laws or the rules of law governing the arbitration proceedings. See also Richard Garnett, ‘International Arbitration Law: Progress towards Harmonisation’ (2002) 3 Melbourne Journal of International Law.

analysing the mechanics of arbitral decision-making. Furthermore, it undermines the role that cultural and legal diversity play in international commercial arbitration⁵⁸.

In light of the above, it is considered that the term “judicialisation” will best serve the objectives of this thesis. As indicated above, in contrast to the terms “legalisation”, “formalisation”, “Americanisation”, “contractualisation” and “harmonisation” the term “judicialisation” is capable of indicating phenomena that can be observed both in the conduct of international arbitration proceedings and in the arbitral decision-making. In addition, the concept of judicialisation is broad enough to appreciate the relevance of competing developments, such as the cultural diversification of international commercial arbitration, on the one hand, and the process of harmonisation, on the other hand, or the establishment of the primacy of party autonomy, on the one hand, and the formalisation of the arbitral process, on the other hand.

The term “judicialisation” will be used in this thesis as a generic concept. It will encompass the meanings attributed to all other terms, i.e. “legalisation”, “formalisation”, “Americanisation”, “contractualisation” and “harmonisation”. By using judicialisation in its broad sense, the thesis will examine the various causes and implications of the developments shaping the face of modern international commercial arbitration and will not be limited by the definition that it adopts. Thus, “judicialisation” will be understood to indicate a process resulting in a displacement of the inherent and widely appreciated characteristics of international commercial

⁵⁸ In John M. Barkett and Jan Paulsson, ‘The Myth of Cultural Clash in International Commercial Arbitration’ (2009) 5 FIU L. Rev. 1–11 the authors maintain that cultural clashes “are a function of tactics not tradition” (at 3) but then quickly concede that “clashes occur” (at 3). Although it is acknowledged that when two lawyers are trained in different systems they develop very different skills, Barkett and Paulsson argue that this does not necessarily have an effect on the way arbitration proceedings are conducted. An example is given with the practice of cross-examination, which is not typical for civil-law-trained lawyers but is now routinely conducted in international commercial arbitration. In the authors’ opinion, however, cross-examination is not an example of a cultural clash, but an issue of simple procedural fairness: “In establishing procedures, arbitrators must understand their impact on the disputants and insure that due process is not compromised” (at 4). It is true that as a procedural tool, the practice of cross-examination has an effect on the fairness of the process, however, the authors have failed to appreciate the fact that the admissibility and necessity of conducting cross-examination will ultimately be decided by the arbitrators, who will rely on their legal training and experience in ruling on this issue. Thus, the cultural clash does not necessarily involve only legal counsel; it may rather be a clash between one of the counsel and the arbitrator or arbitral tribunal.

arbitration, i.e. informality, speediness, flexibility, time- and cost-efficiency, by features usually associated with national litigation, such as procedural formality, legalism, cumbersomeness, excessive costs, rigidity and even inefficiency.

CHAPTER 2 THE PROCESS OF JUDICIALISATION AND THE CONCEPT OF SOURCES OF LAW IN INTERNATIONAL COMMERCIAL ARBITRATION

Objectives

This chapter explores the concept of “source of law”⁵⁹ in international commercial arbitration. Its main objective is to examine whether the recognition of certain rules and norms as sources of law reveals an ongoing process of judicialisation. The existence and classification of sources of law manifest formality and legalism. As one of the implications of judicialisation is considered to be the increasing formality and legalisation of international commercial arbitration, it is important to consider the role sources of law play in that area of law.

Particular attention is to be given to the classification of the sources of law for two reasons. Firstly, if the categorisation of sources of law in international commercial arbitration is identical to the one in national jurisdictions, this congruence may foster the process of judicialisation by prompting arbitrators to interpret and apply the sources of law in a way very similar to the approach adopted by national judges. Secondly, the categorisation of the sources of law is of importance to examining whether there is an evolving hierarchical system of international arbitral law. Should evidence for such a developing system be found, this will imply that there is an ongoing legalisation and institutionalisation of international commercial arbitration, which are considered to be some of the implications of the process of judicialisation.

The analysis commences with an overview of the major theories for source of law and it will proceed with a review of the classifications of sources of law suggested in

⁵⁹ Emmanuel Gaillard and John Savage, ‘Sources of International Commercial Arbitration’ in Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (1st edn, Kluwer Law International 1999) suggest that the main sources of international arbitration law consist of rules enacted by competent national authorities acting in a national or international context. This definition, however, is too narrow and does not reflect important characteristics attributed to international commercial arbitration, such as the tendency towards self-regulation.

the literature. In view of the theoretical foundations of the concept of source of law and taking into account the particularities of international commercial arbitration, a working classification of the sources of international commercial arbitration will be suggested. Such categorisation will contribute to the analysis on the evolution of sources of law and assist with establishing whether the latter benefits the judicialisation agenda.

This chapter does not aim to construct a definition for “source of law” in the context of international commercial arbitration, since this will not add much to the study of the process of judicialisation. To define “source of law” will require an extensive research in the field of legal theory and legal philosophy, which is beyond the objectives of this thesis. The aim of this chapter is to set the theoretical foundation for assessing arbitrator’s approach to the sources of law, meaning the way they interpret, apply and weigh the sources of law. The mechanics of arbitrator’s decision-making, including the use and application of the sources of law will be discussed in some detail in Chapter 5.

2.1 The Importance of Classification of the Sources of Law in the Context of International Commercial Arbitration

Although little attention is paid to the classification of the sources of law⁶⁰ in international commercial arbitration, this matter is of general importance and it is of particular significance when discussing the implications of the process of judicialisation. It goes back to the theoretical foundations and nature of international commercial arbitration and the legal order(s) from which the latter derives its legitimacy⁶¹. The classification of sources of international commercial arbitration is

⁶⁰ In this and the following chapters the term “source of law” is understood to be a reference to sources of law governing both the arbitration proceedings and the merits of the dispute. When the analysis requires a differentiation between these sets of rules, this would be made clear.

⁶¹ See generally Jan Paulsson, ‘Arbitration in Three Dimensions’ (2011) 60 ICLQ 291–323. Also Giuditta Cordero-Moss, ‘International Arbitration is Not Only International’ in Giuditta Cordero-Moss (ed), *International Commercial Arbitration: Different Forms and Their Features* (1st edn, OUP 2013) 8 stating: “(...) not only the law of the place of arbitration, but also other national laws may have an impact on arbitration, and that this is quite irrespective of whether the

necessary in order to understand and appreciate the complexity of modern arbitration, and to identify the variety of norms, which may be found applicable in arbitration proceedings.

The issues of defining and classifying the sources of law in arbitration are of importance when addressing questions related to the tension between the various legal orders that bring international commercial arbitration to existence. Is arbitration legally connected to a particular jurisdiction or is it truly autonomous? Where do arbitrators derive their powers from and what is the scope of their authority? Can arbitration function or continue to function without the support of the law of a particular state? What is the limit of party autonomy? Can parties alter the institutional arbitration rules applicable to the arbitration proceedings and to what extent? All these questions, although not directly bringing up the problem of classification of the sources of law in international commercial arbitration, are linked to legal norms that govern arbitration proceedings, their interpretation, application and binding/persuasive effect.

Apart from identifying those legal norms, a classification of the sources of law in international commercial arbitration has the purpose of examining the process of regulation and harmonisation in the field. A tendency of bringing rules to the system and developing stricter legal framework within which arbitration users can operate will be evidence of the on-going judicialisation process. Further regulation of the conduct and administration of arbitration proceedings will benefit and facilitate the judicialisation agenda, as it ensures greater certainty and predictability of the outcome of arbitral process. Besides, by developing a more advanced legal framework to govern the exertion of parties', counsel's and arbitrators' rights and obligations, arbitration consumers highlight the importance of the way procedural and substantive justice is achieved.

The classification of the sources of law in international commercial arbitration can also be of significance to analyse some emerging trends in this field. Although it is

parties have chosen them to apply or have even decided that they shall not apply: the law of the place of enforcement (...) and, to a certain extent, the law applicable to the substance of the dispute (...)"

widely accepted that there is no hierarchy of norms in international commercial arbitration, it cannot be denied that there is increasing differentiation between the sources of arbitration in terms of their binding and persuasive effect.⁶² Arbitral tribunals necessarily apply certain principles and considerations in order to weigh in the legal force and binding effect of the sources of law. It can be argued that the growing importance of questions related to the scope of party autonomy and public policy, the relevance of the law at the seat of arbitration, the applicability of general rules of law, the essence of arbitrators adjudicative function, and considerations as to procedural flexibility, legal certainty, and natural justice can be linked to an emerging hierarchical system of rules of law in international commercial arbitration. Such a development will complement the attempts to bring more certainty and predictability of the outcome of commercial disputes and more transparency in the decision-making process of arbitrators – evolution that can be associated with the judicialisation process of arbitration.

Finally and following the foregoing, a classification of the sources of law in international commercial arbitration sets the theoretical foundation for analysing the arbitrator's decision-making process. A look in the "black box"⁶³ is of importance in order to examine whether the judicialisation process can be traced to the decision-making process of arbitrators, making it similar or identical to the one applied by national judges. The increased regulation of arbitral process, the complexity of transnational commercial disputes and the higher expectations of commercial parties have allegedly transformed international commercial arbitration. As put by Catherine Rogers:

The modern international business environment has forced international arbitration to become a more formalised and legalized dispute resolution process. In its final incarnation, international arbitration is less recognizable as a form of 'alternative

⁶² See generally Moritz Renner, 'Towards a Hierarchy of Norms in Transnational Law?' (2009) 26 *Journal of International Arbitration* 533–555.

⁶³ A reference to the Bernhard Berger and Michael E. Schneider (eds), 'Inside the Black Box: How Arbitral Tribunals Operate and Reach Their Decisions - ASA Special Series No. 42' in (1st edn, Juris Net 2014).

dispute resolution’ than as a type of ‘offshore litigation.’ This transformation has been both celebrated and decried as the “judicialization” of arbitration.⁶⁴

In order to analyse this transformation and to find out what the implications of the judicialisation process are, it will be necessary to correctly identify the legal framework, within which arbitration users exert their rights and obligations and which governs the conduct of arbitral process from its start to the enforcement stage.

2.2 The Concept of Source of Law in International Commercial Arbitration Context

The classification of sources of law in international commercial arbitration necessarily goes through analysing the concept of source of law from jurisprudential standpoint. General presentation of the doctrinal concepts of source of law is of importance for two reasons. Firstly, it will introduce the theoretical framework necessary to understand the nature of legal norms, the validity of the legal system and the authoritativeness of the sources of law. Simply put, it will provide an overview of possible answers to the question ‘What makes a norm a legal rule?’ Secondly, a brief introduction to the theoretical foundations of the concept of source of law will facilitate the presentation of the thesis that international commercial arbitration derives its legitimacy and sources of law from a number of potentially relevant legal orders.⁶⁵ Hence, when categorising the sources of law in international commercial arbitration context, the analysis will take into account concepts of “source of law” found in jurisprudence and compare them to arbitration reality.

2.2.1 Doctrinal Concepts of Source of Law

The main theories of law that determine the understanding of the term “source of law” are five, namely the naturalism, positivism, formalism, realism and legal

⁶⁴ Catherine A. Rogers, ‘Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration’ (2002) 23 Mich. J. Int’l L. 341–423, 352-353.

⁶⁵ See generally Paulsson, ‘Arbitration in Three Dimensions’ (n 61).

pluralism. The first two take completely opposite stances as to the foundations of the law, the validity of the legal system and the authoritativeness of the sources of law. The natural law theories proclaim that “unjust laws are not laws” and accept that law have a dual nature – it can be considered both as a social fact of power and practice, and as a set of reasons for actions that are sound and just, and therefore normative. As explained in *McCoubrey & White's Textbook on Jurisprudence*, “[n]atural law (...) was principally a theory of the nature of morality in which the law was used as a model for understanding it”.⁶⁶ Thus, according to the natural law theories the moral rules not only fall under the category of sources of law, but they are at the top of the hierarchy of norms, as they are rules of “higher law” and always apply to supplement the “social-fact” sources, especially when the latter are injustice, inadequate and insufficient behavioural guides. In normal adjudication and judicial reasoning two set of rules are used to rule on a case and justify the correctness of a decision – on one hand, the social-fact sources or “legal materials”⁶⁷ (statutes, precedents, practice, etc.), and, on the other hand, moral standards, which function as a direct source of law.

The opponents of the idea that law depends on its merits and goes hand in hand with morality form the legal positivism school of thought. As formulated by John Austin, “the existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry”.⁶⁸ The positivist thesis does not state that the idea of justice, moral standards, and law are incompatible; it only asserts that the existence of a legal system and enforcement of laws is dependent on the presence of certain structures of governance. Whether and what laws are going to be enacted is subject to the officials’ power to recognise social guides and standards as authoritative, and not to the extent social norms satisfy ideals of justice or morality. Thus, according to one of the main architects of the legal positivism theory, Jeremy Bentham and John Austin, laws are *de facto* the sovereign’s commands backed up by threat of force or sanction.

⁶⁶ James Penner and Emmanuel Melissaris, *McCoubrey & White's Textbook on Jurisprudence* (5th edn, OUP 2012) 12.

⁶⁷ See Stephen Guest, *Ronald Dworkin* (3rd edn, Stanford University Press 2012).

⁶⁸ John Austin, *Austin: The Province of Jurisprudence Determined* (Wilfrid Rumble (ed), Cambridge University Press 1995) 157.

Hans Kelsen further develops the positivist idea of the coercive nature of law; however, he substantiates the validity and authoritativeness of the sources of law not on the ground of the sovereign's commands, but through the "basic norm".⁶⁹ In Kelsen's view "[l]aw is not, as it is sometimes said, a rule. It is a set of rules having the kind of unity we understand by a system."⁷⁰ The unity of the system is what validates the binding force of the norms, and not the fact that the laws are commanded by one sovereign. Thus, a by-law is legally valid, as it is a result of a corporation exercising powers conferred on it by the legislature. The latter grants power in accordance with the constitution, which was itself created as per an earlier constitution.⁷¹ Kelsen asserts that at the very end of the chain of norms is the so called "basic norm" which is neither a legal rule, nor a social norm, but is binding. Hence, the authoritative sources of law should be those legal norms that are part of the unity of the normative system.

H.L.A. Hart accepts Kelsian's view on the normative foundations of legal systems; however, he argues that the authority of law is not grounded in force (sovereign commands), or in a presupposed norm (basic rule), but in a social rule, practice, and custom. Hart divides the rules into primary and secondary rules, as the latter represents rules "for conclusive identification of the primary rules of obligation"⁷². Thus, three categories might be distinguished within the group of the secondary rules – "rules of recognition" which specify the criteria of validity in the legal system, "rules of change" which identify the individual or body of persons who will be entitled to change or introduce new primary rules, and rules bestowing powers on individuals to judge whether a primary rule has been violated. Hence, Hart places the social customs at the very top of the legal system as they provide guidance and standards for behaviour. These social customs, however, are official, i.e. in order for the rules of behaviour to be valid they "must be generally obeyed, and (...) must be

⁶⁹ See Hans Kelsen, *General Theory of Law and State* (3rd edn, The Lawbook Exchange Ltd. 2009).

⁷⁰ Ibid 3.

⁷¹ The example is illustrated in the online version of Stanford Encyclopaedia of Philosophy, available at <<http://plato.stanford.edu/>>

⁷² H. L. A. Hart, *The Concept of Law* (Joseph Raz and Penelope A. Bulloch (eds), 3rd edn, OUP 2012) 95.

effectively accepted as common public standards of official behaviour by its officials”⁷³.

International commercial arbitration is considered a part of the normative system and its recognition is dependant on the existence of a certain structures of governance. Arbitration is conducted within national legal regimes, the validity of the arbitration proceedings and arbitration agreements is subject to mandatory rules and public policy of national laws, but most importantly arbitration lacks the coercive powers of national courts and relies on the public system of justice to compel compliance. The interrelationship between national courts and international commercial arbitration is highlighted by Hon Mr Justice Blair in his speech at the 2016 Commercial Litigation and Arbitration Forum.⁷⁴ Hon Mr Justice Blair cited statistics according to which in 2015 25.7% of cases commenced in the Commercial Court were arbitration claims and this trend is allegedly rising. These cases include wide range of issues – from injunctions, interim measures and appointment of arbitrators, to registration of awards and enforcement, appeals on points of law and challenges on the grounds of serious irregularity. Hon Mr Justice Blair pointed out that this not only gives some perspective on the scope of the court’s work in support of arbitration, but it also emphasises the interrelationship between international commercial arbitration and national legal systems. In the words of Hon Mr Justice Blair: “(...) [w]e do not think it is accurate or sensible to see arbitration and litigation as in some kind of arms race. Both should be seen as mutually supportive parts of what is a developing system of international commercial dispute resolution.”⁷⁵

It is to be noted that in contrast with international commercial arbitration some ADR mechanisms may appear to operate within the normative system more independently. For example, eBay dispute resolution is conducted on the basis of well-developed and formalised set of rules of conduct. EBay regulatory workings appear “to be

⁷³ Ibid 116.

⁷⁴ See Remarks by The Hon Mr Justice Blair: Commercial Dispute Resolution – Current Developments in the Commercial Court, available at: <<https://www.judiciary.gov.uk/wp-content/uploads/2016/11/blair-j-legal-week-20161103.pdf>>

⁷⁵ Ibid 7.

closer to a legal system than to a contractual framework”.⁷⁶ The efficiency of the eBay dispute resolution mechanism rests on its detailed policies, which have a high level of recognition among eBay users. This recognition stems from the constraining power of eBay’s user policies by virtue of the instrumentalisation of the reputation of eBay members.⁷⁷ eBay users are sanctioned if they refuse to participate in the dispute resolution process or fail to comply with its outcome.

Hart’s theory of primary and secondary rules is seriously questioned by the leading theoretical spokesman for legal formalism Ronald Dworkin, Dworkin rejects the differentiation between the rules of law into rules of obligation and rules of recognition/change. In his opinion “when lawyers reason or dispute about legal rights and obligations, [...] they make use of standards that do not function as rules, but operate differently as principles, policies, and other sorts of standards”⁷⁸. In line with formalist theory, Dworkin argues that the difference between legal principles and legal rules is just a logical distinction and both sets of standards directs to a particular decision about legal obligations under certain circumstances. The difference lies in the character of the direction they give:

The standards [...] are not the sort we think of as legal rules. [...] They are different because they are legal principles rather than legal rules. [...] Rules are applicable in all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision. [...] But this is not the way sample principles [...] operate. Even those which look most like rules do not set out legal consequences that follow automatically when the conditions provided are met.⁷⁹

The assertion that legal rules are complimented by and interpreted in view of a set of standards supports formalists’ argument for an autonomous adjudication, i.e. “judges can reach the required decision without recourse to non-legal normative

⁷⁶ Arnold Ingen-Housz, *ADR in Business. Practice and Issues across Countries and Cultures*: 2 (1st edn, Kluwer Law International 2010) 139.

⁷⁷ Ibid.

⁷⁸ Ronald Dworkin, ‘The Model of Rules I’ in Larry May and Jeff Brown (eds), *Philosophy of Law: Classic and Contemporary Readings* (1st edn, Wiley-Blackwell 2009) 99.

⁷⁹ Ibid 100, 101.

considerations of morality and political philosophy”⁸⁰. The way formalists ascertain the rules of law is what distinguish them from the adherents of other schools of thought. Jean d'Aspremont explains the rationale of formalism in international law as follows:

Formalism [...] refers to the use of formal yardsticks to distinguish law from non-law. According to a formal conception of law-identification, any norm that meets such predefined formal standards is a rule of law. This formal standardization will materialize itself in predefined formal indicators. These predefined indicators can be linguistic or material. This means that formal ascertainment of legal rules does not automatically necessitate the existence of a written instrument where the rule concerned is enshrined.⁸¹

Indeed in contrast with Hart, Kelsen, and their supporters who reduce the functional legal norms to one variety, namely rules (although of various types), formalists look at other important aspects of law in order to ascertain the rules, such as legal principles, judicial decision-making⁸², and the form of functional legal units⁸³. Robert Summers, a formalist adherent, attempts to understand the nature of a legal system by dividing it into functional units, namely legislatures and courts, legal precepts, such as rules and principles, nonpreceptual species of law, such as contracts and property interests, interpretive and other legal methodologies, sanctions and remedies, and analysing the dynamics between them. In Summers' words:

(...) to grasp the nature of a legal system and the purposes it can serve, it is not enough to understand the functional units of the system. (...) These units must also be combined and integrated within an operational system to be duly functional. Various

⁸⁰ Brian Leiter, 'Legal Formalism and Legal Realism: What is the Issue?' (2010) 16 *Legal Theory* 111–133, 111.

⁸¹ Jean D'Aspremont, 'The Concept and the Rationale of Formalism in International Law' in *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (1st edn, OUP 2011) 13.

⁸² Ronald Dworkin is often criticised for focusing too closely on judicial decision-making. See Brian Bix, 'Form and Formalism: The View from Legal Theory' (2007) 20 *Ratio Juris* 45–55, 47.

⁸³ Robert S. Summers, *Form and Function in a Legal System: A General Study* (1st edn, OUP 2005).

systematizing devices are required for this. Some of these devices centralise and hierarchically order the relations between legal institutions as, for example, with the general prioritization of a legislature over a court in the making of law. Other such devices specify and order system-wide criteria for identifying valid rules and other species of law of the system in the first place. (...) Other devices consist of basic operational techniques that integrate and coordinate institutions, precepts, methodologies, sanctions, and other functional units. (...) From systematic study of the nature and roles of legal form, form itself can be clarified, functional legal units and the legal system as a whole can be better understood (...).⁸⁴

Summers' point that the focus on rules cannot give us adequate and full understanding of many aspects of law is particularly relevant when trying to decipher the concept of source of law in the context of international commercial arbitration. Full appreciation of the variety of rules and their functions in the area of arbitration can be achieved by acknowledging the importance of the rules of procedure, the role of arbitration institutions, the forms of arbitration agreements, the role of arbitrators, etc.

Less formalised approach to the sources of law is adopted by the legal realism school of thought. The legal realist movement has been triggered by the works of John Chipman Gray and Oliver Wendall Holmes, and it is further developed by Karl Llewellyn, Jerome Frank, and Felix Cohen. The realists aim to show how the cases are being decided *de facto*, so they abandoned the conceptual approach of the positivists and naturalists in favour of an empirical analysis. In the core of legal realism stand the idea that the available law is usually insufficient for the judges to decide on cases, so the latter create new law by exercising law-making discretion. Indeed, realists, such as John Chipman Gray, draw a difference between the concepts of "law" and "sources of law". The former consists of "the rules authoritatively laid down by the courts in their decisions"⁸⁵, while the latter represents "certain legal and non-legal materials relied upon by the judges in shaping rules which make up the laws, namely i) Acts of legislative organs; ii) Precedents; iii) Customs; iv) Principles

⁸⁴ Ibid 8.

⁸⁵ Veena Madhav and Tonapi, *Textbook on Jurisprudence* (Universal Law Publishing Co Ltd. 2011) 84.

of morality”⁸⁶. Thus the legal realism school of thought takes into account that legal reasoning may be indeterminate in some cases and judges may resort to practices and customs as a normative benchmark in order to reach a predictable and right outcome. Contrary to formalist theories, which claim that law is rationally determinate and there is no need for recourse to non-legal normative considerations of morality or political philosophy, the proponents of legal realism recognise the positivist approach to sources of law, however they apply social sciences into the domain of jurisprudence for predictive purposes.

The commercialisation of national Commercial Courts and the judicialisation of international commercial arbitration could be viewed as legal realism at play. These processes indicate that both courts and arbitration users are interested in seeing that the rule of law is upheld, while commercial justice that meets the needs of the very rapidly changing world of international markets, trade and commerce is delivered. On the one hand, there are aspirations to bring Commercial Courts up to speed with the developments in the international markets. The Right Hon The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales has recently announced the formation of a forum of Commercial Courts which objective is “to build on and develop a more systematic approach to providing a common approach to the resolution of disputes and (...) to developing the law to keep pace with the way our global village is developing”.⁸⁷ In The Lord Chief Justice’s opinion commercial courts will realise better their potential to ensure “the prosperity and good order of the digital village” if they are able to start developing more structured links, sharing best practices, considering problematic areas and novel developments and building mutual confidence.⁸⁸ On the other hand, there are calls to increase and equalise access to information about arbitrators and their decision making, which aims to promote greater transparency, fairness and accountability in the selection of

⁸⁶ Ibid.

⁸⁷ The Right Hon. The Lord Thomas of Cwmgiedd and Lord Chief Justice of England and Wales, ‘Commercial Justice in the Global Village: The Role of Commercial Courts’ 2016 at 18, available at: <<https://www.judiciary.gov.uk/wp-content/uploads/2016/02/LCJ-commercial-justice-in-the-global-village-DIFC-Academy-of-Law-Lecture-February-2016.pdf>>

⁸⁸ Ibid.

international arbitrators.⁸⁹ Thus, both developments aim at improving the access to best practices, customs and know-how in order to enhance the decision making of judges and arbitrators.

It has been argued that the best – and perhaps only – manner to justify in theory the multiplicity of legal and social norms that apply in international commercial arbitration is legal pluralism⁹⁰. Following the theory of legal pluralism all social bodies may be the source of a legal order and not only the State. In a pluralist approach the recognition of such orders by the State is not a condition of their existence.⁹¹ According to the legal pluralism school of thought there are multiple not just one legal system that exist within a state or a geographic state. This presupposes a re-conceptualisation of the traditional State-centric paradigm of law-making and a shift towards a paradigm of spontaneous creation of rules of law and social norms by the international business community. In an era of globalisation, rapidly changing

⁸⁹ See e.g. projects, such as Arbitrator Intelligence, available at: <<http://www.arbitratorintelligence.org/about/>>

⁹⁰ See generally John Griffiths, 'What is Legal Pluralism?' (1986) 24 J. Legal Pluralism & Unofficial L.; Sally Engle Merry, 'Legal Pluralism' (1988) 22 Law & Soc'y Rev. 869; Sally Engle Merry, 'New Legal Realism and the Ethnography of Transnational Law' (2006) 31 Law & Social Inquiry 975; Peer Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism' (2012) 21 Transnational Law and Contemporary Problems 305–336; Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (1st edn, Cambridge University Press 2012).

⁹¹ Andrea M. Steingruber, 'The Juridical Nature of Arbitration with Particular Regard to its Consensual Nature' in *Consent in International Arbitration* (1st edn, OUP 2012) at para 4.29. Roseveare, C. *The rule of law and international development. Department for International Development* (DFID), London, UK (2013) defines legal pluralism as "the existence of multiple sources of law (both state and non-state) within the same geographical area. Although the rule of law is often represented as law being made and administered by the state, a growing body of literature suggests that the provision of a range of different legal and quasi-legal security and justice mechanisms creates choices for individuals, communities, and even the state itself" (p. 39). See also Baudouin Dupret, 'Legal Pluralism, Plurality of Laws, and Legal Practices' (2007) 1 European Journal of Legal Studies; Jan H. Dalhuisen, 'The Operation of the International Commercial and Financial Legal Order: The Lex Mercatoria and its Application - Moving from the Theories of Legal Positivism and Formalism to the Practicalities of Legal Pluralism and Dynamism' (2008) 19 Eur. Bus. L. Rev. 985–1049; Klaus Günther, 'Legal Pluralism or Uniform Concept of Law? Globalisation as a Problem of Legal Theory' (2008) 5 No Foundations: An Interdisciplinary Journal of Law and Justice 5–21; Paulsson, 'Arbitration in Three Dimensions' (n 61); Ulla Liukkunen, 'Lex Mercatoria in International Arbitration' in Jan Klabbers and Touko Piiparinen (eds), *Normative Pluralism and International Law. Exploring Global Governance* (1st edn, Cambridge University Press 2013); Larry DiMatteo, 'Soft Law and the Principle of Fair and Equitable Decision Making in International Contract Arbitration' [2013] The Chinese Journal of Comparative Law 1–35.

international markets and evolving complex society the school of legal pluralism offers a way to reconcile the coexistence and competition between hard and soft law, official and unofficial law, public and private norms, rules of law and social norms. This makes legal pluralism the legal realism of 21st century.

Legal pluralism has even been suggested as one of the theoretical foundations for the new *lex mercatoria*.⁹² On the basis of the latter Teubner argues that the law-making function has moved away from the State into various transnational actors.⁹³ Ralf Michaels, however, correctly points out that although legal pluralism helpfully explains the existence of law beyond the State, in maintaining that legal orders are completely autonomous one runs the risk of overstating the internal coherence and external autonomy of the transnational legal orders that are depicted.⁹⁴ This may appear be particularly true for international commercial arbitration, which reliance on the cooperation and supervisory powers of national courts is not to be underestimated. In fact the process of judicialisation in international commercial arbitration may be indicative of the weaknesses of the legal pluralism theory as it suggest an urge for greater certainty, predictability and coherence in transnational arbitration.

The above overview of the schools of thought gives an understanding of the complexity that permeates the notion “source of law” and the difficulties associated with the categorisation of the sources of law. If just looking at custom as a source of law, one will see that different schools of thoughts adopt different understanding. Whether custom will be considered to be a species of natural law or positive law is of importance to questions as “whether a practice can displace a contrary statute (or other form of positive law-making authority) or can be in conflict with right reason.”⁹⁵ There is no uniformly accepted concept of source of law and this is of particular importance to international commercial arbitration, which not only may

⁹² See Filip de Ly, *International Business Law and Lex Mercatoria* (1st edn, North Holland 1992).

⁹³ Gunther Teubner, ‘Global Bukowina: Legal Pluralism in the World Society’ in Gunther Teubner (ed), *Global Law Without a State (Studies in Modern Law and Policy)* (1st edn, Dartmouth Publishing Co Ltd 1997).

⁹⁴ Ralf Michaels, ‘Global Legal Pluralism’ (2009) 5 *Annual Review of Law & Social Science* 1–35, 7.

⁹⁵ David J. Bederman, *Custom as a Source of Law* (1st edn, Cambridge University Press 2010) 16.

derive its legitimacy from several conceivable jurisdictions, but also by its very nature is an intersection of sources of national and international, private and public origin to which different doctrinal theories may apply. Hence, for the purposes of classifying the sources of law in the context of international commercial arbitration it is essential to adhere to a broad understanding of the concept “source of law”. Such an understanding may necessarily be adjusted in view of the particularities of a specific case at hand. A. Roger provides a useful example of what may go wrong if trying to generalise what the sources of law are:

[t]he issues are complicated. [...] The sources of English law are said to be Custom, Precedent, Equity, Legislation, and Subordinate Legislation. But already that would not apply to Canadian law, whose sources include the Charter of Rights and Freedoms, and embody both provincial and federal jurisdiction. Nor would it apply to European Community Law [...], or to the United States [...]. Under the civil law, doctrinal treatises – legal dogmatics – have some role as a source as well as the code.⁹⁶

Further analysis on the theoretical foundations of the notion “source of law” will not add much to the classification of sources of law, as it is not among the objectives of this chapter to construct a working definition of “source of law” in international commercial arbitration context. As for the concept of source of law from international law perspective, it has caused as much misunderstanding as in national jurisprudence. For example, Herbert Briggs points out that the term “source of law” leads to confusion with: (i) basis of international law, i.e. the basis of obligation of this law, (ii) causes, i.e. factors influencing its development, or (iii) its evidences, where the substantive rules find expression, and suggests that for the sake of clarity the term is used in a formal sense, as indicating the methods or procedures by which international law is created.⁹⁷ Herbert Briggs’s opinion was shared and developed by Georg Schwarzenberger, who proposed the terms law-creating processes for treaties, custom and general principles, and law-determining agencies for “subsidiary means

⁹⁶ Roger A. Shiner, *A Treatise of Legal Philosophy and General Jurisprudence: Volume 3. Legal Institutions and the Sources of Law* (4th edn, Springer-Verlag New York Inc. 2005) 1.

⁹⁷ Herbert Briggs, *The Law of Nations* (2nd edn, Appleton-Century-Crofts 1952) 44.

for determination of law, this is judicial practice and doctrine”.⁹⁸ It is also to be noted that although a definition of source of law is provided in Article 38 of the Statute of the International Court of Justice, this concept is of relevance to the field of public international law and not necessarily to private international law.

Given that international commercial arbitration is a forum where different legal traditions and cultures meet it might be of benefit to consider the concept of source of law and the issues concerning the classification of sources of law from a comparative law perspective. As Stefan Vogenauer points out the concept of source of law is always followed by terminological difficulties as it is used to designate related, but ultimately different objects.⁹⁹

Stefan Vogenauer distinguishes between five concepts of “source of law”: the first one is used to denote “*institutions or groups of persons which create law*” (e.g. the legislature, the courts, the merchants); the second one refers to “*various forms of conduct which these institutions or persons engage in and which are generally accepted in a legal system as validly generating law*” (such as the passing of legislation, rendering a decision, or customary behaviour); the third concept designates “*the wide variety of factors influencing these institutions and persons when they are creating law*” (e.g. certain customary behaviour can be treated as a source of a passage in a treatise); the fourth one denotes “*the body of law resulting from one of the forms of conduct that are generally accepted as validly generating law*” (e.g. statute law, case law, or customary law); and the fifth one refers to “*the instruments or documents from which lawyers obtain their knowledge of such law and which provide evidence for its existence*” (such as statutory materials, case reports, records of customs, or legal treatises).¹⁰⁰

⁹⁸ Vladimir D. Degan, *Sources of International Law* (1st edn, Kluwer Law International 1997) citing Georg Schwarzenberger, *International Law, Volume I International Law as Applied by International Courts and Tribunals* (3rd edn, London, Stevens & Sons 1957) 26-27.

⁹⁹ Stefan Vogenauer, ‘Sources of Law and Legal Method in Comparative Law’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2008) 878.

¹⁰⁰ Ibid.

Although all five notions presented by Vogenauer are interrelated, the notion of source of law in this thesis will be understood to denote the body of law that is a result of a law-making or law-applying function, and the instruments or documents, which contain the rules of law. Such a general understanding of the concept of source of law serves the purposes of this Chapter and Chapter 3. The objective of the analysis hereto is not to construct a definition of source of law or to explore how the sources of law are created. Instead the aim is to consider whether the approach to the sources of law could be linked to the process of judicialisation. As the issues of classification could indicate a preference for a judicialised or flexible approach to the sources of law in international commercial arbitration, these matters will be discussed further.

Indeed the question to be asked here is not “What makes the legal norms in international commercial arbitration what they are?” but rather “Does the recognition of certain norms as sources of law in international commercial arbitration demonstrate an aspiration for judicialisation?” In other words, regardless of the precise definition of sources of law, if the categorisation, emerging hierarchical order¹⁰¹ and authoritativeness of the sources of law in international commercial arbitration show similarities to those applicable in national jurisdictions, such resemblance will demonstrate a tendency towards judicialisation, i.e. international commercial arbitration becoming more alike national litigation. Other related questions to be considered are: How does the recognition of certain resources, materials or norms as sources of law contribute to the judicialisation agenda or not? Does this recognition make them more influential and authoritative sources of law and is this linked to the pursuit of greater predictability, certainty and foreseeability in international commercial arbitration?

In order to address those questions issues of general jurisprudence and legal theory are to be considered in view of the special attributes of international commercial arbitration and current developments in the field. It is important to take into account

¹⁰¹ It is yet to be examined whether there is an emerging hierarchy of norms in international commercial arbitration (see Renner, ‘Towards a Hierarchy of Norms in Transnational Law?’ (n 62)), however if such is argued to have developed this will benefit the analysis on judicialisation process.

the transnationality of arbitration – it is a forum for resolving international trade disputes where rules of national and international law, norms drafted by professional bodies and intergovernmental organisations, and trade practices and customs meet. Due to its transnational character some authors consider international commercial arbitration as an entirely autonomous legal order separated from the national legal systems. For example, according to Jan Paulsson the suggestion that arbitration can have no foundation other than that of the legal order of the particular state in which the arbitration takes place is out-dated; “[a] critical look at the competing conceptions leads to the insight that arbitration derives its legitimacy and effectiveness from an indefinite number of potentially relevant legal orders.”¹⁰² Giuditta Cordero-Moss also shares the view that international commercial arbitration is not affiliated only with the law of the seat of arbitration:

(...) not only the law of the place of arbitration, but also other national laws may have an impact on arbitration, and that this is quite irrespective of whether the parties have chosen them to apply or have even decided that they shall not apply: the law of the place of enforcement (...) and, to a certain extent, the law applicable to the substance of the dispute (...).¹⁰³

An overview of the special attributes of international commercial arbitration will provide the context in which to consider issues of categorisation of the sources of law.

2.2.2 Special Attributes of International Commercial Arbitration

This sections aims at providing an overview of the inherent features of international commercial arbitration before embarking on a discussion about the categorisation of the sources of law. It is necessary to approach the latter with an understanding of the characteristics of international commercial arbitration in order to examine whether a traditional, formalistic approach to the sources of law and their classification is appropriate in a forum, which is valued for being an alternative to court litigation.

¹⁰² Paulsson, ‘Arbitration in Three Dimensions’ (n 61) 291.

¹⁰³ Cordero-Moss, ‘International Arbitration is Not Only International’ (n 61) 8.

International commercial arbitration is an *alternative* method for resolution of international private disputes. It is conceived to be an a-nation neutral forum, which does not subject the disputing parties to the caprices of local courts. As explained by Julian Lew:

The ideal and expectation is for international arbitration to be established and conducted according to internationally accepted practices, free from the controls of parochial national laws, and without the interference or review of national courts. Arbitration agreements and awards should be recognised and given effect, with little or no complication or review, by national courts.¹⁰⁴

Although the autonomy of commercial parties to agree their dispute to be resolved by independent experts has remained a pivotal principle in international commercial arbitration, the battle for supremacy between national laws and national courts, on the one hand, and party autonomy and the independence of international arbitration system, on the other hand, has not ceased yet. Throughout the years national laws variously sought to control, administer, interfere or support international commercial arbitration. To oppose the attempts to “localise” international commercial arbitration¹⁰⁵ and to promote uniformity in the field, professional private institutions and international and intergovernmental organisations have produced a considerable body of rules of law, which aims to ensure the self-management and self-governance of the system.

Despite, or maybe because of, paradoxically seeking “the cooperation of the very public authorities from which it wants free itself”¹⁰⁶, international commercial arbitration cannot exist independently from national jurisdictions. In today’s international arbitration the relevance and influence of national arbitration laws and of national court supervision is greatly reduced, however *lex fori* still plays an

¹⁰⁴ Julian D. M. Lew, ‘Achieving the Dream: Autonomous Arbitration’ (2006) 22 *Arbitration International* 179–203, 179.

¹⁰⁵ As pointed out by Julian D. M. Lew, throughout the years national law succeeded in “taming” international commercial arbitration. It “prescribed party autonomy, limited the powers of arbitrators and the extent of the arbitrators’ jurisdiction, and in some form reviewed arbitrators’ determinations” *ibid* 181.

¹⁰⁶ Paulsson, ‘Arbitration in Three Dimensions’ (n 61) 292.

important role in arbitration proceedings. Although Francis Mann's position that "every arbitration is a national arbitration"¹⁰⁷ is no longer endorsed, as it is considered inflexible and incorrect,¹⁰⁸ it is aimed to suggest that international arbitration does not exist in a "legal vacuum"¹⁰⁹ – it derives its legitimacy and authoritativeness from certain legal orders. Mann's legacy was seeking to defend the legitimacy of international arbitration and to protect some arbitrators from the temptation to exceed their powers and use arbitration as a tool for law-avoidance.¹¹⁰

However, as Jan Paulsson observes, in his article Mann does not make distinction between identifying the law followed in making an award, on the one hand, and, on the other hand, the law that gives effect to the undertaking to arbitrate, to the arbitral process, and to the final award. The result is that Mann unnecessarily restricts the number of legal orders that can validate arbitration proceedings to just one – the law of the seat of arbitration. In contrast to Mann's theory Paulsson observes that "it is curious to insist on the authority of a preordained *lex arbitri* all the while observing that it is not preordained at all, since the parties may choose their legal order."¹¹¹ For example, there may be several conceivable enforcement *fori*¹¹², parallel court and arbitration proceedings, national courts asked to grant provisional measures in aid of arbitration – international arbitration is not confined to the rules of law of a single legal system. Hence, when categorising the sources of law in international

¹⁰⁷ Francis A. Mann, 'The UNCITRAL Model Law - Lex Facit Arbitrum (Reprinted from Liber Amicorum for Martin Domke in 1967)' (1986) 2 *Arbitration International* 245, 243.

¹⁰⁸ See Paulsson, 'Arbitration in Three Dimensions' (n 61) 294, who highlights that in his article Francis Mann "makes no distinction between identifying the law followed in making an award, on the one hand, and, on the other, the law that gives effect to the undertaking to arbitrate, to the arbitral process, and to the award". Thus, by disregarding issues related to legal theory and making "false" comparison, Jan Paulsson asserts that Mann has reached erroneous conclusions.

¹⁰⁹ Blackaby, Partasides, Redfern, and Hunter (n 24) para 3.04, 164.

¹¹⁰ Mann main assertion was that arbitrators must obey the private international law of the seat of arbitration, because "[a]ny other solution would involve the conclusion that it is open to the arbitrator to disregard the law" in Mann, 'The UNCITRAL Model Law' (n 107) 250.

¹¹¹ Paulsson, 'Arbitration in Three Dimensions' (n 61) 295.

¹¹² See generally Christopher Koch, 'The Enforcement of Awards Annulled in their Place of Origin' (2009) 26 *Journal of International Arbitration* 267–292; Michael Dunmore, 'The Award and the Courts, Enforcement of Awards Set Aside in their Jurisdiction of Origin' in Christian Klausegger and others (eds), *Austrian Yearbook on International Arbitration 2014* (1st edn, Beck C. H. 2014).

commercial arbitration it is necessary to keep in mind that several legal orders may give effect to arbitration and thus various rules of law may be applicable to it.

The above helpfully illustrates the plurality of sources of international commercial arbitration and the complexities associated with identifying the laws that give effect to the undertaking of arbitration, the conduct of arbitration proceedings and the making and enforcement of the arbitral award, on one hand, and, the laws that are found applicable to parties' commercial relationships and are followed in making the award, on the other. The privatisation of adjudication authority and the development of private law-making, however, give rise to arguments that international commercial arbitration is part of a transnational legal order¹¹³, which has to be distinguished and kept intact from national legal systems. Such assertions have been extended to judicial pronouncements, but are not embedded in legislation. The proponents of the thesis of an autonomous arbitral legal order maintain that when faced with a matter which is not expressly settled by the parties, respectively the law chosen by the latter, arbitrators can and should reach a decision by interpretation and application of general principles of law and *lex mercatoria*, which are more appropriate and commercially-fit for resolving disputes by means of arbitration than the legal rules of a different legal system. Julian Lew explains this vision idea, which has been gaining popularity for half century now, as follows:

[t]oday, there is increasingly, I suggest, a new regime. International arbitration is a *sui juris* or autonomous dispute resolution process, governed primarily by non-national rules and accepted international commercial rules and practices. [...] [I]nternational arbitration is, and should be recognised to be, an autonomous process for the determination of all types of international business disputes. It exists in its own space – a non-national or transnational or, if you prefer, an international domain. It has its own space independent of all national jurisdictions. This has implications for the approach of

¹¹³ See generally A. Claire Cutler, 'International Commercial Arbitration, Transnational Governance, and the New Constitutionalism' in Walter Mattli and Thomas Dietz (eds), *International Arbitration and Global Governance: Contending Theories and Evidence* (1st edn, OUP 2014) 141 stating: "private law-making and dispute resolution processes are regarded as transforming the fields of public and private international law and giving rise to a new transnational legal order."

national courts and law when their involvement with a particular arbitration is sought.¹¹⁴

The well-known author and arbitrator further adds that there is no doubt that international arbitration coexists with national laws, however, “national courts will not interfere in the arbitration process (...) and will not seek to review or know better than the arbitrators in any particular case.”¹¹⁵ The theory of an autonomous arbitral legal order have important implications with regard to the sources of international commercial arbitration and particularly as to their authoritativeness. The proponents of this thesis support the view that transnational norms and trade practices are often better suited to provide answers to issues arising out of international commercial relations than national positive law. Although the theory of an autonomous arbitral legal order is mainly endorsed by French courts¹¹⁶, it once again demonstrates the multiple legal orders, hence rules of law, that may give effect to arbitration.

It follows from the foregoing that when commenting on the sources of international commercial arbitration, it is important to bear in mind that there is not a unanimous view as to the legal order(s) that legitimise international arbitration. Whether one will follow the plurality thesis or the autonomous arbitral legal order theory makes no significant difference as to the numbers of conceivable legal orders that may be applicable to arbitration.¹¹⁷ The conflict in the views lies in the acknowledgement or the dismissal that one of those legal orders has primacy over the others.

¹¹⁴ Lew, ‘Achieving the Dream’ (n 104) 180.

¹¹⁵ Ibid 181.

¹¹⁶ See *Hilmarton Ltd v Omnium de traitement et de valorisation - OTV*, Cour de Cassation, First Civil Chamber, 23 March 1994 in Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration 1995 - Volume XX* (Kluwer Law International, 1995); *Société PT Putrabali Adyamulia v Rena Holding and other*, Cour de cassation, First Civil Chamber, 29 June 2007 (Petition No. 05-18053); *Société PT Putrabali Adyamulia v Rena Holding and other, Chromalloy Aeroservices v. Arab Republic of Egypt* 939 F. Supp. 907 (D.D.C. 1996).

¹¹⁷ See also Alan Redfern, Martin Hunter, Nigel Blackaby, and Constantine Partasides, ‘Introduction’ in Alan Redfern and others (eds), *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell 2004) 75 para 1-159: “People involved in international commercial arbitration, whether as arbitrators, parties or advisers, need to be aware of this continuous interplay between national and international laws. They should also be capable of abandoning a parochial view of the law, as constituted by the particular national system with which they happen to be familiar, in favour of a wider and more international outlook. In

In light of the abovesaid and in view of the forthcoming classification of the sources of international commercial arbitration, it is important to note the difference that Jan Paulsson draws between the law applicable to arbitration and the law applicable in arbitration.¹¹⁸ As further explained by the eminent author, the distinction between the two is that the latter determines arbitrators' decisions, while the former refers to the source of their authority and the legal order that governs arbitration.¹¹⁹ In a less unequivocal way, Julian D. M. Lew also comments on the contrast between the rules of law applicable to the merits of disputes between commercial parties, and the rules of law governing the undertaking of arbitration, parties' and arbitrators' conduct, scope of arbitrators' power, enforcing and setting aside arbitral awards:

There are rules of private international law that regulate the interaction of different or conflicting national laws. There are also rules to regulate the relations between national laws and international arbitration. These rules have their origin in public international law, private international law and intergovernmental and non-government instruments which have developed procedures and practices that have wide international acceptance.¹²⁰

Hence, although the primary sources of international commercial arbitration that are applicable to parties' disputes are of private international law origin, there might be instances where sources of international public law can be taken into account because they are relevant to determining the legitimacy of international commercial arbitration.¹²¹ With that in mind, it will be pertinent to note here that the Statute of the ICJ has a specific provision devoted on sources of law.

particular, they must be prepared to accept that there are other systems of law which may, in some respects, be better than their own and which must in any event be taken into account."

¹¹⁸ Paulsson, 'Arbitration in Three Dimensions' (n 61) 291.

¹¹⁹ Ibid.

¹²⁰ Lew, 'Achieving the Dream' (n 104) 181.

¹²¹ Thus, for example, the sources of international public law might be employed in the interpretation of the CISG, the latter being a convention that applies to contracts of sale of goods between private parties according to CISG, Art. 1. See generally Marianne Roth and Richard Happ, 'Interpretation of the CISG According to Principles of International Law' (1999) 4 Int'l. Trade & Bus. L. Ann. 1–12; John O. Honnold, 'Article 7. Interpretation of the Convention' in *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd. Kluwer Law International 1999).

According to Article 38 of the Statute of the ICJ the main sources of international law are international conventions, international custom and the general principles of law recognised by civilised nations. The latter are also recognised as a supplementary source of law under instruments of private international law.¹²² The Statute of the ICJ also endorses the judicial decisions and the teachings of the most highly qualified publicists of the various nations as a supplementary source of international law (or in the words of the Statute “a subsidiary means for determination of rules of law”). Though these have no binding force except between the parties and in respect of that particular case¹²³, their role is of great importance. This approach to the supplementary sources provides for both legal certainty in application of the rules of law and flexibility in considering application of new legal reasoning to the matters. On one hand, the Court is free to follow the legal reasoning of its decisions established in previous cases, which benefits the creation of a stable and consistent jurisprudence; while on the other hand, the Court is not bound by this legal reasoning and can adopt a new one if it appears to be more appropriate. This ensures the flexibility and adjustment of the existing law to new life situations, for example in relation to technological developments, or acquiring new data or knowledge.¹²⁴ The approach to court decisions adopted by the International Court of

¹²² For example, according to CISG, Art. 7(2) “[q]uestions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based (...)”. Similar reasoning is found in UNCITRAL ML, Art. 2A(2) on which many national arbitration laws are based.

¹²³ Statute of the ICJ, Art. 59.

¹²⁴ An example of the Courts’ practice of incorporation of new legal reasoning as to the interpretation of international rules, and in particular those related to the law of maritime delimitation, is provided by Gilbert Guillaume, ‘The Use of Precedent by International Judges and Arbitrators’ (2011) 2 Journal of International Dispute Settlement 5–23, 11–12. So, the Court has applied for years contradictory methods to maritime delimitation, i.e. “equidistance method” and “equitable principles and standards”. Refusing to grant binding effect to its previous decisions and looking relentlessly for the best solution for each particular case, the Court has managed to unify and stabilise its position on the matter – “in all cases it was necessary to first draw the line of equidistance, then adjust it to take account of relevant factors related mainly to the coastline”. As Guillaume correctly observes “[t]his dual analysis clarifies a lesson: the International Court of Justice does not recognize any binding value to its own precedent. However, it takes it into great consideration. It is nonetheless prepared to reconsider jurisprudence on the request of the parties or *ex officio*” (Guillaume, ‘The Use of Precedent by International Judges and Arbitrators’ 12). Furthermore, the above also speaks for the fact that ICJ takes into account the legal reasoning in previous decisions, rather than following established precedents. Such an approach is rigid enough in order to provide the necessary legal

Justice might be considered as an example of good practice when analysing the status of arbitral awards as a source of law in international commercial arbitration.¹²⁵

It is also worth noting that the role the sources of law play in international commercial arbitration could be influenced by the endorsement of one or another theory about the foundations of international commercial arbitration. Thus, for example, the jurisdictional theory favours arbitrators' strict application of the law, including adherence to court decisions as far as they are considered to have a binding effect according to the law applicable to the merits of the dispute. Such an approach upholds the rule of law, promotes greater certainty and predictability in international commercial arbitration, and arguably enhances the authoritativeness of the system¹²⁶. It also serves the agenda of the judicialisation process and meets its objectives¹²⁷.

Having presented the theoretical foundations of the concept of source of law and highlighted some intrinsic features of international commercial arbitration that have to be considered when classifying the sources of international arbitration, the following section will examine categorisations suggested in the literature. The proposed classifications will be analysed in view of their adequacy and sufficiency. It is to be questioned whether a traditional, formalised classification of the sources of

certainty in ICJ's practice, and at the same time, flexible enough in order not to prevent ICJ's jurisprudence from developing. As the court puts it: "[i]t is not a question of holding [the parties in the instant case] to decisions reached by the court in previous cases. The real question is whether in this case, there is cause not to follow the reasoning and conclusions of earlier cases." (citation from *Land and Maritime Boundary between Cameroon and Nigeria* (Preliminary Objections Judgment) [1998] ICJ Rep. 275, para. 28).

¹²⁵ See Section 2.3.4.

¹²⁶ The contention that arbitrator's status and function resembles the one of a judge demonstrates not only endorsement of the jurisdictional theory but also the state and courts' pro-arbitration position. According to Julian Lew, Loukas Mistelis and Stefan Kröll (Julian D. M. Lew, Loukas A. Mistelis, and Stefan Michael Kröll, 'Juridical Nature of Arbitration' in Julian D. M. Lew and others (eds), *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 75) such an approach is adopted by the English Court of Appeal and is illustrated in its discussion about the neutrality and impartiality of arbitrators. In *AT & T Corporation and another v Saudi Cable Company* [2000] 2 Lloyd's Rep 127 the Court of Appeal held that "(...) the test under English Law for apparent or unconscious bias in an arbitrator is the same as that for all those who make judicial decisions and is that to be found in the opinion of Lord Goff of Chieveley in *R v Gough* [1993] AC 646."

¹²⁷ See Lew, Mistelis, and Kröll, 'Juridical Nature of Arbitration' (n 126) 74 addressing the issue of the increasing judicialisation of international commercial arbitration in the presentation of the jurisdictional theory.

law is appropriate in an alternative forum for dispute resolution and whether this approach could be linked to the emerging system of norms and the process of judicialisation in international commercial arbitration. Attention will be paid as to whether the suggested categorisations take into account the plurality of legal orders that apply in and to international commercial arbitration, the multiplicity of rules of law and social norms followed in arbitrators' decision-making process¹²⁸ and the increasing self-regulation in the field carried out through soft-law instruments created by professional bodies, international and intergovernmental organisations¹²⁹.

2.2.3 Suggested Classifications of Sources of Law in International Commercial Arbitration

It is to be noted from the outset that the issues of categorisation in the context of international commercial arbitration require further research. The literature on the matter is scarce, despite the importance of those issues with regard to questions of applicable law. In addition, there is insufficient research on the concept of "source of law" in international commercial arbitration and a lack of a consensus as to the classification of the sources of law. Answers to questions, such as "Is Lex Mercatoria a source of law?"; "Should arbitrators adhere to national court decisions?"; "Should arbitrators adopt a legalistic or flexible approach to issues of classification, i.e. should arbitrators follow the method of categorisation as prescribed by a particular legal system or should they engage in a comparative legal analysis?" have effect on arbitral decision making¹³⁰.

Despite the lack of consistency in the categorisation of the sources of law, however, it can be inferred from the available literature that scholars and practitioners adopt a less formalistic approach to the matter. They often take into consideration the special attributes of international commercial arbitration and support an understanding of the sources of international commercial arbitration that is not parochial to concepts embedded in their home jurisdictions.

¹²⁸ See p 59.

¹²⁹ See also Section 3.2.1.

¹³⁰ See Chapter 3 and Section 5.3.

Thus, SI Strong distinguishes among eight categories of legal authorities, namely conventions and treaties, national laws, arbitral rules, law of the dispute (procedural orders and agreements between the parties), arbitral awards, case law, treatises and monographs, and legal articles.¹³¹ Apart from stating that the “authorities in this field can be generated by both public sources (states) and private sources (ranging from international arbitral institutions to the parties themselves)”¹³² Prof Strong does not provide a theoretical framework for this classification. The interchangeable use of the terms “sources of law”, “legal sources”, “legal authorities” and “forms of legal authorities” creates some confusion as to the criteria used to distinguish between the sources of law in arbitration.

Unfortunately, Prof Strong does not focus on the role of widely recognised rules of law, such as *lex mercatoria*, trade usages and customs, as well as general principles of international law¹³³. Although *lex mercatoria* and general principles under Article 38 of the Statute of ICJ are briefly mentioned with regard to possible laws governing the merits of a dispute, their inclusion in Section “Sources of Law – National Laws” raises salient questions¹³⁴. It is interesting to note that procedural orders and agreements between parties are categorised by the author as sources of law, on the basis of their binding effect upon parties. Thus, it may be assumed that the underlying sale/commercial contract between parties should be considered as a source of law (according to this categorisation) as well. Such conclusion, however, will delude the difference between sources of law and sources of (contractual) obligations and may be deceptive. Although sale contracts and arbitration agreements are binding upon parties, this effect is derived from the principles of *pacta sunt servanda* and good faith (part of states’ public policy)¹³⁵.

¹³¹ SI Strong, *Research and Practice in International Commercial Arbitration: Sources and Strategies* (1st edn, OUP 2009) para 2.09, 12.

¹³² Ibid paras 2.11, 2.12.

¹³³ For the role of *lex mercatoria* see Blackaby, Partasides, Redfern, and Hunter (n 24); Gary B. Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014); Michael Pryles, ‘Application of Lex Mercatoria in International Commercial Arbitration’ (2008) 31 U.N.S.W.L.J. 319–329.

¹³⁴ Ibid (n 131) paras 2.31, 2.33.

¹³⁵ See Swiss Federal Tribunal Decision No 4A_488/2009 rendered on 15 February 2010; English translation available at: <<http://www.swissarbitrationdecisions.com/claim-of-violation-of>

As such, the comparative analysis conducted by Prof Strong between the sources of law in national legal systems and those in international commercial arbitration shows some omissions and limitations. The author, however, correctly highlights the importance of the sources of law in arbitration, countering criticisms against the private nature of this dispute resolution method, as well as allegations equating international arbitration to a “lawless” decision-making process¹³⁶ because of the informality of the proceedings and the alleged lack of adherence to the substantive rules of law.

Another classification of the sources of law in international arbitration is suggested by Loeff C. Verbeke, who distinguishes between six categories, namely treaties, national legislation, arbitration rules, arbitral awards, court decisions and literature.¹³⁷ Verbeke does not recognise either *lex mercatoria* or trade usages and general principles of law as sources of law in international commercial arbitration. However, it is undoubted that *lex mercatoria*, trade usages and customs have a wide recognition as sources of law and a major role in the decision-making process.¹³⁸

public-policy-pacta-sunt-servanda-and-the->; Original text available at: <http://relevancy.bger.ch/php/aza/http/index.php?lang=fr&type=highlight_simple_query&page=1&from_date=&to_date=&sort=relevance&insertion_date=&top_subcollection_aza=all&query_words=4A_488/2009&rank=1&azaclir=aza&highlight_docid=aza%3A/15-02-2010-4A_488-2009&number_of_ranks=1>. A dispute arose with regard to a terminated contract for sale of metal bars between a Turkish company and a Romanian company. The former initiated arbitration proceedings in Geneva in front of a sole arbitrator, who upheld the claim. The Romanian company appealed to the Swiss Federal Tribunal seeking annulment of arbitrator’s award on the grounds of violation of public policy, in particular violation of the rule of *pacta sunt servanda*. The Tribunal rejected the claim stating that inaccurate interpretation of a contract did not constitute violation of the rule of *pacta sunt servanda*. The latter would be infringed only in the (most unlikely) event that an arbitral tribunal would find that a contract is binding and then dispense a party from complying with it.

¹³⁶ See for example Christopher R. Drahozal, ‘Is Arbitration Lawless?’ (2007) 40 Loy. L. A. L. Rev. 187–216; Philip J. McConnaughay, ‘The Risks and Virtues of Lawlessness: a “Second Look” at International Commercial Arbitration’ (1999) 93 Nw. U.L. Rev. 453–523.

¹³⁷ Loeff C. Verbeke, ‘Sources of International Commercial Arbitration’ (1995) 23 Int’l J Legal Info 293–294.

¹³⁸ See CISG, Art. 7(2) “Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.” CISG, Art. 9 “(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to

Emmanuel Gaillard and John Savage try to introduce a more systematic approach in determining the types of sources of law in international commercial arbitration.¹³⁹ They distinguish between two main categories, i.e. sources of public and private origin. Among the sources of public origin the authors place those found within the legal systems of each country¹⁴⁰, as well as international sources¹⁴¹. The latter consist of “international conventions, but also include international custom, general principles of law and judicial decisions, as listed in Article 38 of the Statute of the International Court of Justice”¹⁴². Furthermore, according to Gaillard and Savage, the “soft law” can also be attributed to the category of international sources of law, as it consists of “instruments drawn up by international organizations, but which are simply recommended to, rather than imposed upon, potential users”.¹⁴³ Such optional instruments are arbitration rules drafted by international institutions, e.g. the UNCITRAL Arbitration Rules, the UNCITRAL ML, and bilateral agreements concerning judicial assistance. Gaillard and Savage argue that the second main category, namely the sources of private origin, is comprised of model arbitration agreements, arbitration rules and arbitral awards.¹⁴⁴

The approach adopted by Gaillard and Savage in categorisation of the sources of law in international commercial arbitration has the benefit of providing a better-structured classification, as it is based on differentiation on the grounds of certain criteria, i.e. origin and territorial validity. Despite employing a formal law-

their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.” See also William W. Park, ‘The Procedural Soft Law of International Arbitration: Non-Governmental Instruments’ in Julian D.M. Lew and Loukas Mistelis (eds), *Pervasive Problems in International Arbitration* (1st edn, Kluwer Law International 2006); Gabrielle Kaufmann-Kohler, ‘Soft Law in International Arbitration: Codification and Normativity’ (2010) 1 *Journal of International Dispute Settlement* 283–299; Joshua D. H. Karton, ‘Norms Arising from the Values Shared by International Commercial Arbitrators’ in Joshua D. H. Karton (ed), *The Culture of International Arbitration and The Evolution of Contract Law* (1st edn, OUP 2013).

¹³⁹ Gaillard and Savage, ‘Sources of International Commercial Arbitration’ (n 59).

¹⁴⁰ Ibid 63.

¹⁴¹ Ibid 102.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid 151.

ascertainment method, the approach is not entirely comprehensive because there is no explanation as to the rationale behind categorising the sources of law on the basis of public-private origin differentiation. Such classification adds little to understanding why the designated rules of law are recognised as sources of law in international commercial arbitration. Thus, for example the so-called soft law can be present both in the categories of sources of public and private origin. UNCITRAL ML is drafted by the UN Commission on International Trade Law and is designed to assist states in reforming, modernising and harmonising their laws on arbitral procedure. It does not have a binding effect, unless implemented in the national legislation following the relevant procedure for that. An example for a piece of soft law from private origin can be given with the IBA Guidelines on Party Representation in International Arbitration. The latter are created by International Bar Association, which is professional organisation of legal practitioners, bar associations and law societies devoted to the development of international law. Similarly, corresponding illustrations can be provided with regard to the international custom as a source of law of public origin and trade practices and *lex mercatoria* as sources of law of private origin.

Although Gaillard and Savage admit that international commercial arbitration is of peculiar nature, they do not endeavour to examine whether and how its characteristics and objectives might have an effect on the sources of law applicable to and in it. Thus, for example, the main advantages of arbitration, which distinguishes it from state litigation, is its consideration for individual interests and the promotion of the principle of party autonomy. However, arbitrators always face a predicament when they have to rule on the limitations of the principle of party autonomy – both when the principle collides with sources of law of public and private origin. While party autonomy is limited only to the extent it is contrary to mandatory rules in national legislations, institutional arbitration rules are becoming more comprehensive and intolerant to parties' interference. It is becoming more and more questionable whether the origin of the rules of law is what makes them sources of law and entirely determines their authoritativeness.

Another interesting aspect that deserves attention is the recognition of model arbitration clauses as sources of law.¹⁴⁵ Gaillard and Savage argue that model arbitration agreements can be considered as sources of law, because:

from a theoretical standpoint, a degree of repetition and generality is required for a rule of contractual origin to govern situations for which it was not expressly intended and thus contribute to the creation of a non-national body of legal rules.¹⁴⁶

However, the arbitration agreements negotiated on case-by-case basis cannot be considered “a source of international arbitration law” because:

from a more practical point of view, *ad hoc* clauses agreed between parties to a contract clearly do not have the same authority and relevance as instruments intended for use in – and actually used in – an indefinite number of cases.¹⁴⁷

The above statements are equivocal for several reasons. Firstly, it is difficult to understand how a model arbitration clause can “govern any situations for which it was not expressly intended”. Any arbitration agreement, whether a model or an *ad hoc* one, is applicable to parties’ dispute only in case it is valid and operational, i.e. the parties have explicitly decided their dispute to be resolved by arbitration and the necessary requirements for formal and substantive validity of the arbitration agreement are met.

Secondly, the foregoing approach fails to take into account that professional organisations and private entities are delegated law-making functions in international commercial arbitration. This function is derived not from any degree of repetition and generality of the rules but from statutory provisions in national legislations that mirror Article 19(1) UNCITRAL ML, stating: “Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.” In absence of such agreement arbitral

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

tribunal may conduct the arbitration and follow rules of law in such a manner, as it considers appropriate.¹⁴⁸

Thirdly, the proposition that model arbitration clauses can be considered as sources of law fails to differentiate between sources of law applicable in international commercial arbitration and sources of obligation. Any arbitration agreement (source of obligation) has to be followed by the parties due to the principle of *pacta sunt servanda* (source of law).¹⁴⁹ An opposite approach will call for commercial contracts or at least boilerplate clauses and agreements being recognised as sources of law. Although it is acknowledged that soft law¹⁵⁰ is one of the sources of law in international commercial arbitration, model arbitration clauses cannot be considered as a source of law as they are neither acts of rules of law, nor they have any binding or persuasive authority to disputes where parties have not validly agreed on them.

All foregoing classifications adopt a formalised approach to ascertain the sources of international commercial arbitration. They follow the so-called source thesis “whereby law is identified in accordance with its formal pedigree”.¹⁵¹ Joshua Karton argues for a less legalistic understanding of the concept of norms in international commercial arbitration. His proposition is conforming to the social thesis, which infers the law-ascertaining criteria from the practice of law-applying officials.¹⁵² According to Joshua Karton some intrinsic characteristics of arbitration are a result of shared culture and values, of shared social norms:

¹⁴⁸ UNCITRAL ML, Art. 19(2).

¹⁴⁹ Gerald Fitzmaurice, ‘Some Problems Regarding the Formal Sources of International Law’ [1958] *Symbolae Verzijl* (Martinus Nijhoff, The Hague) 153–176, 157, 158.

¹⁵⁰ See D’Aspremont, ‘The Emergence of Formal Law-Ascertainment in the Theory of the Sources of International Law’ (n 38) 72 stating: “In the second half of the 20th century, another form of deformalisation gained currency through the concept of soft law, i.e. the idea that international law can originate in acts that are not formally identified as legal acts. These non-formal law-ascertainment mechanisms enjoyed a wide acceptance as they provided room to reconnect international law with pluralized norm-making at the international level.”

¹⁵¹ Jean D’Aspremont, ‘The Critiques of Formal Law-Ascertainment in the Theory of the Sources of International Law’ in *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (1st edn, OUP 2011) 83.

¹⁵² *Ibid.*

In a system with few constraints on arbitrators' power to adjudicate the merits of disputes, social norms are particularly important in guiding and legitimizing international arbitral justice. Shared norms promote harmonization of decision-making in a system that otherwise has little to encourage internal consistency.¹⁵³

The author identifies four social norms that constitute elements of an incipient international commercial arbitration culture. Those are party autonomy, the service of business, neutrality, and internationalism. Joshua Karton further elaborates on each of the four social norms. Thus, for example, he acknowledges that party autonomy is a core principle in international commercial arbitration¹⁵⁴ and has become a widely entrenched norm, which relevance is discerned through all stages of arbitration proceedings.¹⁵⁵ It is asserted that as a social norm party autonomy acts as a constraint on arbitrators' powers and as a guarantee that individual interests will take primacy over systemic ones.¹⁵⁶

The contribution of Karton's analysis to the development of a concept of source of law in international commercial arbitration is the suggested shift to a less formal approach, which takes into account the peculiar nature of arbitration and has regard not only to the law-making function of states, organisations and professional bodies, but also to the law-applying function of arbitrators. Such an approach is undoubtedly more appropriate when identifying the rules of law being recognised as sources of law in the context of international commercial arbitration. It gives credit to the multiplicity of norms that govern arbitration and the complex dynamics of the system. A formalistic construction is not adequate as it cannot explain why arbitrators can decide the dispute at hand in a manner which is very different from national courts. The categorisation of sources of international commercial arbitration has to be fitted to convey these intrinsic characteristics of the system.

¹⁵³ Karton, 'Norms Arising from the Values Shared by International Commercial Arbitrators' (n 138) 78.

¹⁵⁴ Ibid 78, 79.

¹⁵⁵ Ibid 79.

¹⁵⁶ Ibid et seq. The primacy of individual interests over system ones even gives rise to the thesis of "lawlessness" of international commercial arbitration. This phenomenon is explained by arbitrators' focus on the equities of a dispute or the particularities of a contract than to the applicable law (at 91).

Conclusion

It appears that the majority of suggested classifications do not take into account the *sue generis* nature of international commercial arbitration and favour a formalistic approach to ascertaining the sources of law. Such an approach creates a favourable environment for the evolution of the process of judicialisation. By applying a formalistic approach to the classification of sources of law arbitrators are encouraged to apply the law strictly and disregard the application of other norms that may otherwise influence their decision-making.

Although it is true that arbitration “does not exist in a legal vacuum”¹⁵⁷ and its legitimacy is derived from one or more national legal orders¹⁵⁸, it is argued that arbitral practice in the form of shared social norms plays a significant role in the organisation and conduct of arbitration proceedings and arbitrator’s decision-making. This is why the significance of such practices and norms should be appreciated by acknowledging the latter as legitimate sources of law. It is, therefore, suggested that the categorisation of the sources of law has to have regard to the plurality legal orders applying to and in arbitration¹⁵⁹, on the one hand, and the shared social norms forming a rising arbitration culture, on the other hand.

The concept of “source of law” is to be understood in its broadest meaning in order to be inclusive of different rules of law and social norms influencing arbitrator’s decision-making process. Adopting a flexible approach to the classification of the sources of law in international commercial arbitration has the implication of encouraging arbitrators to conduct a comparative legal analysis when taking decisions, rather than following a formalistic approach to the sources of law, the latter being organised in a hierarchical system. Such a formalistic approach serves the judicialisation agenda and contributes to the formalisation of international commercial arbitration.

¹⁵⁷ Blackaby, Partasides, Redfern, and Hunter (n 24) para 3.04, 164.

¹⁵⁸ See n 61.

¹⁵⁹ See generally Paulsson, ‘Arbitration in Three Dimensions’ (n 61).

CHAPTER 3 THE JUDICIALISED AND FLEXIBLE APPROACHES TO THE SOURCES OF LAW IN INTERNATIONAL COMMERCIAL ARBITRATION

Objectives

It was discussed in the previous chapter that the way the sources of law are classified in international commercial arbitration might influence the very concept of “source of law”. A formalistic approach to the categorisation of the sources of law will serve the judicialisation agenda and will encourage arbitrators to adopt a judicialised approach to the sources of law, meaning that arbitrators will be expected to interpret and apply the sources of law in a way very similar to the one adopted by national judges. In contrast, a classification of the sources of law that takes into account the particularities of the latter and the incipient arbitral culture will endorse a flexible or autonomous approach to the sources of law.

In view of the above this chapters aims to examine how a judicialised approach to the sources of law in international commercial arbitration differs from a flexible approach. Of particular interest are three categories of sources of law, namely national court decisions, arbitral awards and trade practices, the latter often referred to as *lex mercatoria*. Although these are generally acknowledged as sources of law in the context of international commercial arbitration, there are debates in the literature and inconsistent practices as to their authoritativeness and binding force.

The question whether and to what extent national case law¹⁶⁰ is binding on arbitrators in international arbitration proceedings has not been answered

¹⁶⁰ For the purposes of this part the term “case law” will be used as a synonym of the term “judicial precedent”, the describing the binding force of precedents under the doctrine of *stare decisis*. Despite the fact that there are authors, such as Gabrielle Kaufmann-Kohler, ‘Arbitral Precedent: Dream, Necessity or Excuse?’ (2007) 23 Arbitration International 357–378, who use the term “precedent” broadly, namely to cover the notion of both binding and persuasive precedents, this thesis will aim to distinguish between the two. The concept of “precedent” is a disputable one in the area of international commercial arbitration and its scope has not been strictly defined yet. As such, it is believed that (where possible) differentiating between binding and persuasive precedents will be of benefit to the analysis in this thesis.

unequivocally in the literature. This issue is of relevance to the discussion about the process of judicialisation because the subscription to a particular position with regard to the authoritativeness of national court decisions could suggest an endorsement of either a flexible or judicialised approach to the sources of law in international commercial arbitration. Similarly, two approaches could also be applied to arbitral awards and their authoritativeness. As for *lex mercatoria*, the analysis will focus on the use of *lex mercatoria* and the general principles of law in international commercial arbitration. The extent to which arbitration users rely on *lex mercatoria* is used as an indication of proliferation of a judicialised approach to the sources of law. It is expected that if trade customs and general principles of law are considered applicable predominantly when an arbitrator is granted the power to decide a dispute as *amiable compositeur*¹⁶¹, a judicialised approach to *lex mercatoria* will be adopted. In contrast if *lex mercatoria* is considered to form a body of rules, i.e. transnational rules of law¹⁶², that is commonly applied in absence of a specific choice of law agreement, then a flexible approach that nourishes the developing arbitration culture will be observed.

3.1 National Court Decisions as a Source of Law – The Judicialised Approach

The main question regarding court decisions as sources of law in international commercial arbitration is whether in case of a presence of a choice of law clause arbitrators are obliged to follow the reasoning of national courts. Other related

¹⁶¹ See Berthold Goldman, 'The Applicable Law: General Principles of Law - the Lex Mercatoria' in Julian D. M. Lew (ed), *Contemporary Problems in International Arbitration* (1st edn, Springer-Science+Business Media, B.V. 1987) 117 stating that "(...) certain contractual clauses may be construed as implying a reference to the *lex mercatoria*, for example, the *amiable composition* clause, which empowers the arbitrator to decide *ex aequo et bono*."

¹⁶² See Clive M. Schmitthoff, *Select Essays on International Trade Law* (Kluwer Academic Publishers 1988) 221 arguing that "[m]odern trade demands an autonomous international trade law, founded on uniform rules accepted in all countries. Such a regulation would make the localisation of a transaction in a national jurisdiction superfluous"; and at 222 "[...]the modern *lex mercatoria* is the deliberate creation of formulating agencies and is expressed in international conventions or model laws or in documents published by such bodies as the International Chamber of Commerce".

questions are whether arbitrators have to abide by the conflict of laws approach applied by national judges, whether in cases where arbitrators are confronted with long-standing case law of the highest court of the country whose law has been chosen by the parties to govern the substantive issues of case, but which case law arbitrators consider to be unacceptable or unfavourable in an international commercial context, the tribunal can disregard the case law in favour of a more commercially sensible approach, and finally what is the preclusive effect of jurisdictional decisions by national courts, i.e. whether arbitrators in international arbitration proceedings are bound by national courts' judgment dealing with questions of the tribunal's jurisdiction.

Opinions that support the view that arbitrators are not obliged to follow courts' interpretation and application of national laws, and are not bound by national court judgments dealing with questions of tribunal's jurisdiction can be considered to favour a more flexible and autonomous approach to international commercial arbitration, while those advocating for more rigid application of national laws, including adherence to court decisions and acknowledgement of the preclusive effect of court jurisdictional decisions, advance the judicialisation process in international commercial arbitration.

What seems to be the widely accepted position is that when parties' choice of law clause designates a particular national law it will "ordinarily include the constitution, legislation, regulations, judicial decisions and administrative rulings of the state in question"¹⁶³. As Gary Born explains, save where parties have agreed to arbitration *ex aequo et bono* or *amiable compositeur*, the arbitrators' mandate is to resolve the parties' dispute in an adjudicative manner, in accordance with the applicable law. If a national (or international) legal system accords, binding, precedential weight to judicial decisions, then arbitral tribunals should give those decisions no less legal effect than would a court in that system: this conclusion follows inevitably from the arbitrators' adjudicative function of applying the law to the evidence.¹⁶⁴

¹⁶³ Born, *International Commercial Arbitration* (n 131) 2723.

¹⁶⁴ Ibid 3821.

Emmanuel Gaillard and John Savage share a similar view:

In international arbitration, as in private international law, the word ‘law’ encompasses all rules belonging to the legal system in question, with each source (including statute, case law and custom) having the authority attributed to it by that legal system. Thus, for example, by referring to ‘Venezuelan law’, the parties include all of the sources recognized by the Venezuelan legal system, following the hierarchy established therein.¹⁶⁵

Such an approach, where arbitral tribunals accord with the effect of national court decisions, can be viewed as judicialised because it is more rigid, inflexible and does not leave arbitral tribunal with much room for interpretation and/or law making. It can be argued that this position has both its advantages and disadvantages. On the positive side, adherence to judicial decisions upholds the principle of legal certainty and predictability in law and avoids a scenario where parties are returned to the “legal no-man’s land”. Ascertaining principles like *stare decisis* and binding precedential authority undoubtedly serves the judicialisation agenda. The CISG database, a free platform for publishing national court decisions and arbitral awards rendered on cases where CISG is found to be the applicable law, suggests that arbitrators and foreign national courts are not averse to following judicial precedents.¹⁶⁶

Furthermore, arbitrators’ adherence to the applicable law, including court decisions that have been recognised as primary authority in the relevant national legal systems, can be viewed as a due performance of arbitrators’ mandate: “It is sometimes posited that an arbitrator would violate his mandate if he expressly refused to apply the law

¹⁶⁵ Emmanuel Gaillard and John Savage, ‘Part 5: Chapter I - The Law Applicable to the Merits of the Dispute’ in Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 790.

¹⁶⁶ CISG database: “The U.S. federal court regards a foreign court decision as precedent, or at least as ‘authority’” Peter Schlechtriem, Commentary on *Medical Marketing v. Internationale Medico Scientifica* [translated text of commentary], *Praxis des International Privat- und Verfahrensrechts* (1999) 791; “The European Court of Justice witnessed a reference to our database by an agent for the European Commission. The case of *MCC-Marble v. Ceramica Nuova* that we cite refers to our database as a ‘promising source’ for ‘persuasive authority from courts of other States party to the CISG’.”

stipulated by the parties.”¹⁶⁷ A frequently cited suggestion by Lord Denning states that “whenever a tribunal goes wrong in law it goes outside the jurisdiction conferred on it and its decision is void”.¹⁶⁸ Although not going to the extreme to argue that any mistake in law by the arbitral tribunal is excess of authority, William Park also contends that one of four arbitrators’ obligations, apart from observing procedural fairness, striving for efficiency and exercising vigilance in promoting an enforceable award, is rendering an accurate award:

The first duty of an arbitrator lies in rendering an accurate award, in the sense of fidelity to the text and the context of the relevant bargain, whether memorialized in a private contract or the terms of a public investment treaty. The arbitrator should aim to get as near as reasonably possible to understanding what actually happened between the litigants, and how the pertinent legal norms apply to the controverted events. (...) Arbitration would provide for poor justice if arbitrators aspired to nothing higher than to meet the minimum grounds for annulment.¹⁶⁹

In contrast with the above position, what may be considered a disadvantage of the judicialised approach is its inflexibility – in presence of a choice of law clause an arbitrator has to abide by the particularities of the designated national legal system and to follow court decisions without questioning the appropriateness of the latter in international commercial context. Furthermore, it could be argued that the relevance and weight of judicial decisions may vary depending on whether there is an express or implied choice of law provision, or the particular national law has been applied as most closely connected to the dispute. Finally, regarding courts’ jurisdictional decisions, arbitrators should be free to determine whether they have jurisdiction to decide the dispute and what the scope of their jurisdiction is, which is in accordance with the *kompetenz-kompetenz* doctrine¹⁷⁰ (also referred to as *competence-*

¹⁶⁷ Jan Paulsson, *The Idea of Arbitration* (1st edn, OUP 2013) 93.

¹⁶⁸ Lord Alfred Denning, *Lord Denning: The Discipline of Law* (1st edn, OUP 1979) 74.

¹⁶⁹ William W. Park, ‘International Arbitration (Sokol Colloquium)’ in John Norton Moore (ed), *International Arbitration (Sokol Colloquium)* (1st edn, Martinus Nijhoff 2013) 7.

¹⁷⁰ Paulsson, *The Idea of Arbitration* (n 167) 54: “In the context of private arbitrations subject to the supervision of national courts, which could if needed enforce the arbitral agreement, it has also long been understood that a fundamental advantage of arbitration would be lost if the process instantly came to a halt as soon as one of the parties protested. (...) Here is how Lord Devlin, a prominent English judge, put it in 1954: (...) They [arbitrators] are entitled to inquire into the

competence in England and *compétence de la compétence* in France). Such arbitral decisions are subject to judicial control, once the award is rendered, and any adherence to jurisdictional court decisions may be premature and incorrect. As argued by Jan Paulsson, when deciding challenges to arbitral authority, the most essential question is what the parties' intention is, rather than following blindly the reasoning of certain sources of law.¹⁷¹

The justification for the judicialised approach to nation court decisions lies on the premise that arbitrators are obliged to apply the law, and since case law is either a primary or secondary source of law in national legal orders, arbitral tribunals have to abide by its authoritativeness. In common law jurisdictions judicial decisions are recognised as primary sources of law, which have precedential effect in accordance with the principle of *stare decisis*, while in civil law jurisdictions, court decisions are secondary sources of law that provide interpretation of the primary authority. This means that in civil legal systems the Parliament or other legislature have law-making functions and courts' adjudicative role covers mere interpretation and application of the law.

The doctrine of precedent in the common law system is a result of certain evolution, i.e. that "historically much of the law was a product of the common law rather than statutes"¹⁷². For common law systems the concept of precedent is a centric one as judges are not allowed to deviate from established judicial principle unless they can reason the inapplicability of the latter to the case in hand. Despite securing a predictable outcomes, the doctrine of *stare decisis*, has been criticised for its inflexibility to accommodate new developments. The main proposition in support of such a criticism is that in order to justify a decision that embraces new solutions, a judge or an arbitrator has to distinguish their case from judicial precedents, i.e. decisions rendered on similar facts. This may prove to be of particular difficulty to

merits of the issue as to whether they have jurisdiction or not, not for the purposes of reaching any conclusion which will be binding on the parties—because that they cannot do—but for the purpose of satisfying themselves as a preliminary matter about whether they ought to go on with the arbitration or not. (*Christopher Brown Ltd v. Genossenschaft Österreichischer Waldbestitzer GmbH* [1954] 1 QB 8, at 12–13)."

¹⁷¹ Ibid 89.

¹⁷² Alisdair A. Gillespie, *The English Legal System* (1st edn, OUP 2007) 61.

arbitrators who have their legal training in countries pertaining to the civil legal system, where legal rules are characterised with their generality and it is the art of the jurist to ascertain the specific legal rule that applies to the particular factual situation:

The generality of the [Romano-Germanic] legal rule explains why the task of lawyers in these countries is conceived as essentially one of *interpreting* legislative provisions and is thus unlike that of Common law countries where the legal technique is characterized by the process of *distinguishing* judicial decisions. The ‘right’ legal rule itself is not thought of in the same manner: in Common law countries the judge is expected to formulate, as precisely as possible, the rule which provides a solution to the dispute; in Romano-Germanic countries on the contrary, because its function is simply to establish the framework of the law and to furnish the judge with guidelines for decision-making, it is considered desirable that the legal rule leave him a certain margin of discretion.¹⁷³

The advantages of *stare decisis* in providing legal certainty and predictability, however, seem to overrun the concerns about its potential for development and progress. In *Davis v Johnson*¹⁷⁴ Cumming-Bruce L.J. gave an opinion on the balance that is to be achieved between legal certainty and justice in a legal system. In his view “in any system of law the undoubted public advantages of certainty in civil proceedings must be purchased at the price of the risk of injustice in difficult individual situations”¹⁷⁵. Such a position is justified in national court proceedings where among judges’ adjudicative functions also rests the obligation to preserve the public interest and to ensure the stability and unity of the legal system. In international commercial arbitration, where the applicable standard is commercial reasonableness and the limits to party autonomy is international public policy and national mandatory rules, arbitrators do not have such duties. Save where parties have explicitly designated a national law to govern the dispute between them, it is

¹⁷³ Rene David, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (2nd edn, The Free Press 1979) 90.

¹⁷⁴ *Davis v Johnson* [1979] AC 264.

¹⁷⁵ *Ibid* at [311].

arguable whether arbitrators' mandate is to render a correct decision¹⁷⁶ or "merely" settle¹⁷⁷ the dispute between the parties.

In contrast with common law jurisdictions in civil law jurisdictions, court decisions are secondary sources of law that provide interpretation of the primary authority. This means that in civil legal systems the Parliament or other legislature have law-making functions and courts' adjudicative role covers mere interpretation and application of the law. This is the reason for some author to claim that while in common law system judicial precedent forms a principle source of law, it is debatable whether in civil law jurisdictions court decisions are "at most a source of definition of subjective rights, or also a source for creation of objective rights"¹⁷⁸.

The role of court decisions in civil law jurisdictions can be historically explained by way the Continental system evolved, i.e. the need for legal consistency, certainty and stability was ensured through codification of the law, rather than judge-made law. In civil law jurisdictions legal provisions are, in principle, abstract and general enough to encompass all and every factual case that may arise, so that all judges have to do is to subsume the factual case under the general rule. Thus, the adjudicative function of judges includes interpretation and application of the legal rules enacted by the Parliament or other legislature. The case law has a persuasive effect, as it is not governed by the *stare decisis* doctrine.

Although in civil law jurisdictions codified legislation has primary authority, while court decisions have secondary, previous judicial decisions, especially decisions of

¹⁷⁶ This does not mean that arbitration is not concerned with settling the dispute between the parties by means of fair and just arbitral award (see e.g. Jeffrey Waincymer, 'Promoting Fairness and Efficiency of Procedures in International Commercial Arbitration - Identifying Uniform Model Norms' (2010) 2 Contemp Asia Arb J 25–64; E. D. D. Tavender, 'Considerations of Fairness in the Context of International Commercial Arbitration' (1995) 34 Alta L Rev 509–556; Henry Gabriel and Anjanette H. Raymond, 'Ethics for Commercial Arbitrators: Basic Principles and Emerging Standards' (2005) 5 Wyo. L. Rev. 453–470), rather that the pursuit for fairness, justice together with preservation of public interest are major characteristics of national state litigation.

¹⁷⁷ See, for example, A. M. Stuyt, *Survey of International Arbitrations, 1794-1989* (3rd edn, Kluwer Academic Publishers 1990) where it is stated that "arbitration is the oldest method for the peaceful settlement of international disputes".

¹⁷⁸ María José Falcón y Tella, *Case Law in Roman, Anglosaxon and Continental Law* (1st edn, Martinus Nijhoff Publishers/ Brill Academic 2011) 1.

the supreme courts, are respected in a way that is very similar in substance to the doctrine of precedent in the common law jurisdictions. As Gary Born explains:

it is unclear whether orthodox characterizations of the role of precedent and *stare decisis* in civil and common law jurisdictions are sufficiently nuanced. In reality, the role of precedent in different legal systems is more complex, with most developed legal systems – both common law and civil law – according varying degrees of binding effect to prior judicial decisions, depending on the nature of those decisions and the relevant decision-makers, the subject matter the decisions deal with, the means available to alter the assertedly precedential rule, and other factors.¹⁷⁹

Indeed, despite the discrepancy in the degree of binding force, a concept alike *stare decisis* does exist in civil law jurisdictions: “there are jurisdictions where a *quasi stare decisis* effect is implemented by the law itself”¹⁸⁰. An example can be given, as pointed out by Professor Berger, with the Spanish *Tribunal Supremo*, which case law constitutes *doctrina legal* or binding law, in case there are no less than two Supreme Court decision supporting a particular legal doctrine. Similar example can be provided with the Bulgarian Court of Appeal whose decisions are subject to a cassation appeal where the decisions are rendered in controversy with case law of the Supreme Cassation Court (i.e. “съдебна практика”) and they concern substantial issues of procedural or substantive law.¹⁸¹ In France, Switzerland and Germany courts also follow previous judicial decisions on the grounds of principles referred to as “*jurisprudence constante*” and “*ständige Rechtsprechung*”.¹⁸² Although civil law jurisdictions use various formulations when referring to the binding precedential authority of prior judicial decisions and the concept of precedential authority is very flexible, it is well-established view¹⁸³ that the courts take into account previous

¹⁷⁹ Born, *International Commercial Arbitration* (n 131) 3810.

¹⁸⁰ Klaus Peter Berger, ‘The International Arbitrators’ Application of Precedents’ (1992) 9 *International Arbitration* 5–228.

¹⁸¹ See Bulgarian Code of Civil Procedure (Promulgated State Gazette No. 59/20.07.2007, effective as of 1.03.2008), Art. 280 (1).

¹⁸² See generally Born, *International Commercial Arbitration* (n 131) 3815.

¹⁸³ See generally *ibid* 3815, 3816, 3817; Berger, ‘The International Arbitrators’ Application of Precedents’ (n 180); Kaufmann-Kohler, ‘Arbitral Precedent’ (n 160) 358, 359: “The degree of deference to earlier cases and the level of freedom to depart from prior rulings may vary from one jurisdiction to another, and even within one jurisdiction, depending on the court and the issue involves. In civil law countries, the precedential value of cases may be weaker than in

judicial decisions in deliberation of the case, and as such pursuing the need for consistency, foreseeability and stability in law. The role of the case law in civil law systems should not be belittled because a *de facto* doctrine of precedent can be as important as *de jure* one. Or as Prof Berger cites Larenz and Canaris' *Methodenlehre der Rechtswissenschaft*:

even if case-law is considered not to be a source of law but a mere 'source for the cognition of the law' a binding effect of case-law of the highest court is acknowledged if the court, in deciding an individual case before it, has developed a general rule which comes close to a statutory rule of law that can easily be applied to all future cases of this kind.¹⁸⁴

As theory and practice in civil law jurisdictions is constantly improving, adherence to previous court decisions is being favoured because it provides legal certainty and predictability. Moreover, in line with the global trends of harmonisation¹⁸⁵ and unification of international law¹⁸⁶, national laws also incorporate practices and doctrines that bring more stability for the legal systems. Thus, although case law has secondary to legislation authority in civil law jurisdictions, decisions of higher courts have *de facto* binding effect similar to the doctrine of *stare decisis* in common law jurisdictions.

common law countries, though it is nonetheless well established there. Indeed, civil law countries such notions as *arret de principe* and *jurisprudence constante*, which are similar to *stare decisis* except that they do not require adherence to a legal principle that has been applied only once before."

¹⁸⁴ Berger, 'The International Arbitrators' Application of Precedents' (n 180) 9, citing Claus-Wilhelm Canaris, Karl Larenz, *Methodenlehre der Rechtswissenschaft* (4th edn, Springer, 2009).

¹⁸⁵ The UNCITRAL, the UNIDROIT, and the Hague Conference on Private International Law have played central roles in the process of harmonisation of private commercial and arbitration laws. UNCITRAL has been responsible for a variety of conventions, model laws and rules, including the CISG, UNCITRAL ML and the UNCITRAL Arbitration Rules. UNIDROIT has also played a prominent role in the preparatory work for the CISG, but what is considered to be a highly successful international restatement is the UNIDROIT Principles.

¹⁸⁶ In this thesis the processes of harmonisation and uniformity in international laws are viewed as two inherently different developments. See generally Camilla Baasch Andersen, 'Defining Uniformity in Law' (2007) 12 Unif. L. Rev. 5–55, in which article Prof Andersen distinguishes between shared, harmonised and uniform laws, as well as between textual and applied uniformity.

To conclude the overview of the authoritativeness of judicial decisions, it is important to highlight that from a comparative law perspective:

there is widespread agreement that, as with statute law, the perceived differences [with regard to the case law as a source of law] are rather due to diverging theories of sources and that there are, at least in this respect, no major differences of practical relevance between the legal families.¹⁸⁷

In spite of the “difference between the literary, discursive, and closely fact-related judicial style of the Anglo-American courts and the formal, austere, and abstract mode of writing judgements in the Continent”¹⁸⁸ no legal system has remained indifferent to the doctrine of judicial precedent. The latter fosters the accomplishment of fairness, justice, certainty and consistency in the making and application of legal provisions, while ensuring that public interest is preserved and individual rights are honoured. Although it is argued by some that the doctrine of precedent hinders the evolution of law and makes the legal system inflexible and impermeable to new developments, all common law, civil law and mixed legal systems¹⁸⁹ resort to the doctrines of *stare decisis*, *res judicata*, *jurisprudence constante*, *arrêt de principe*, *ständige Rechtsprechung*, *съдебна практика*, *doctrina legal* or similar concepts of judicial precedent in pursuit of legal stability and certainty.

In the light of the above, it is questionable why the approach to national court decisions should be different in international commercial arbitration. The latter is an adjudication system having its roots in national legislation and reinforced by international instruments and uniform rules of law. It not only “does not exist in a legal vacuum”¹⁹⁰, but is in fact evolving as a system of rules of law and some even

¹⁸⁷ Stefan Vogenauer, ‘Comparative Studies of Sources of Law and Legal Method’ in Reinhard Zimmermann and Mathias Reinmann (eds), *The Oxford Handbook of Comparative Law* (1st edn, OUP 2008) 895.

¹⁸⁸ Ibid 894.

¹⁸⁹ See generally Jacques du Plessis, ‘Comparative Law and the Study of Mixed Legal Systems’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (1st edn, OUP 2008) 480-486.

¹⁹⁰ Blackaby, Partasides, Redfern, and Hunter (n 24) para 3.04, 164.

claim that it as a separate legal order¹⁹¹. As such, it is argued that principles and doctrines that foster legal certainty and predictability in national legal system should also be followed in international commercial arbitration, as this would benefit the development of international law and the evolution of international commercial community. As explained by Gary Born:

[i]n a system with only limited codification, heavily reliant on developing norms of customary law, the alternatives to precedent would be an invitation to discretionary whim and a lack of law. Equally, the reasons that gave rise to rules of *stare decisis* and *jurisprudence constante* in national courts – parties’ expectations, the need for predictable rules, enhancing judicial integrity and efficiency – all apply with at least equal force in international settings.¹⁹²

Considerations of legal certainty, stability and judicial integrity are put forward by the supporters of a judicialised approach to national court decisions to argue that the authoritativeness and binding force of national case law should be upheld in international commercial arbitration. According to them, arbitral tribunals should respect the precedential effect of national case law and apply it in the same manner as national judges do. This obligation derives from the judicial function that they exercise. Legal stability and certainty could only be achieved when arbitrators recognise that their adjudicative function entails a mandate¹⁹³ to decide a dispute by following the letter of the law, i.e. by construing and applying the law in accordance with longstanding case law. In the opinion of Professor Berger:

the international arbitrator would be held to construe and apply the law along the case-law of the highest courts of that country. (...) This does not only conform with the parties’ legitimate interest in legal certainty and predictability of the arbitrators’ decision-making and the “judicial” function of the international arbitrator, it also prevents international arbitrators from assuming the function of appellate courts,

¹⁹¹ See Emmanuel Gaillard, ‘The Present – Commercial Arbitration as a Transnational System of Justice: International Arbitration as a Transnational System of Justice’ in Albert Jan van den Berg (ed), *Arbitration: The Next Fifty Years, ICCA Congress Series, Volume 16* (1st edn, Kluwer Law International 2012).

¹⁹² Born, *International Commercial Arbitration* (n 131) 380.

¹⁹³ For further arguments on the scope of arbitrator’s mandate see text to n 167, 168.

capable of developing the law and, more importantly, of reviewing the merits of decisions which are regarded as authoritative in the country in question.¹⁹⁴

Gary Born shares similar opinion and argues that arbitrators are compelled to strictly apply the law not only because they exercise an adjudicative function but because they must meet parties' legitimate expectations:

[i]f national (or international) legal system accords, binding, precedential weight to judicial decisions, then arbitral tribunals should give those decisions no less legal effect than would a court in that system: this conclusion follows inevitably from the arbitrators' adjudicative function of applying the law to the evidence. (...) [P]arties select arbitrators to decide a single case in order to obtain the most expert, best-suited and most attentive decision-maker, to resolve their dispute in accordance with the law, including the law as expressed in decided judicial authorities.¹⁹⁵

By following national judicial precedents arbitrators also enhance the legitimacy of international commercial arbitration as a dispute resolution mechanism. It will be contrary to international public policy¹⁹⁶ to see in parties' arbitration agreement willingness to avoid or circumvent the application of relevant legal provisions and judicial precedents. The arbitration clause conveys the express consent of the parties to adjudicate their dispute according to the letter of the law, as formulated by the legislature and applied by the national courts. The views that arbitrators should be allowed to disregard long-standing case law:

are incompatible with the adjudicative function and mandate of international arbitrators. It is not acceptable that arbitrators view their mandate as coming close to applying the law or as being able to disregard settled authority if there is "sufficient support" for doing so. These formulations are incompatible with both the arbitrators' obligation to

¹⁹⁴ Berger, 'The International Arbitrators' Application of Precedents' (n 178) 10-11.

¹⁹⁵ Born, *International Commercial Arbitration* (n 131) 3821, 3822.

¹⁹⁶ According to Pierre Mayer in Pierre Mayer, 'The Effect of International Public Policy in International Arbitration?' in Loukas A. Mistelis and D. M. Lew (eds), *Pervasive Problems in International Arbitration* (1st edn, Kluwer Law International 2008): "Transnational public policy' can be defined as the set of legal principles, not belonging to the law of a particular State, which may be relied upon by an arbitrator either as a bar to the enforcement of an international commercial contract, or, in a less direct manner, as an obstacle to the application of the State law normally applicable to such contract."

apply the law and the parties' desire for predictability and certainty – evinced through their choice-of-law agreement and their decision not to arbitrate *ex aequo et bono*. Nor does it even arguably matter that the arbitrators become *functus officio* after deciding a single case (...).¹⁹⁷

It is to be noted that the understanding of the nature of arbitrator's adjudicative function could be influenced by the adherence to one or another theory of the foundations of international commercial arbitration. The endorsement of the jurisdictional theory indicates preference for a more judicialised approach to international commercial arbitration. The proponents of the jurisdictional theory contend that arbitrator's adjudicative function incorporates strict application of the rules of law, including application of national and international laws, and adherence to national judicial precedents to the extent that those decisions are given binding effect in state jurisdictions. Some argue that:

arbitrators resemble judges of national courts because the arbitrators' powers are drawn from the states by means of the rules of law. As with judges, arbitrators are required to apply the rules of law of a specific state to settle the disputes submitted to them.¹⁹⁸

According to the judicialised position towards the sources of law in international commercial arbitration, arbitrator's mandate also includes an obligation to honour parties' express choice of law and in absence of explicit provisions to resort to the conflicts of law principles to determine the relevant rules of law. Only in cases where parties explicitly state that they opt for *amiable compositeur* arbitration, an arbitral tribunal is free to disregard judicial decisions and adjust the outcome by taking into account equitable principles.¹⁹⁹

A word of caution should be given here, as the meaning and significance of legal certainty in national legal systems may be different from the ones in international commercial arbitration. This is because policy considerations that are advanced by

¹⁹⁷ Born, *International Commercial Arbitration* (n 131) 3822.

¹⁹⁸ Hong-lin Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1 *Contemp Asia Arb J* 255–286, 258.

¹⁹⁹ Further analysis on different theories of the foundations of international commercial arbitration in Chapter 5.

the concepts of legal certainty and predictability in national legal systems may not be at all or entirely applicable in international commercial arbitration settings. It is widely acknowledged that policy issues do not play a significant role in international commercial arbitration proceedings, where often protection for private interests as opposed to the public interest is sought. Thus, although it is true that business parties appreciate legal certainty and predictability, it is necessary to ask the question “legal certainty with respect to what?”. Do parties expect legal certainty with respect to the dispute resolution procedure or do they seek predictability in arbitrator’s decision-making? What is the meaning of legal certainty in international commercial arbitration? The significance of parties’ expectations and how they influence the judicialisation process will be considered in the following Chapters 3 and 5.

To conclude it is worth mentioning that the judicialised approach to court decisions resonates with the position adopted in other areas of international law. Thus, for example, the important role of court decisions as a source of law is emphasised in Art. 38 of the Statute of the ICJ, according to which judicial decisions, as well as the teachings of the most highly qualified publicists of the various nations, are recognised as international sources of law, or in the words of the Statute – they are “subsidiary means for the determination of rules of law”. In ICSID arbitrations, which arise out of bilateral or other investment treaties as opposed to arbitration agreements, which is the case with international commercial arbitration, the reference to judicial decisions by arbitral tribunals is characterised as “remarkable”²⁰⁰: “The relatively high number of references to domestic court decisions as compared to the other categories of unilateral practice is remarkable. It may indicate a trend in ICSID tribunals to be more case law oriented than legislation oriented.”²⁰¹

Judicial decisions, viewed as authoritative legal reasoning, have effects beyond the particular case. Apart from providing standards for the correctness and fairness of the decisions, case law also has a bearing on the process of harmonisation and

²⁰⁰ The example with ICSID arbitrations has its limitations in this analysis, as policy issues play a greater role in international investment arbitration than in international commercial arbitration.

²⁰¹ Ole Kristian Fauchald, ‘The Legal Reasoning of ICSID Tribunals – An Empirical Analysis’ (2008) 19 *The European Journal of International Law* 301–364, 348.

unification of law. As highlighted by Professor Camilla Baasch Andersen²⁰², the *jurisconsultorium*, or “the sharing of scholarly and case-law-based sources of legal understanding and interpretation”²⁰³, is the means to ensure not mere textual uniformity, but also applied uniformity in law, as “any drafted text purporting to be a uniform law is nothing until it is applied uniformly as law”²⁰⁴. It is considered that for the international business community consistency in resolving similar legal disputes is of great importance.

3.1.1 Case Study with a Collection of Arbitral Awards by the Society of Maritime Arbitrators and ICC Arbitral Awards

The judicialised approach to sources of law can be illustrated by examination of arbitral awards rendered in commercial and maritime cases, where legal certainty and predictability are highly valued.²⁰⁵ A comprehensive search in the collection of awards rendered by the Society of Maritime Arbitrators reveals that maritime law arbitrators very often refer to national court decisions and other arbitral awards in order to promote the principles of legal certainty, predictability and commercial justice.²⁰⁶ Thus, in *Agrowest, S.A., Dos Valles S.A. and Comexa S.A. and Maersk Sealand*²⁰⁷ the sole arbitrator analysed various court decisions and arbitral awards in consideration of arbitrator’s obligation to bring arbitration proceedings to a conclusion as soon as reasonably possible, and arbitrator’s power to dismiss cases with prejudice for failure to prosecute. Similar approach to court decisions is

²⁰² See Camilla Baasch Andersen, *The Uniformity of the CISG and Its Jurisconsultorium: An Analysis of the Terms and a Closer Look at Examination and Notification* (1st edn, Handelshøjskolen i Aarhus 2006); Andersen, ‘Defining Uniformity in Law’ (n 184).

²⁰³ Andersen, ‘Defining Uniformity in Law’ (n 186) 6.

²⁰⁴ Andersen, *The Uniformity of the CISG and Its Jurisconsultorium* (n 200) 57.

²⁰⁵ Regarding the importance of legal certainty and predictability in commercial and maritime cases, see Zerkos Georgios I. Zerkos, *International Commercial and Marine Arbitration* (1st edn, Routledge-Cavendish 2008) 491 stating: “In practice, parties’ perceived fairness in arbitration process and the predictability and certainty of the result is why arbitration is becoming more and more the preferred dispute mechanism for specific kind of disputes such as commercial, maritime, employment and consumer protection issues”.

²⁰⁶ Similar search in the CISG database, available at: <<http://www.cisg.law.pace.edu/cisg/search-cases.html>>, using the keyword “precedent” rendered no result.

²⁰⁷ SMA 4050 (2009).

demonstrated in the cases of *Transammonia, Inc. and Bergesen d.y. ASA as agents for the Norwegian flag LPG/C HUGO N*, and *General Gas Carrier Corp., Ltd.*²⁰⁸, *Sangamon Transportation Group, as Disponent Owner of the Genco Carrier and OSL Steamship Corp.*²⁰⁹, *Amerada Hess Shipping Corporation, Time Charterers, and Ina Tankers Corp., Owners of the M.T. Noto*²¹⁰. In all of the cited awards the arbitrators' decisions are introduced with variations of the following wording: "The Panel has carefully considered the facts, arguments and legal precedents, and reaches the following decision (...)"²¹¹.

Several ICC arbitral awards also follow a formalistic and judicialised approach to the sources of law and national court decisions in particular. The dispute in ICC Case 13258²¹² arose between a Claimant, a UK joint venture company and a Respondent, an African State-owned entity, which awarded a construction contract for part of a hydroelectricity project to the Claimant. Claimant alleged that the issuance of a variation order by the employer amounted to a breach of contract, while Respondent argued that such an order allows an employer to make changes to the works without thereby committing a breach of contract. The contract was based on the FIDIC Conditions of Contract for Works of Civil Engineering Construction, 4th edition, 1987, as amended and completed by conditions of particular application. The law governing the substantive matters of the dispute was the law of the African state [F] from which the Respondent originated. That law was based on English common law. The arbitral tribunal reasoned that "[t]he crux of the issues in the present case is whether the facts come within the proviso expressly stipulated in FIDIC/GC 51.1(b)." ²¹³ Despite the lack of judicial decisions on the matter and the fact that "[t]he parties did not refer the Arbitral Tribunal to any [State F] legal authorities

²⁰⁸ SMA 4115 (2011).

²⁰⁹ SMA 4167 (2012).

²¹⁰ SMA 1032 (1976).

²¹¹ *Sangamon Transportation Group* (n 209). Also see *Agrowest, S.A.* (n 207): "(...)[A]fter having taken into account the totality of facts and circumstances, the contract terms, the conduct by AgroWest and its counsel, the legal and arbitral precedents as well as the principles of fairness and equity, I conclude (...)."

²¹² ICC Case 12358, partial award rendered in 2005 in (2012) 23(2) 'ICC International Court of Arbitration Bulletin' 83.

²¹³ Ibid.

concerning the interpretation of variations clauses for building contracts”²¹⁴, the arbitrators based their construction of FIDIC/GC 51.1(b) on a number of English, Commonwealth and other common law judicial decisions instead of practices and usages in the construction industry for example.

In another ICC case the law governing to the contractual relationship between the parties was Brazilian law.²¹⁵ The arbitral tribunal gave consideration to a number of judicial decisions to support its interpretation of the Brazilian Civil Code of 1916. It also engaged in a surprisingly long discussion on the evolution of the governing law only to conclude that the parties were free to agree otherwise and had indeed done so. With respect to the binding authority of the court decisions, the tribunal explicitly stated that in addition to the applicable legal provisions:

the Arbitral Tribunal will also look at secondary sources of Brazilian law, such as writings by legal scholars and decisions taken by Brazilian courts. It will take into account the opinions written by the distinguished legal experts brought by the parties to these proceedings. Furthermore, to enlighten this review [the] Arbitral Tribunal will also take into account sources of comparative law, particularly of countries of the civil law tradition that have similar regulations (...). The tribunal holds that these secondary sources of law do not serve as precedents and they are not imperative or binding, but they are useful to attain a duly justified and fair decision.²¹⁶

In ICC Cases 11876²¹⁷ and 12048²¹⁸ the arbitral tribunals relied on a number of court decisions before confirming that they have powers to rule upon a dispute involving a party against which insolvency proceedings are brought and award pre-judgment interest respectively. In the second ICC Case, ICC Case 12048²¹⁹, the tribunal pointed out that it could find no impediment in the applicable law to the award of

²¹⁴ Ibid.

²¹⁵ ICC Case 14424, award rendered in 2008 in (2012) 23(1) ‘ICC International Court of Arbitration Bulletin’.

²¹⁶ Ibid.

²¹⁷ ICC Case 11876, award rendered in 2003 in (2009) 20(1) ‘ICC International Court of Arbitration Bulletin’ 86.

²¹⁸ ICC Case 12048, award rendered in 2006 in (2012) 23(2) ‘ICC International Court of Arbitration Bulletin’ 70.

²¹⁹ Ibid.

pre-judgment interest and reasoned that it should have as much authority to award such interest as a state court indisputably would have under the applicable law.

In ICC Case 10346²²⁰ the arbitral tribunal expressly relied on judicial precedents to decide against Claimant's proposed remedy. The dispute concerned the performance of a contract for construction of an industrial facility in a South Asian country. The law governing the contract was the law of New York. In the course of the arbitration proceedings Respondent raised a threshold issue, alleging that Claimant was barred from obtaining relief as it had won the contract by bribing Respondent's advisers and had failed to disclose information on the bribes paid to them. In a partial award the arbitral tribunal found that the existence of bribery did not make the contract unforeseeable or prevent Claimant from pursuing its claims. In the second phase of the arbitration proceedings the arbitral tribunal considered whether to allow Claimant to recover its out-of-pocket expenses and profit (Claimant's proposed remedy) or to deprive Claimant of any profit and allow it only to recover its out-of-pocket expenses (Respondent's proposed remedy). The tribunal found that "[Claimant]'s proposed remedy, which would allow [Claimant] to recover costs plus profit minus the bribe, is inconsistent with the New York precedent".²²¹ In addition it relied on policy considerations to conclude that the remedy must deprive Claimant from any incentive to participate in bribery: "the remedy that the Tribunal adopts, one that allows no profit to the briber, is surely a powerful disincentive. Corporations do not thrive on costs plus zero contracts."²²²

It could be inferred from the above that in arbitrations where parties have explicitly agreed on a choice of law provision legal certainty and precision are highly valued. It appears that such a clause restricts to some extent arbitrators' discretion to judge on the authoritativeness and persuasiveness of the applicable sources of law and compel arbitral tribunals tend to follow established judicial precedents. Adherence to well-established legal reasoning serves the need for consistency, certainty and predictability in law.

²²⁰ ICC Case 10346, award rendered in 2000 in (2001) 12(2) 'ICC International Court of Arbitration Bulletin' 106.

²²¹ Ibid.

²²² Ibid.

3.2 National Court Decisions as a Source of Law - A Flexible Approach

The downsides of the judicialised approach to national court decisions as a source of law in international commercial arbitration give rise to arguments in favour of a more flexible position. The proponents of the latter argue that arbitrators should have authority to decide whether to adhere to the rigidity of national legal systems or not. The approach to precedents is to be decided on a case-by-case basis. Thus, for example, arbitrators may sometimes be faced with situations, where the reasoning of national court decisions is out-dated, rigid or inapplicable to the realities of international commerce and trade. If a national law does not provide for a particular set of rules designated specifically for transactions in international commercial context, the case law on those provisions may lead to an unacceptable, nonsensical or unjust outcome of the dispute. A flexible position would be to grant arbitrators with discretion to decide whether to follow national court decisions in view of the particular facts of the case. Prosper Weil deftly explains the sociological imperatives in play:

The question whether and to what extent judicial decisions constitute a source of law and, therefore, a binding authority upon tribunals, is, as we all know, a difficult and controversial one. There are competing sociological imperatives at play: the need for continuity of jurisprudence, which is to say stability in the rules of law, without which there can be no predictability, weighs against the need for the evolution of such rules of law, responsive to an ever changing political, sociological, and economic climate. Permanence and stability serve certain purposes; flexibility and evolution serve others.²²³

Indeed, the flexible approach to the sources of law in international commercial arbitration prioritises considerations of flexibility, commercial sense and private

²²³ Prosper Weil, 'Introductory Remarks' in Emmanuel Gaillard and Yas Banifatemi (eds), *IAI Series on International Arbitration No. 5: Precedent in International Arbitration* (1st edn, Juris Publishing, Inc. 2008) 95.

interests over those of certainty and the public interest. While the latter generally applies to both the arbitration proceedings and arbitrator's decision-making, it will be discussed in the following chapters what parties' expectations as to the arbitral process and arbitrator's functions are and whether they differ. It is, however, important to note that the proponents of the flexible approach maintain that business needs will best be met if arbitrators decide disputes on a case-by-case basis with minimum reference to established case law. On the occasions that national court decisions are cited, arbitral tribunals should consider whether the application of judicial precedents is appropriate. Advocates for a more flexible approach to the sources of law contend that instead of blindly following the letter of the law, arbitrators should strive to resolve disputes in view of the particularities of the specific case, i.e. by closely examining the facts of the case and applying commercial sense. In Redfern's view:

[b]y its whole nature and constitution, an arbitral tribunal is far more ready, and far freer than a conventional judicial tribunal to deal with the actual case in front of it. An arbitral tribunal is usually established to deal with a particular case. Once it has pronounced its decision, its function is over. In such cases, there is less need to be concerned with consistency of decisions. There is more scope for tailoring the award to the particular merits of the dispute.²²⁴

Klaus Peter Berger also asserts that arbitrators are not obliged to comply with the rigidity of the national legal systems. While arbitral tribunals are forbidden to act *contra legem*²²⁵, they may apply the law in a more flexible way, developing a law "*secundum or praetor legem*". Professor Berger further notes that arbitrators should assess the authoritativeness of national court decisions in view of the specifics of the particular legal system to which the applicable national law belongs. For example, judicial precedents play a significant role in common law systems, which is not always the case with the function that court decisions have in civil law jurisdictions²²⁶.

²²⁴ Alan Redfern, 'International Commercial Arbitration: Winning the Battle' in The Southwestern Legal Foundation (ed), *Private Investors Abroad* (1st edn, Dallas 1989) 11-1, 11-12.

²²⁵ See Berger, 'The International Arbitrators' Application of Precedents' (n 178) 15.

²²⁶ It is worth mentioning that in Falcón y Tella (n 176), the author distinguishes between the terms "legal system", and "legal tradition" or "legal family". In particular it is argued that the terms

Contrary to the judicialised approach to the sources of law in arbitration, proponents of the flexible position, such as Professor Klaus P. Berger²²⁷ and Alan Redfern²²⁸ do not fully equate the arbitrator's adjudicative function to the judicial one and, as such, do not transpose on arbitrators policy consideration associated with the role of a national judge. Arbitrators' mandate is seen as a case-specific one rather than as a system-contributive mandate²²⁹. According to Professor Berger:

“civil legal system” and “common legal system” are not correct, and one has to refer to Continental, Anglo-Saxon and Roman systems. However, Prof Berger uses the expressions “civil/common law system”, “civil/common law”, “civil/common law tradition”, and “civil/common law jurisdictions” interchangeably, without making a distinction between the terms. As such any references made to Berger, ‘The International Arbitrators’ Application of Precedents’ (n 180) should not contain connotations regarding any differences that may have between the terms “common/civil legal system” and “Continental/Anglo-Saxon systems”. In fact, the terms “common/civil legal system” will be used throughout the research paper without going into detail to deliberate on their accuracy, as those terms are widely recognisable.

²²⁷ See n 225.

²²⁸ See n 224.

²²⁹ The viability of the doctrine of *stare decisis* and the applicability of the concept of precedent are disputable issues in the area of international investment arbitration as well. In Michael W. Reisman, “‘Case Specific Mandates’ versus ‘Systemic Implications’: How Should Investment Tribunals Decide? The Freshfields Arbitration Lecture’ (2013) 29 *Arbitration International* 131–153, the author analyses two approaches to arbitrators’ legal function, namely “case-specific” and “systematic-application”, as the latter is taking account of the “systematic implications” of arbitral decisions. Contrary to the assertions of Sir Robert Jennings and Prof Mc Edward Whinney, cited by Reisman, the latter concludes that application of international investment law “based on ‘a modicum of awareness of the system as a whole’ and ‘greater contextual awareness’ actually have negative implications for the public system of private investment protection” (at 151). In support of his arguments, the author refers to the legal reasoning in the case of *Himpurna California Energy Ltd. v. PT. (Persero) Perusahaan Listrik Negara*, UNCITRAL Ad-Hoc Award, 4 May (1999), where the tribunal made a remark on the “inherent limitations of its role”. Needless to say that international investment arbitration differs greatly from international commercial arbitration. The former is part of public international law as a system for investor-state disputes settlement, while the latter is part of private international law realm. However, it is interesting to note that in both areas the function of arbitrators is disputable, namely whether arbitral tribunals should confine to the case-specific and rule-and-text-based analysis or they also need to pay regard to policy-and-context-based considerations and to the systemic implications of their decisions. Although Reisman objects the idea of limited law-making function for private international tribunals, stating that “a policy or law-making function for the international commercial arbitrator would seem anomalous (...): private law-making, conducted under private circumstances and not published simply would not serve as law for an entire national community” (at 135), the latter is not entirely unsupported in the literature. According to CISG, Art. 7(2) where questions concerning matters governed by the Convention are not expressly settled in it, arbitral tribunals are entitled to fill the gap by resorting to the general principles on which the CISG is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. The promotion of autonomous interpretation of the Convention under Art. 7(1) and the provision of

in view of the specificity of international arbitration, the arbitrators should be entitled to go a step further than the foreign judge and disregard even long-standing case-law of the highest court if the result does not conform with the needs of international trade and commerce, provided there is sufficient support in foreign doctrine for the result he endeavours to achieve in the case before him.²³⁰

At first thought such an approach does not seem to be in favour of the international commercial community, as it does not guarantee certainty and predictability in the application of the law. If a long-standing case law can easily be disregarded by arbitrators, then businesses will be brought back to a “legal no-man’s land”²³¹. Some will even argue that if parties want their disputes to be decided on the grounds of general norms and equity principles, they will opt for *ex aequo et bono* arbitration instead of including a choice of law provision.

The position of the proponents of the flexible approach to national case law is not that arbitrators are entitled to completely disregard national court decisions. The argument goes differently. It is argued that arbitrators have the discretion to follow or not established case law as long as their decision is not *contra legem*. This is because by its nature international commercial arbitration is an alternative to

gap-filling mechanism under Art. 7(2) serve for grounds for some scholars to advocate for a binding effect of arbitral awards on the CISG and “supranational *stare decisis*” (in Larry DiMatteo, ‘The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings’ (1997) 22 Yale Journal of International Law 111–170, 111), “*ipso facto stare decisis*” (in René Franz Henschel, ‘Conformity of Goods in International Sales Governed by CISG Article 35: Caveat Venditor, Caveat Emptor and Contract Law as Background Law and as a Competing Set of Rules’ (2004) 1 Nordic Journal of Commercial Law) or “inspirational precedent” (in Andersen, *The Uniformity of the CISG and Its Jurisconsultorium* (n 202) 117). Furthermore, in François Perret, ‘Is There a Need for Consistency in International Commercial Arbitration?’ in Yas Banifatemi and Emmanuel Gaillard (eds), *IAI Series on International Commercial Arbitration No. 5, Precedent in International Commercial Arbitration* (1st edn, Juris Net, International Arbitration Institute (IAI) 2008), 26 it is argued that “[w]hile it is true that arbitrators must not lose sight of the main objective assigned to them, namely settling the dispute pending before them, it is equally true that in many cases the reasons for the decision are not limited to the application of a given legal rule on the circumstances at hand. Like an *arrêt de principe*, an arbitral award may give a solution to the legal issue at state going beyond the contingency of the specific case and thus may be called upon to rule on disputes of the same kind.”

²³⁰ Berger, ‘The International Arbitrators’ Application of Precedents’ (n 180) 15.

²³¹ See Born, *International Commercial Arbitration* (n 131) 3821; *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17 (U.S. S. Ct. 1974).

litigation dispute resolution mechanism, which cares more for the needs of commercial parties than for the public interest. As such, arbitrator's function is to render a decision that meets businesses' needs and if, in light of the particular facts of the case and international trade practices, this means deviating from the strict application of judicial precedents, arbitrators should be allowed to do so.

The alternative nature of arbitration and the secondary role of court decisions as sources of law are attested by the increasing significance of the so-called "soft law" in international commercial arbitration²³². The importance of self-regulation in arbitration can be interpreted as willingness on the side of international commercial community to grant normativity to such sources of law that are perceived with greater respect for the authority of the lawmaker and are associated with harmonisation and globalisation trends and commercial realities. Hence, references to national court decisions may be expected only when parties' contract, mandatory rules, trade practices and soft law do not provide unequivocal answer to the matters of dispute.

ICC Case 14208/14236²³³ provides an excellent example of a flexible approach to the sources of law and court decisions in particular. The parties to the contract had specified that the contract should be governed and construed in accordance with the laws of [State X]. The arbitral tribunal had not been granted powers to act as *amiable compositeur* or to decide matters *ex aequo et bono*. Among the issues to be decided by the arbitrators was the question whether a third party should/could be joined to the arbitration agreement.

The arbitral tribunal held that "[t]he fact that [State X] law governs the merits of the dispute does not mean that it necessarily also governs the issues of joining a non-signatory, or, in other words, the issue of whether the arbitration clause should be extended to [the Parent Company]".²³⁴ Claimant's position was that reference to any particular law was unnecessary and the arbitral tribunal should instead refer the *lex*

²³² See generally Kaufmann-Kohler, 'Soft Law in International Arbitration' (n 136).

²³³ ICC Case 14208/14236, partial award rendered in 2008 in (2013) 24(2) ICC 'International Court of Arbitration Bulletin'.

²³⁴ Ibid.

mercatoria. According to the Respondent, the arbitral tribunal was to consider the law of the state where the parent company was incorporated as a starting point in the veil-piercing exercise because “the Arbitral Tribunal’s determination concerns an issue of legal personality”.²³⁵ The tribunal disagreed with the Respondent on the basis that:

While in national legal systems, piercing the corporate veil is in most cases a substitution mechanism, and therefore an issue of corporate legal personality, it is not generally considered as such in transnational arbitration, but rather as another method of extending the arbitration clause to a non-signatory in case of abusive or fraudulent behaviour by the parent company or the owner of the group.²³⁶

By distinguishing between issues relating to the internal affairs of a corporation, i.e. issues of corporate legal personality governed by the law of the state of incorporation, and issues relating to the rights of third parties external to the corporation, the tribunal concluded that it was not bound to consider the law of the state of incorporation and allowed the corporate veil to be pierced in consideration of the individual circumstances of the case at hand.

The reasoning in ICC Case 14208/14236²³⁷ demonstrates a flexible approach to the sources of law and the appropriateness of referring to *lex mercatoria* in view of the particular circumstances of the dispute. The appeal of applying transnational principles to international commercial disputes has been explained in ICC Case 8385:

Application of international standards offer many advantages. They apply uniformly and are not dependent on the peculiarities of any particular national law. They take due account of the needs of international intercourse and permit cross-fertilization between systems that may be unduly wedded to conceptual distinctions and those that look for a pragmatic and fair resolution in the individual case.²³⁸

²³⁵ Ibid.

²³⁶ Ibid.

²³⁷ Ibid.

²³⁸ ICC Case 8385, award rendered in 1995.

Section 2.4 of this thesis considers the recognition and application of *lex mercatoria* as a source of law in international commercial arbitration proceedings and two approaches to the New Law Merchant.²³⁹

3.3 Arbitral Awards as a Source of Law

A question that causes as much difficulty to answer as the one concerning the binding force of national court decisions in international commercial arbitration, refers to the nature of arbitral awards in arbitration and their role, if any, as sources of law. If it may be hard to justify judicial decisions' strict application in international arbitration, it is even harder to argue that arbitral decisions decided in an *ad hoc* manner, and as a rule protected by confidentiality clauses, can be regarded as a source of law.

Similar to the approach to national court decisions, there are two general points of view that are of importance for the process of judicialisation in international commercial arbitration. The first position is associated with the judicialised approach to sources of law and perceives arbitral awards as a source of law for considerations of legal certainty, predictability of dispute's outcome, and procedural and substantive justice. This position is necessarily linked to some new developments in international commercial arbitration, such as the rise of transparency in arbitration²⁴⁰, the emergence of the theory of arbitral precedent²⁴¹, and transmission

²³⁹ See Section 2.4.

²⁴⁰ Alberto Malatesta and Rinaldo Sali, *The Rise of Transparency in International Arbitration: The Case for the Anonymous Publication of Arbitral Awards* (Alberto Malatesta and Rinaldo Sali (eds), 1st edn, Juris Net 2013). Also see the new initiative for publicising arbitral awards called Arbitrator Intelligence, web page available at: <<http://www.arbitratorintelligence.org/>>; Catherine A. Rogers, 'Arbitrator Intelligence: the Pilot Project and Beyond', Kluwer Arbitration Blog, post available at: <<http://kluwerarbitrationblog.com/blog/2015/01/20/arbitrator-intelligence-the-pilot-project-and-beyond/>>

²⁴¹ See generally Guillaume (n 124); Kaufmann-Kohler, 'Arbitral Precedent' (n 158); Weidemaier, 'Judging-Lite' (n 33); Yas Banifatemi and Emmanuel Gaillard (eds), *IAI Series on International Arbitration No. 5, Precedent in International Arbitration* (1st edn, Juris Net, International Arbitration Institute (IAI) 2008); Carlton J. Snow, 'An Arbitrator's Use of Precedent' (1990) 94 Dick. L. Rev. 665–720; W. Mark C. Weidemaier, 'Toward a Theory of Precedent in Arbitration' (2010) 51 Wm. & Mary L. Rev. 1895–1958; Walter E. Baer, 'Precedent Value of Arbitration

of the principle of *Jura Novit Curia* from Continental jurisdictions to international commercial arbitration²⁴².

The second approach seeks more flexibility, greater freedom in arbitrator's decision-making process and re-affirmation of the principle of confidentiality. The supporters of this position daydream about the bygone golden age of cheap, fast, efficient and less regulated international commercial arbitration. They argue that international commercial arbitration should remain free of litigation concepts, such as *lis pendens*, and rigid doctrines, such as *stare decisis*.

The significance of these two approaches to the sources of law in arbitration, in particular with regard to arbitral awards, comes into play when issues of *res judicata*, *lis pendens* and precedential/persuasive effect of arbitral awards arise in international arbitration proceedings. Thus, arbitration users, who favour the process of judicialisation in international commercial arbitration and, as such, encourage further regulation in the field, and strive for greater certainty and predictability in arbitration proceedings, apply the concept of *res judicata* more strictly, adopt litigation-like

Awards' (1966) 45 Personnel Journal 484–488; Rolf A. Schütze, 'The Precedential Effect of Arbitration Decisions' (1994) 11 J. Int'l Arb. 69–75; Perret, 'Is There a Need for Consistency in International Commercial Arbitration?' (n 227); William W. Park and Jan Paulsson, 'The Binding Force of International Arbitral Awards' (1983) 23 Va. J. Int'l L. 253–285.

²⁴² Teresa Isele, 'The Principle Iura Novit Curia in International Commercial Arbitration' (2010) 13 International Arbitration Law Review 14–26; Claus von Wobeser, 'The Effective Use of Legal Sources: How Much Is Too Much and What Is the Role for Iura Novit Curia?' in Albert Jan van den Berg (ed), *Arbitration Advocacy in Changing Times, ICCA Congress Series* (Kluwer Law International 2010); Christian P. Alberti, 'Iura Novit Curia in International Commercial Arbitration: How Much Justice Do You Want?' in Stefan Michael Kröll and others (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (1st edn, Kluwer Law International 2011); Julian D. M. Lew, 'Iura Novit Curia and Due Process' in Yves Derains and Le (eds), *Liber Amicorum en l'honneur de Serge Lazareff* (1st edn, Pedone 2011); Lisa Spagnalo, 'Iura Novit Curia and the CISG: Resolution of the Faux Procedural Black Hole' in Ingeborg Schwenzer and Lisa Spagnalo (eds), *Towards Uniformity: the 2nd Annual MAA Schlechtriem CISG Conference* (1st edn, The Hague: Eleven International Publishing 2011); Teresa Giovannini, 'International Arbitration and Iura Novit Curia - Towards Harmonization' (2012) 9 Transnational Dispute Management; Gisela Knuts, 'Iura Novit Curia and the Right to Be Heard - An Analysis of Recent Case Law' (2012) 28 Arbitration International 669–668; Anna Mantakou, 'The Misadventures of the Principle Iura Novit Curia in International Arbitration - A Practitioner's Approach' [2014] Τμητικός Τόμος Σπ. Β. Βρέλλη 487–498; See also the ILA Recommendations on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration, Resolution No. 6/2008: electronic copy available at: <<http://www.ila-hq.org/en/committees/index.cfm/cid/19>>.

practices to combat parallel proceedings, and acknowledge, if not the binding, at least the persuasive effect of arbitral awards. In contrast to the judicialised approach, those who oppose the applicability of litigation concepts to arbitration, seek an autonomous and flexible understanding of the concept of *res judicata*, and dispute the role of arbitral awards as a source of law in arbitration.

Since the concepts of *res judicata*, *lis pendens*, and arbitral precedent require an extensive analysis²⁴³, the latter not being the purpose of this study, it is necessary to

²⁴³ For profound analysis on the concepts of *res judicata* and *lis pendens* in international arbitration see: Audley Sheppard, 'Res Judicata and Estoppel' in Bernardo M. Cremades and Julian D. M. Lew (eds), *Parallel State and Arbitral Procedures in International Arbitration* (1st edn, ICC Publishing 2005); Melissa Hope Biren, 'Res Judicata/Collateral Estoppel Effect of a Court Determination in Subsequent Arbitration' (1981) 45 Alb. L. Rev. 1029–1059; Richard G. Shell, 'Res Judicata and Collateral Estoppel Effects of Commercial Arbitration' (1988) 35 UCLA Law Review 623–675; Christer Söderlund, 'Lis Pendens, Res Judicata and the Issue of Parallel Judicial Proceedings' in Lars Heuman and Sigvard Jarvin (eds), *The Swedish Arbitration Act of 1999, Five Years on: a Critical Review of Strengths and Weaknesses* (1st edn, Juris Net 2006); Randy D. Gordon, 'Only One Kick at the Cat: A Contextual Rubric for Evaluating Res Judicata and Collateral Estoppel in International Commercial Arbitration' (2006) 18 Florida Journal of International Law 549–595; Mark Beeley and Hakeem Seriki, 'Res Judicata: Recent developments in Arbitration' (2005) 8 International Arbitration Law Review 111–116; Florian Kremslehner, 'The Arbitration Procedure - Lis pendens and res judicata in International Commercial Arbitration' in Christian Klausegger and others (eds), *Austrian Arbitration Yearbook 2007* (1st edn, C.H.Beck, Stämpfli & Manz 2007); Christer Söderlund, 'Lis Pendens, Res Judicata and the Issue of Parallel Judicial Proceedings' (2005) 22 Journal of International Arbitration 301–322; Gretta L. Walters, 'Fitting a Square Peg into a Round Hole: Do Res Judicata Challenges in International Arbitration Constitute Jurisdictional or Admissibility Problems?' (2012) 29 Journal of International Arbitration 651–680; AnneCatherine Hahn, 'The Award and the Courts, Res Judicata as a Challenge for Arbitral Tribunals' in Christian Klausegger and Peter Klein (eds), *Austrian Yearbook on International Arbitration 2014* (1st edn, Manz'sche Verlags und Universitätsbuchhandlung; Manz'sche Verlagsund Universitätsbuchhandlung 2004); Filip de Ly and Audley Sheppard, 'ILA Final Report on Res Judicata and Arbitration' (2009) 25 Arbitration International 67–82; Vaughan Lowe, 'Res Judicata and the Rule of Law in International Arbitration' (1996) 8 Afr. J. Int'l & Comp. L. 38–50; Luca G. Radicati di Brozolo, 'Res Judicata and International Arbitral Awards' [2012] ASA Special Series No. 38; August Reinisch, 'The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes' (2004) 3 Law & Prac. Int'l Cts. & Tribunals 37–77; Kaj Hobér, 'International Arbitration, Res Judicata and Lis Pendens' in *Recueil Des Courts, Volume 366* (1st edn, Martinus Nijhoff Publishers Leiden/Boston 2013); Norah Gallagher, 'Parallel Proceedings, Res Judicata and Lis Pendens: Problems and Possible Solutions' in Loukas A. Mistelis (ed), *Pervasive Problems in International Arbitration (International Arbitration Law Library Series)* (1st edn, Kluwer Law International 2008); Stavros Brekoulakis, 'The Effect of an Arbitral Award and Third Parties in International Arbitration: Res Judicata Revisited' (2005) 16 American Review of International Arbitration 177–209; Bernard Hanotiau, 'The Res Judicata Effect of Arbitral Awards' in *Special Supplement 2003: Complex Arbitrations: Perspectives on their Procedural Implications* (ICC Publishing 2003); Christa Roodt, 'Reflections on Finality in Arbitration' [2012] De Jure 485–

set some preliminary limitations. The objective of this chapter is to explore whether (the approaches to) the sources of law in international commercial arbitration demonstrate an on-going process of judicialisation in the field. As such, the following section will explore only developments that can be linked to the judicialisation process, rather than conducting an in-depth examination of the above-mentioned notions.

510; Gary B. Born, 'Chapter 27: Preclusion, Lis Pendens and Stare Decisis in International Arbitration' in *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014); Campbell McLachlan, *Lis Pendens in International Litigation* (1st edn, Hague Academy of International Law 2009); Elliott Geisinger and Laurent Lévy, 'Lis Alibi Pendens in International Commercial Arbitration' in *Special Supplement 2003: Complex Arbitrations: Perspectives on their Procedural Implications* (ICC Publishing 2003); Emil Brengesjö, 'The Pursuit of Solutions to Lis Alibi Pendens in International Commercial Arbitration' (2014) 17 *International Arbitration Law Review* 2014 43–57; Francisco Orrego Vicuña, 'Lis Pendens Arbitralis' in *Dossier of the ICC Institute of World Business Law: Parallel State and Arbitral Procedures in International Arbitration* (ICC Publishing 2005); Gabrielle Kaufmann-Kohler, 'How to Handle Parallel Proceedings: A Practical Approach to Issues such as Competence-Competence and Anti-Suit Injunctions' (2008) 2 *Dispute Resolution International* 110–113; François Perret, 'Parallel Actions Pending before an Arbitral Tribunal and a State Court: The Solution under Swiss Law' (2001) 15 *ASA Special Series No. 15*; Bernardo M. Cremades and Julian D. M. Lew, *Parallel State and Arbitral Procedures in International Arbitration* (Bernardo M. Cremades and Julian D. M. Lew (eds), 1st edn, ICC Publishing 2005); Douglas D. Reichert, 'Problems with Parallel and Duplicate Proceedings: The Litispendence Principle and International Arbitration' (1992) 8 *Arbitration International* 237–256; Kaj Hobér, 'Parallel Arbitration Proceedings - Duties of the Arbitrators: Some Reflections and Ideas' in *Dossier of the ICC Institute of World Business Law: Parallel State and Arbitral Procedures in International Arbitration* (ICC Publishing 2005); Julian D.M. Lew, 'Parallel Proceedings in International Arbitration - Challenges and Realities' in *Dossier of the ICC Institute of World Business Law: Parallel State and Arbitral Procedures in International Arbitration* (ICC Publishing 2005); David W. Rivkin, 'The Impact of Parallel and Successive Proceedings on the Enforcement of Arbitral Awards' in *Dossier of the ICC Institute of World Business Law: Parallel State and Arbitral Procedures in International Arbitration* (ICC Publishing 2005); 'Supreme Court rules on res judicata - International Law Office' [2014] ; 'Schellenberg Wittmer - Swiss Supreme Court clarifies res judicata effect of preliminary award rendered by same arbitrators', no date; 'Issue estoppel and res judicata in international arbitration: more weapons in the fight against guerrilla tactics - Lexology', no date; 'New developments on res judicata (Swiss Supreme Court)', no date; 'Exploiting the advantages of an English arbitral seat? Commercial Court confirms the validity of an arbitration agreement and tribunal's substantive jurisdiction whilst parallel proceedings continue in Italy | Herbert Smith Freehills – Arbitration notes', no date; Georg von Segesser, 'Swiss Federal Tribunal applies Article 186 (1bis) of the Swiss Private International Law Act in a case involving parallel proceedings before two arbitral tribunals | Kluwer Arbitration Blog', 2009 Nadja Erk, 'Introduction' in Nadja Erk (ed), *Parallel Proceedings in International Arbitration: A Comparative European Perspective, International Arbitration Law Library, Volume 30* (1st edn, Kluwer Law International 2014); Silja Schaffstein, *The Doctrine of Res Judicata Before International Commercial Arbitral Tribunals* (1st edn, OUP 2016).

The applicability of doctrines like *res judicata* and *lis pendens* to international commercial arbitration, as well as the implementation of litigation practices, such as consolidation of arbitration proceedings, joinder of additional parties, and claims between multiple parties²⁴⁴, raises salient questions as to the increased complexity of arbitration proceedings, including post-award issues. Having taken on the litigation toolkit to handle parallel proceedings in international arbitration, arbitrators are even “required to proceed judicially”²⁴⁵ and adopt solutions that promote the principles of *res judicata* and *lis pendens* – doctrines intrinsically associated with national legal systems. These new developments in international commercial arbitration sparkle the debate about its judicialisation, as they are perceived as a move towards a litigation-like adjudication process.

Due to the expansion of international arbitration as a dispute resolution method, however, the harmonisation of courts’ and tribunals’ approaches to parallel proceedings and post-award issues related to the *res judicata* effect of arbitral awards has become increasingly important. Thus, although the doctrines of *res judicata* and *lis pendens* are innate to national legal systems, they found their way to the field of international commercial arbitration as well.

3.3.1 *Lis Alibi Pendens* and International Commercial Arbitration

National courts apply *lis alibi pendens* to tackle parallel proceedings involving the same parties and the case cause of action. It entitles courts to refuse to exercise jurisdiction, i.e. to stay or suspend legal proceedings, when there is parallel litigation pending in another jurisdiction. The *lis pendens* doctrine is relied upon both in civil law and common law jurisdictions²⁴⁶, and is considered by some authors to be also a rule of customary international law or a general principle of law²⁴⁷. The applicability

²⁴⁴ The incorporation of litigation practices in the arbitration process and its implications are considered in Chapter 4.

²⁴⁵ Blackaby, Partasides, Redfern, and Hunter (n 24) 41.

²⁴⁶ Born, *International Commercial Arbitration* (n 131) 3792.

²⁴⁷ See for example Reinisch (n 241) 48: “Still, it can hardly be disputed that *lis pendens* is also a rule of international law applicable in international proceedings. The widespread use and similarity of the concept of *lis pendens* in the national procedural laws of States of all legal

of the principle of *lis alibi pendens* in international arbitration is not just unclear but highly questionable. Opinions on the matter range from complete dismissal of the relevance of *lis pendens* doctrine to international arbitration, to acknowledgment of its *sui generis* application. Thus, according to Julian D.M. Lew QC:

There is no place for the concept of *lis pendens* in international arbitration. It will not and cannot resolve the problem of parallel and simultaneous forums. (...) Tribunals should not look over their shoulder at what other tribunals may or may not be doing. Each tribunal has a duty to carry out its authority and responsibility in accordance with the appropriate jurisdiction clause and the agreements of the parties. There may be instances where a stay or slowdown of proceedings might be appropriate, provided this does not cause undue delay and will not prejudice the interests of the parties.²⁴⁸

Furthermore, it is commonly acknowledged that “the very concept of *lis alibi pendens* is considered as a logical impossibility in international commercial arbitration”:

(...) there can be no question of two equally competent bodies: the jurisdiction of an arbitral tribunal requires a valid arbitration agreement, and one of the main legal consequences of such an agreement is precisely that it evicts the jurisdiction of national courts. Moreover, it is commonly held that whenever the validity or the scope of an agreement to arbitrate is in dispute, national courts should defer initially to the arbitral tribunal, whose jurisdiction to decide the issue is said to have priority (...).²⁴⁹

In spite of the suggestion that *lis pendens* may be an oxymoron in the field of international arbitration, issues considering the extent to which court proceedings

traditions as well as its inclusion in a number of bi- and multilateral agreements is evidence that *lis pendens* can be regarded as a general principle of law in the sense of Art. 38 of the ICJ Statute. Further, the existence or application of such a rule was generally acknowledged in the few cases where *lis pendens* claims were made before international courts or tribunals.” (citing *Certain German Interests in Polish Upper Silesia* (Germany v. Poland), 1926 P.C.I.J. (Ser. A) No. 6; *Caire Claim* (France v. Mexico), 5 R.I.A.A. 516 (1929).

²⁴⁸ Cremades and Lew (n 243) 311.

²⁴⁹ Geisinger and Lévy (n 241) 53, also citing the reasoning of the Italian *Corte di cassazione* in the decision *Società Montedison e altre v. Società Enichem*, 8 July 1996, [2000] ASA Bulletin 38, 388, ICC Case 5103, award rendered in 1988 in S. Jarvin, Y. Derains and J. J. Arnaldez, *Collection of ICC Arbitral Awards (1986-1990)* (1st (ed), ICC Publishing/Kluwer 1994) 361, 365.

should interfere with or affect arbitral proceedings prove to be of significant importance. An example of these issues is demonstrated by the *Fomento* case²⁵⁰, in which Swiss courts had to deal with questions arising out of pending proceedings. Before an arbitral tribunal was instituted, *Fomento* initiated court proceedings in Panama against *Colón Container Terminal (CCT)*, a Panamanian company. CCT objected to the jurisdiction of the Panamanian court by virtue of the valid arbitration agreement. The court of first instance rejected the jurisdictional objection and did not grant stay of the proceedings. CCT subsequently brought arbitration proceedings under the ICC Arbitration Rules, however *Fomento* maintained before the Panamanian courts that the arbitral tribunal lacked jurisdiction because the Claimant had waived its right to arbitration by not challenging the court's jurisdiction in time. The case went to the Supreme Court of Panama, which ruled that the jurisdictional objection had been raised too late. *Fomento* then challenged the jurisdictional decision of the arbitral tribunal before the Swiss Federal Tribunal on the grounds of tribunal's violation of *lis pendens* principle. The Swiss Federal Tribunal set aside the jurisdictional award of the arbitral tribunal. The Tribunal saw no reason to distinguish arbitral awards from court decisions when it came to the principles of *res judicata* and *lis pendens*, and, as such, since the foreign court judgement was susceptible to enforcement in Switzerland, the issue of priority had to be applied also with respect to the court first seised. Thus, the Swiss Federal Tribunal maintained that both the arbitral tribunal and the court are entitled to rule on their jurisdiction and there was no reason to grant any priority with regard to the principle of *compétence de la compétence* to the arbitral tribunal.

The decision of the Swiss Federal Tribunal on *Fomento* case was heavily criticised because it opened the possibility of arbitral proceedings being circumvented by a party by bringing an action before a foreign court prior to the institution of an arbitral tribunal. This position of the Tribunal was rectified by amendment to the Swiss PILA, which Art. 186 (1bis) now reads: "It [the arbitral Tribunal] shall decide on its jurisdiction notwithstanding an action on the same matter between the same parties already pending before a State Court or another arbitral tribunal, unless there

²⁵⁰ *Fomento de Construcciones y Contratas SA v. Colón Container Terminal SA*, BGE 127 III 279 (2001), English translation in 19 ASA Bulletin (2001) 555.

are serious reasons to stay the proceedings”²⁵¹. In 2008, in the Swiss Federal Tribunal decision 4A_210/2008, the Tribunal applied Art. 186 (*1bis*) Swiss PILA to a case involving parallel proceedings before two arbitral tribunals, thus following the Swiss legislator’s position that the arbitral tribunal first seised of the same issue is entitled to rule on its jurisdiction.²⁵²

There are several rules and tools that an arbitral tribunal can use or resort to when faced with parallel proceedings in international arbitration. The general provisions that regulate the issue of priority in international arbitration are Art. II(3) NYC and Art. 8(1) UNCITRAL ML, according to which a national court, before which an action is brought in a matter which is the subject of an arbitration agreement, should refer the parties to arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed. The application of these provisions is supported by the doctrine of *competence-competence* under national arbitration laws, according to which arbitrators are entitled to decide on their own jurisdiction. As such, even in case of parallel pending proceedings, arbitrators are allowed to proceed with the arbitration (this is the so-called positive effect of *competence-competence* doctrine). Some jurisdictions, among which France is the leading example, recognise a negative effect of the doctrine of *competence-competence* as well. The latter grants priority to arbitral tribunals to rule on their jurisdiction and prohibits courts from making determination of arbitrators’ jurisdiction before tribunals have decided on the matter. Finally, the most controversial tool that can be used to handle parallel proceedings in international arbitration is anti-suit injunctions²⁵³. They are

²⁵¹ Art. 186 (*1bis*) reads: ‘Il statue sur sa compétence sans égard à une action ayant le même objet déjà pendant entre les mêmes parties devant un autre tribunal étatique ou arbitral, sauf si des motifs sérieux commandent de suspendre la procédure’. The English translation is cited as in Thomas H. Webster and Michael W. Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* (3rd edn, Sweet & Maxwell 2014) 329 at para 22-26.

²⁵² For analysis on the Swiss Federal Tribunal decision 4A_210/2008 dated 29 October 2008 see von Segesser, ‘Swiss Federal Tribunal applies Article 186 (*1bis*) of the Swiss Private International Law Act in a case involving parallel proceedings before two arbitral tribunals | Kluwer Arbitration Blog’, available at: <<http://kluwerarbitrationblog.com/blog/2009/03/12/swiss-federal-tribunal-applies-article-186-1bis-of-the-swiss-private-international-law-act-in-a-case-involving-parallel-proceedings-before-two-arbitral-tribunals/>>

²⁵³ Anti-suit injunctions are well established in some jurisdictions (traditionally common-law ones) and absent in others. National courts are called upon to intervene in arbitration by means of anti-suit injunctions in extreme, pathological situations occurring during the course of arbitration

traditionally associated with common law jurisdictions, since civil law jurisdictions invoke the concept of *lis pendens* to tackle problems arising of parallel pending proceedings. Anti-suit injunctions can be issued both by courts in support of or against arbitration, and by arbitral tribunals against court litigation.

The above rules and tools provide a regulatory framework, within which the arbitral tribunals and courts can function when dealing with parallel proceedings in international commercial arbitration. This framework, however, proves to be incomplete and not entirely efficient, as it leaves many unanswered questions. Thus, for example, there is no general principle as to the priority and coordination between arbitration and court litigation. It is true that an arbitral tribunal has power to rule on its jurisdiction and is entitled to carry on with the arbitration even when faced with parallel court proceedings. However it is equally true that both parties and arbitrators “shall make every effort to conduct the arbitration in an expeditious and cost-effective manner”²⁵⁴, and, as such, the arbitral tribunal should take into account the fact that the final decision regarding the validity of the arbitration agreement belongs to the national courts, which can set aside the jurisdictional or final award in accordance with Art. 34(2)(a)(i) UNCITRAL ML.

proceedings. Still, anti-suit injunctions are considered a controversial tool and have been criticised for being in breach of public international law and general principles of international arbitration. For in-depth analysis on anti-suit injunctions in international arbitration, see: Kaufmann-Kohler, ‘How to Handle Parallel Proceedings’ (n 241); Emmanuel Gaillard, *IAI Series on International Arbitration No2: Anti-Suit Injunctions in International Arbitration* (Emmanuel Gaillard (ed), 1st edn, Juris Net Llc 2005); Emmanuel Gaillard, ‘Reflections on the Use of Anti-Suit Injunctions in International Arbitration’ in Loukas A. Mistelis (ed), *Pervasive Problems in International Arbitration* (1st edn, Kluwer Law International 2008); Olivier Luc Mosimann, *Anti-suit Injunctions in International Commercial Arbitration* (1st edn, Eleven International Publishing 2010); Thomas Raphael, ‘Anti-Suit Injunctions to Restrain Arbitration Proceedings’ in *The Anti-Suit Injunction* (1st edn, OUP 2008); Georgios Petrochilos, *Procedural Law in International Arbitration* (OUP 2004) 105-107.

²⁵⁴ See ICC Arbitration Rules 2012, Art. 22(1). Similar provisions are found in LCIA Arbitration Rules 2014, Art. 14.4(ii) stating: “Under the Arbitration Agreement, the Arbitral Tribunal’s general duties at all times during the arbitration shall include a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties’ dispute”; SIAC Arbitration Rules 2013, Art. 16.1 stating: “The Tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties, to ensure the fair, expeditious, economical and final determination of the dispute”.

Apart from being the perfect example for illustration of the problems that can arise with regard to parallel proceedings in international commercial arbitration, *Fomento* case demonstrates a downside of a judicialised approach to international commercial arbitration. As pointed out by Elliott Geisinger and Laurent Lévy:

[t]here can be little doubt that the belief that arbitral tribunals and national courts rank equally with each other laid the foundations for *Fomento*. (...) If arbitration is the ordinary dispute resolution method in international commercial contracts and arbitral tribunals rank equally with national courts, is it not natural to treat instances of competing jurisdiction alike, whether they involve an arbitral tribunal and a national court or two national courts?²⁵⁵

Indeed, an implication of the judicialisation process in international commercial arbitration, particularly with regard to the approach to the sources of international commercial arbitration and the principles that govern it, would be putting international commercial arbitration on an equal footing with national litigation when it comes to competing jurisdictions. This would mean accommodating the principle of *lis pendens* in international commercial arbitration and adopting litigation tools to handle parallel proceedings, so as to avoid situations, in which two equally final, binding and enforceable decisions exist within the same legal system. This would also suggest that in case of pending proceedings before a national court, on the one hand, and an arbitral tribunal, on the other hand, where the national court renders a decision regarding the arbitrators' jurisdiction, the latter should be binding upon the arbitral tribunal. In fact, such is the conclusion reached by the Swiss Federal Tribunal in *Westland Helicopters* case²⁵⁶, where the latter stated in *obiter dictum* that:

(...) if a national court decides that it has jurisdiction notwithstanding an agreement to arbitrate and despite a jurisdictional defence based on that agreement, its ruling on jurisdiction is binding upon an arbitral tribunal before which proceedings are brought

²⁵⁵ Geisinger and Lévy (n 241) 55.

²⁵⁶ *Les Emirats Arabes Unis v Westland Helicopters*, (1994) ASA Bulletin 404.

subsequent to the commencement of judicial proceedings, provided that the parties and the subject matter in both proceedings are the same²⁵⁷.

As demonstrated by both *Westland Helicopters* and *Fomento*, applying the principle of *lis pendens* to international commercial arbitration proceedings may lead to more complications than the one that the doctrine aims to eradicate²⁵⁸. Although it may seem reasonable to give priority to the court at the seat of arbitration in situation of parallel proceedings, since the court is the one that has the last word on arbitrators' jurisdiction, this solution vitiates party autonomy, in particular the arbitration agreement granting explicit jurisdiction to the arbitral tribunal, as well as the doctrine of *competence-competence*.

This is why both Regulation (EC) 44/2001 on jurisdiction and the recognition of judgments in civil and commercial matters (Brussels I Regulation) and Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels I Regulation) left arbitration out of its scope of application. Art. 1(2)(d) Brussels I Regulation is simply drafted, as the aim is to ensure that member state courts act in support of arbitration in compliance with their national law. Thus, in *Marc Rich*²⁵⁹ the European Court of Justice held that the issue of the scope or validity of an arbitration agreement is covered by the exception

²⁵⁷ Geisinger and Lévy (n 241) 55, commenting on *Les Emirats Arabes Unis v Westland Helicopters*, (1994) ASA Bulletin 404, 411. Original text in French: 'En droit suisse, la question de la compétence - la "compétence de la compétence" (Kompetenz-Kompetenz) - est tranchée en dernier ressort par le juge étatique (art. 36 let. b CIA; art. 190 al. 2 let. b LDIP). Cependant, il appartient dans la régie au tribunal arbitral de la traiter en priorité (art. 8 CIA; art. 186 LDIP). Il n'en va autrement - sous réserve de l'admissibilité, sujette à caution, d'une action en constatation de l'existence, de la validité ou des effets d'une convention d'arbitrage (Poudret, FS Walder, loc. cit.) - que lorsque la juridiction ordinaire est saisie en premier d'une action au fond et qu'une exception d'arbitrage est soulevée devant elle. Si elle décline sa compétence, sa décision ne lie pas le tribunal arbitral saisi en second lieu; en revanche, si elle l'admet, elle le lie en raison de l'autorité de la chose jugée attachée à sa décision (Lalive/Poudret/Reymond, op. cit., n. 1 ad art. 8 CIA).

²⁵⁸ As noted by Geisinger and Lévy (n 241) citing Perret, 'Parallel Actions Pending before an Arbitral Tribunal and a State Court' (n 243), 65, 68, 76-78; "Whilst disagreeing with (...) (the) reasoning (in *Westland Helicopters* case), Professor François Perret observes that it is a key link in the chain of thought leading to the recognition of *lis alibi pendens* in international arbitration: if arbitrators were not bound by a court judgement denying the validity of an agreement to arbitrate, they would be free to proceed without regard to any judgement that a national court seized of the same matter might render."

²⁵⁹ ECJ C-190/89, *Marc Rich & Co AG v. Società Italiana Impianti SpA* [1991] ECR I-3855.

in Art. 1(2)(d), provided that this issue only constitutes a preliminary one. Unfortunately, the now infamous *West Tankers*²⁶⁰ decision undermined the arbitration exclusion under the Brussels I Regulation. It gave parties to arbitration agreement green light to act in violation of the latter by allowing them to bring substantive proceedings falling within the scope of the Regulation in a member state court most likely to find the arbitration clause invalid. Although, on the face of it, *West Tankers* dealt with the issue of the availability of anti-suit injunctions as recourse in support of an arbitration agreement²⁶¹, the effect of the decision was *de jure* and *de facto* paralyzing the courts of the seat of arbitration, as well as the party willing to uphold the arbitration agreement, and rendering the latter powerless to prevent the violation of the arbitration clause. The decision in *West Tankers* was heavily criticised by arbitration users, who saw it as a step in the wrong direction. The ECJ's decision created the possibility for a party to arbitration agreements to exploit the principle of *lis pendens* and drag the innocent party into costly and time-consuming proceedings before an unfavourable national court, running a real risk of inconsistent decisions²⁶².

Various proposals for clarification of the scope of the arbitration exclusion were put forward during the wide consultation led by the European Commission on the

²⁶⁰ ECJ C-185/07, *Allianz SpA v West Tankers Inc.* [2009] 1 AC 1138.

²⁶¹ Ibid [31] “(...) [I]f, by means of an anti-suit injunction, the Tribunale di Siracusa were prevented from examining itself the preliminary issue of the validity or the applicability of the arbitration agreement, a party could avoid the proceedings merely by relying on that agreement and the applicant, which considers that the agreement is void, inoperative or incapable of being performed, would thus be barred from access to the court before which it brought proceedings under Article 5(3) of Regulation No 44/2001 and would therefore be deprived of a form of judicial protection to which it is entitled.”

²⁶² Nick Archer, Slaughter and May, ‘The Practical Implications of the West Tankers Decision, April 2009,’ 2009, available online at: <http://www.slaughterandmay.com/media/822289/the_practical_implications_of_the_west_tankers_decision.pdf>. When commenting on the implications of the *West Tankers* decision, the author maintains that: “It is not difficult to envisage a situation where an opportunistic potential defendant could exploit the position created by the ECJ's decision by commencing tactical proceedings which have the effect of delaying the resolution of the substantive dispute. Such delay might well be significant depending on, for example, the availability of summary procedures and the rights of appeal in the relevant jurisdiction's court system. Further, such collateral proceedings will inevitably cause expense – potentially both significant and irrecoverable – for the innocent party. Finally, there is a real risk of inconsistent decisions by the national court on the one hand and the arbitral tribunal on the other both as to the validity and applicability of the arbitration agreement and even on the substantive dispute itself.”

revision of Brussels I Regulation. The new Recital 12 of the Recast Brussels I Regulation restates the exclusion of arbitration-related actions from its scope, in particular: (i) actions relating to the validity of the arbitration agreement or its scope; (ii) actions ancillary to arbitration including actions concerning the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure; (iii) actions relating to the annulment, review, appeal, recognition or enforcement of an arbitral award; and (iv) actions relating to the enforcement of a court judgment recognising the validity of an arbitration agreement. The second paragraph of Recital 12 goes on to provide that a ruling given by a court of a member state as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in the Recast Brussels I Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question. Hopefully, this means that parties now have less incentive to initiate court proceedings in a member state simply with the purpose of obtaining an order that their arbitration agreement is invalid (because such an order will not be susceptible to recognition in other member states).

The above demonstrates the problems that can arise with regard to the principle of *lis pendens*, particularly in proceedings between international arbitral tribunals, on the one hand, and national courts, on the other hand²⁶³. Questions of competing

²⁶³ *Lis pendens* can also be invoked in situations where two different tribunals are instituted to decide on the same or related claims between the same parties, particularly in related international commercial arbitral proceedings (see Hobér (n 241) 245-247, where it is maintained that horizontal or vertical parallel disputes can often arise with regard to complex projects, such as gas and oil drilling projects or construction projects), or in investment arbitrations, if the underlying dispute between an investor and its host state may give rise to multiple claims (see McLachlan (n 241) 197, explaining that parallel proceedings in investment arbitration regarding the same underlying factual dispute may be initiated on the grounds of different investment treaties, or on the basis of a contract concluded between the investor and the state, or with regard to investor's property rights, etc.). For related arbitrations in investment arbitration, see *Ronald S. Lauder v. Czech Republic*, UNCITRAL (*Lauder v. Czech Republic*), Final Award 3 September 2001 and *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL (*CME v. Czech Republic*), Partial Award 13 September 2001, Final Award 14 March 2003. In both cases the submissions based on *lis pendens* were rejected because it was held by the tribunal that claims involved different parties and different causes of action (under different BITs). See also *A v AC Court of First Instance of Geneva*, September 30, 1998, ((1999) 9 *Revue suisse de droit international et droit européen*, 628), 629. Quotations translated from French original by Geisinger & Lévy, (n 243) 66.

jurisdictions are most acute in cases of parallel arbitral and court proceedings because international arbitration can exist and subsist to the extent it is allowed by national laws and supported by national courts. As maintained by Campbell McLachlan “[t]he jurisdiction of the arbitral tribunal is, of its nature, limited by the extent, and validity, of the arbitration agreement. It relies on the intervention of national courts to secure its application.”²⁶⁴ Depending on whether the courts of the seat of arbitration or other courts are deciding on arbitral jurisdiction, questions of priority as between courts and arbitral tribunals are decided differently. Thus, in case of parallel proceedings between an arbitral tribunal and the court of the seat of arbitration, there are three possible solutions: (i) sequencing determination of competence²⁶⁵; (ii) parallel consideration of competence²⁶⁶; (iii) priority to arbitrators’ determination of jurisdiction²⁶⁷. Where the court sought to decide on arbitral jurisdiction is in a different state to that of the arbitral seat, as in *Fomento* case and *Weissfisch v Julius*²⁶⁸, solutions may vary. In the latter case the English Court of Appeal rejected an application for an injunction to restrain Mr. Julius personally from acting as an arbitrator. The Court held that, since the seat of arbitration was in Switzerland and Swiss law was governing the arbitration, Swiss courts had supervisory jurisdiction over the arbitration there and any conduct associated with it. In the absence of any “special circumstances” that could have

²⁶⁴ McLachlan (n 241) 194.

²⁶⁵ This is approach adopted by the ECICA, which states in Art. VI Jurisdiction of Courts of Law that where the court is seised first, the court will proceed to determine the validity, however, if arbitral tribunal is commenced first, the court will stay its ruling until an award is rendered: “(1) A plea as to the jurisdiction of the court made before the court seized by either party to the arbitration agreement, on the basis of the fact that an arbitration agreement exists shall, under penalty of estoppel, be presented by the respondent before or at the same time as the presentation of his substantial defence, depending upon whether the law of the court seized regards this plea as one of procedure or of substance. (...) (3) Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of Contracting States subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay their ruling on the arbitrator’s jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary.”

²⁶⁶ UNCITRAL ML (Art. 8), NYC (Art. II.3), UNCITRAL Arbitration Rules 2010 (Art. 23), ICC Rules 2012 (Art. 6.3), SIAC Arbitration Rules 2013 (Art. 25.1) – all tolerate parallel consideration of arbitrators’ jurisdiction. In contrast SCC Arbitration Rules 2010 do not contain any provisions on the issues of competence as between courts and arbitral tribunals.

²⁶⁷ LCIA Arbitration Rules 2014.

²⁶⁸ [2006] EWCA Civ 218 (08 March 2006), available at: <<http://www.bailii.org/ew/cases/EWCA/Civ/2006/218.html>>

justified English courts having taken an action, the application for injunction was denied²⁶⁹.

It can be argued that this dependence of arbitrators' jurisdiction on national courts' recognition and enforcement will never decide once and for all the questions of priority in international arbitration. The reliance of arbitrator's mandate and the subsistence of arbitration on national laws and state courts necessarily grounds international commercial arbitration to a national forum²⁷⁰ and maintains the umbilical cord connecting international commercial arbitration to one or several national legal orders. As such arbitrators should be cautious if annulment or setting aside proceedings are brought before municipal courts. Although arbitrators are entitled to continue the arbitration, even where a court at the seat of arbitration has determined that there is no valid arbitration agreement, few are the examples of enforcement of arbitral awards annulled in the place of their origin²⁷¹.

In order to conclude on the applicability and scope of *lis pendens* doctrine in international commercial arbitration, it is worth noting (at the risk of generalisation) that in situations where an arbitral tribunal is sitting in a common law jurisdiction, it is quite possible that arbitrators will adopt a flexible approach to issues concerning parallel proceedings, i.e. invoking concepts, such as *forum non conveniens*, *lis alibi pendens*, abuse of process, forum shopping, and will exercise their discretion to

²⁶⁹ Also see the court's decision on the subsequent proceedings in *A v. B* [2007] 1 Lloyd's Rep. 237 (QB), where Colman J decided to stay both the arbitration and personal claims against Julius until he had rendered the final awards. It was stated that the court was not obliged to grant a stay under NYC, Art. II(3) and that: 'the court retains an inherent jurisdiction to stay English proceedings in favour of arbitration in a case where there is an issue whether the parties entered into a binding agreement to arbitrate or whether the subject matter of the action was within the scope of the arbitration' (at 107). See also *Solvarex SA v Romero Alvarez SA* [2011] EWHC 1661 (Comm) and *Union de Remorquage et de Sauvetage SA v. Lake Avery Inc (The Lake Avery)* [1997] 1 Lloyd's Rep.

²⁷⁰ For competing views on the legal foundations of arbitration see: Mann, 'The UNCITRAL Model Law' (n 107); Paulsson, 'Arbitration in Three Dimensions' (n 61); Yu (n 241); Adam Samuel, 'The Nature of Arbitration' in *Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, U.S. and West German Law* (1st edn, Schulthess Polygraphischer Verlag 1989).

²⁷¹ Koch (n 112); Claudia T. Salomon, Lilia B. Vazova 'Arbitral award enforced in the United States although annulled abroad' (2013) Lexology, available online at: <<http://www.lexology.com/library/detail.aspx?g=2ce0058a-826e-4302-a14d-293fa8b2fde4>>; *Hilmarton* (n 116).

proceed with arbitration with greater independence. In contrast, civil law jurisdictions usually follow the first-seised rule and, as such, the timing factor is the one determining the decision to stay or proceed with arbitration.²⁷²

In light of the foregoing, it is argued²⁷³ that the existing legal framework, including both national legislation and international legal instruments²⁷⁴, as well as the tools available to handle parallel proceedings, do not guarantee the primacy of party autonomy and the escape from multiple fora²⁷⁵. Currently the means available to courts and arbitral tribunals to avoid divergent conflicting decisions are: (i)

²⁷² Until recently the first-seised-rule also regulated *lis pendens* scenarios under the European Council Regulation 44/2001, i.e. adopting an approach to parallel proceedings very similar to the one existing in civil law jurisdictions. The Recast Brussels I Regulation, however, contains a new Art. 31(2), according to which: “(...) where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.” This is a positive development aimed at preventing parallel proceedings before member state courts and inconsistent judgments. It shows Commission’s determination to deal with the concerns expressed by commercial parties and practitioners during the consultation stages as to the so-called torpedo tactics/proceedings.

²⁷³ See for example Kaufmann-Kohler, ‘How to Handle Parallel Proceedings’ (n 241) 111 et seq.; Brengesjö (n 241).

²⁷⁴ See NYC, Art. II(3); UNCITRAL ML, Arts. 8, 16(1); Recast Brussels I Regulation, Recital 12; Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Art. 27.

²⁷⁵ As maintained in McLachlan (n 241) 189-190, one of the perceived advantages of international arbitration over litigation is providing a single neutral forum, outside the parochial preoccupations of national courts, for resolution of trade disputes. This reasoning is to be applied to the construction of the arbitration agreement, as well as to tackling questions about courts’ attitude to arbitration. In the recent case of *Premium Nafta Products Ltd. v Fili Shipping Co. Ltd.* [2008] 1 Lloyd’s Rep. 254, at 5-8 Lord Hoffman stated: “(...) Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. (...) The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. (...) If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. (...) If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.”

recognising and exercising the negative form of competence-competence by granting arbitrators priority to rule over their jurisdiction and limiting courts' control over the existence and validity of the arbitration agreement to a *prima facie* review²⁷⁶; (ii) anti-suit injunctions²⁷⁷; (iii) consolidation and joinder of proceedings, if possible and appropriate; and (iv) non-enforcement of a judgment or arbitral award as means of last resort. Apart from some encouraging developments in the realm of the *competence-competence* doctrine with regard to both its positive and negative effects, the other solutions engaged in the battle against parallel proceedings are typically associated with litigation practices. It is yet to be seen how the notion of *lis alibi pendens* will evolve in international commercial arbitration and whether a more flexible understanding of the doctrine together with an independent toolkit for handling parallel proceedings will emerge. According to Elliott Geisinger and Laurent Lévy, however, the recognition of *lis alibi pendens* in international arbitration is a "normal development, which merely highlights the maturity of that field of law"²⁷⁸. For others, the doctrine of *lis pendens* can be perceived as a step further towards a judicialised and overregulated arbitration, since "[t]here is no place for the concept of *lis pendens* in international arbitration"²⁷⁹.

²⁷⁶ See Kaufmann-Kohler, 'How to Handle Parallel Proceedings' (n 241); Sandra Synková, 'The Negative Effect of Competence-Competence' in *Courts' Inquiry into Arbitral Jurisdiction at the Pre-Award Stage: A Comparative Analysis of the English, German and Swiss Legal Order* (1st edn, Springer 2014); Emmanuel Gaillard and Yas Banifatemi, 'Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators' in Emmanuel Gaillard and DD Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards* (Cameron May 2008); Jack M. Graves, 'Court Litigation over Arbitration Agreements: Is It Time for a New Default Rule?' (2012) 23 *The American Review of International Arbitration*, 113; Jean Francois Poudret, Sebastien Besson, and Stephen Birti, 'Control of the Arbitral Tribunal's Jurisdiction' in *Comparative Law of International Arbitration* (2nd edn, Sweet & Maxwell 2007); See also court decisions supporting arbitrators' priority to determine the validity of the arbitration agreement to various extent: *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, *Fondation M v Banque X*, BGE 122 III 139, Swiss Federal Supreme Court, 29 April 1996, *Shin-Etsu Chemical Co Ltd. v Aksh Optifibre Ltd.*, Supreme Court of India, 12 August 2005, *Dell Computer Corp v Union des consommateurs*, Supreme Court of Canada, 13 July 2007, *Copropriété Maritime Jules Verne, et al. v. ABS – American Bureau of Shipping*, Cour de Cassation, First Civil Chamber, 7 June 2006.

²⁷⁷ McLachlan (n 241) 219-253; Raphael (n 251); Gaillard, 'Reflections on the Use of Anti-Suit Injunctions in International Arbitration' (n 251); Mosimann (n 251); Hakeem Seriki, *Injunctive Relief and International Arbitration* (1st edn, Informa Law from Routledge 2015); *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35; [2013] 1 W.L.R. 1889.

²⁷⁸ Geisinger and Lévy (n 241) 68.

²⁷⁹ Cremades and Lew (n 243) 311.

3.3.2 *Res Judicata and International Commercial Arbitration*

Issues of *res judicata*, *cause of action estoppel*, *issue estoppel*, claim preclusion, *lis pendens*, *lis alibi pendens* or similar variations of the concepts in national jurisdictions arise with regard to questions of fact and the legal effects of facts with the intention to avoid re-litigation of issues, conflicting decisions and judicial inefficiency. The principle of *res judicata* is commonly associated with the formal and substantive finality of court decisions. The former has to do with the impossibility to appeal a judgment within the normal procedural regime for review to a higher court, while the latter means that a judgment cannot be considered anew with respect to identical claims, i.e. identity of the parties, the subject matter and the legal grounds²⁸⁰.

Apart from the application of the doctrine in national legal systems, *res judicata* has also been recognised as a general principle of international law²⁸¹. In the area of international commercial arbitration the doctrine of *res judicata* is linked to the negative (preclusive) and the positive (conclusive) effects of arbitral awards, meaning that a final and binding arbitral award prevents further litigation on a matter that has formed the subject matter of a prior arbitral award, however, parties to subsequent arbitration proceedings can rely on findings in previous arbitration to develop their case. Such interpretation is endorsed by the International Law Association's Final Report on Res Judicata and Arbitration, which recognises the inconsistency in the approach to *res judicata* effect of arbitral awards and the need for harmonisation in the area, particularly with regard to the effect of international commercial arbitration awards upon further or subsequent arbitration proceedings between the same parties²⁸².

²⁸⁰ Söderlund (n 241) 300, 301.

²⁸¹ See Sheppard, 'Res Judicata and Estoppel', 228; Reinisch (n 241); Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals (Grotius Classic Reprint Series)* (1st ed), Cambridge University Press 2006) 336-372; Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (3rd edn, OUP 2003) 27-28, 164-173; 245-255; Lowe (n 241).

²⁸² de Ly and Sheppard, 'ILA Final Report on Res Judicata and Arbitration' (n 243).

Post-award issues and *res judicata* effect of arbitral awards in the same arbitration (with regard to the effect of partial or interim awards), in subsequent arbitration and in the proceedings before national courts (with regard to the effect of final awards) can raise various questions, which are well summarised by Luca Radicati di Brozolo in a list of open issues:

- (i) What is the scope of the doctrine, particularly as to the preclusive and conclusive effects of an arbitral award?
- (ii) Does the *res judicata* effect apply only to the dispositive part of the award or also to the reasoning?
- (iii) Does *res judicata* operate only in strict compliance with the triple identity test (same parties, cause of action and subject matter)?
- (iv) Does *res judicata* cover all matters that could or should (by the exercise of due diligence and good faith) have been raised before the court in support of the claims brought in the earlier proceedings (sometimes referred to as the obligation of concentration)? Is there any test for assessing, which matters ought to have been pleaded in support of such claims?
- (v) Do jurisdictional and interim awards have *res judicata* effect?
- (vi) Who is bound by the *res judicata* effect of an arbitral award, in particular does it apply to third parties to arbitration?
- (vii) As of when does an arbitral award have a *res judicata* effect?
- (viii) Is *res judicata* effect conditional on the award being enforced/enforceable?
- (ix) Are there exceptions to the *res judicata* principle?
- (x) Does *res judicata* operate across different legal orders (e.g. can a judgement rendered under public international law or in an investment arbitration be *res judicata* in a commercial arbitration or the vice versa)?
- (xi) What are the consequences of the failure to attribute the requisite *res judicata* effect to an arbitral award?
- (xii) Is an arbitrator obliged or entitled to raise a *res judicata* objection *ex officio*?²⁸³

²⁸³ Those and other questions have been raised by Luca G. Radicati di Brozolo in Radicati di Brozolo (n 243) 3, 4. The author demonstrates the importance of the solutions to those questions by commenting on an unpublished ICC award on ICC case 13808/2008. The facts of the case are stated in Radicati di Brozolo (n 241) 2, 3.

Without going into in-depth analysis on the above-mentioned issues on *res judicata* (since this goes outside the objectives of this chapter), it is necessary to point out some general observations based on commentaries and ILA Final Report on *Res Judicata* in international arbitration²⁸⁴, which have regard to the debate about the process of judicialisation.

Regarding the meaning and scope of *res judicata*, it is well recognised that international arbitration lacks autonomous interpretation of the principle of *res judicata*. At the present, *res judicata* effect is scarcely, if at all, regulated by national procedural rules. The existing regulations, however, are fragmented and inconsistent. Thus, for example, the *res judicata* effect of an award by consent, as well as the scope of the doctrine in general differs between jurisdictions. As observed in ILA Final Report on *Res Judicata* civil law jurisdictions recognise a more limited notion of *res judicata*, which covers only the dispositive part of an arbitral award²⁸⁵. Luca G. Radicati di Brozolo summarises national laws' approaches as follows:

(...) continental legal systems tend to adopt a more formalistic approach, which essentially limits *res judicata* to the dispositive part of the decision and sets considerable emphasis on the triple identity test. Common law systems, on the other hand, follow a more open and pragmatic approach which extends the *res judicata* to cover not only claim preclusion (or cause of action estoppel) but also issue preclusion (or issue estoppel).²⁸⁶

²⁸⁴ de Ly and Sheppard, 'ILA Final Report on Res Judicata and Arbitration' (n 243).

²⁸⁵ Ibid 67.

²⁸⁶ Radicati di Brozolo (n 241) 5; see also Söderlund (n 243) 301-302, who similarly maintains: "In the context of *res judicata*, it is important to underline a feature of continental civil law systems different to the common law systems – that they do not attach *res judicata* effect to the adjudicatory bodies' conclusions in respect of specific issues or legal premises but only to the dispositive part of the judgment. In other words, if one and the same issue arises in another action, although between the same parties, the judge or arbitrator in the page subsequent litigation will be at liberty to revisit the issue and conceivably arrive at a different conclusion. This principle is opposed to the concepts of collateral estoppel (USA) or issue estoppel (English law), which attach the force of *res judicata* also to legal issues and legal premises. The thinking behind the continental law approach is that the importance of a legal action and a specific issue figuring in that action could differ widely in relation to another legal action, meaning that a party might not invest so much effort in one particular issue in the first litigation because of its relative insignificance while the situation could be radically different in a subsequent action." See also Born, *International Commercial Arbitration* (n 131) 3734-3737: "In common law jurisdictions, rules of preclusion are generally not codified, but instead based largely or entirely upon judicial

Furthermore, as pointed out by Gary Born, the preclusive effects of an arbitral award also depend on whether *res judicata* has been invoked before the courts of the seat of arbitration (in which case “an award made in a locally seated arbitration does not require confirmation (or recognition) in order to have preclusive effects”) or before foreign courts (in which case “most jurisdictions require that the award first be recognized, before it will have preclusive effects in local courts”) ²⁸⁷. The uncertainties derive from the fact that “recognition is a separate legal act, which may produce consequences under rules of preclusion, but which is not independently the source of preclusive effects and which does not ‘declare’ what the award’s preclusive effects are” ²⁸⁸.

The diverging approaches of national laws together with the lack of clarity as to the appropriate conflict of laws rules applicable to it lead to inconsistent application of the *res judicata* doctrine in international commercial arbitration. In fact, there are not generally accepted conflict of laws rules on the matter. The laws that can be considered relevant to determining the *res judicata* effect of an arbitral award are (i) the law governing the substantive rights (i.e. the law of the contract); (ii) the law of the place of arbitration of the proceedings leading to the prior award (i.e. the *lex arbitri* of the award whose effects are questioned); and (iii) the law of the place of arbitration of the proceedings where *res judicata* is invoked (i.e. the *lex arbitri* of the second arbitration or the *lex fori* of the state court called upon to rule on the matter).

authority. Most common law page jurisdictions recognise two basic types of preclusion: claim preclusion (also termed “*res judicata*”) and issue preclusion (also termed “collateral estoppel” or “issue estoppel”). (...) Importantly, the notion of a “claim” or “cause of action,” which is subject to preclusion, is generally defined to include all claims or rights of legal action that arise out of a single set of facts or a single transaction. This expansive conception of “claims” has the effect of extending the preclusive effects of a *res judicata* well beyond those claims that were actually litigated concerning a particular transaction in a prior litigation, to also reach claims that might have been litigated (but were not). Distinct from the doctrine of claim preclusion (*res judicata*) in common law jurisdictions is that of issue preclusion (also termed issue estoppel or collateral estoppel). Issue preclusion prevents a party from relitigating, against a counter-party, an issue of fact or law that was previously contested and decided in a litigation between the same parties. (...) Some common law jurisdictions also recognize other grounds of preclusion, including “abuse of process.” (...) Principles of preclusion are generally formulated in less expansive ways in civil law jurisdictions, as compared to common law systems. (...) The basic principle of preclusion in civil law jurisdictions is that of *res judicata* (or claim preclusion).”

²⁸⁷ Born, *International Commercial Arbitration* (n 131) 2908, 2909.

²⁸⁸ Ibid 2909.

There is no prevailing solution as to the conflict of laws rules governing *res judicata* issues, nor is there commonly accepted practices, which avoid yielding unpredictable results²⁸⁹. In general, national courts assess the *res judicata* effect of an arbitral award applying principles and rules applicable to domestic judicial decisions in their own legal systems²⁹⁰. Because of the different regulatory approaches, however, the solutions to the *res judicata* conundrum vary and they are not always in compliance with Arts. III and II NYC. The latter impose an obligation on the states to “recognize arbitral awards as binding and enforce them”, and to give effect to the arbitration agreements concluded by parties.

In order to overcome those discrepancies in the approach to *res judicata*, it has been suggested that state courts should restrain from applying a domestic interpretation of *res judicata* to international arbitral awards, rather courts should develop a *sui generis* transnational approach to the preclusive and conclusive effects of arbitral awards²⁹¹. The starting point in the application of Arts. II and III NYC is applying the correct principles of construction to them. Since the NYC is a treaty within the meaning of the Vienna Convention on the Law of Treaties 1969, regard must be had in its application to the rules of interpretation provided by the Vienna Convention. This suggests that the states (signatories to the NYC and the Vienna Convention on the Law of Treaties) have to interpret and apply their obligations to recognise arbitral awards as binding and enforce them, and to give effect to the arbitration agreements, in light of the object and purpose of the NYC, having regard to relevant general principles of international law, but most importantly to the underlying assumptions of the parties’ agreement to arbitrate. It is claimed that a broader understanding of *res judicata* will give better effect to the terms and objectives of the parties’ agreement to arbitrate:

²⁸⁹ Ibid 3740, 3741: “Despite widespread acceptance of (...) (the) general principle (of *res judicata*), however, there is limited agreement on the precise preclusion rules that apply to international awards. (...) [T]here are no provisions in the New York Convention, or other contemporary arbitration conventions, that expressly address the preclusive effects of arbitral awards. Equally, there is limited arbitral authority formulating particular rules of preclusion.”

²⁹⁰ See Radicati di Brozolo (n 241) 8; Born, *International Commercial Arbitration* (n 131) 3741.

²⁹¹ See de Ly and Sheppard, ‘ILA Final Report on Res Judicata and Arbitration’ (n 243) 71; Radicati di Brozolo (n 241) 9; Born, *International Commercial Arbitration* (n 131) 3744, 3745.

[t]he better view of the Convention is that it should permit parties only “one bite at the cherry” (or apple), as required in developed common law preclusion systems. This analysis would entail a broader view of *res judicata* principles than ordinarily taken in some civil law jurisdictions, but that is appropriate in light of the New York Convention’s requirements and the objectives of the arbitral process.²⁹²

This reasoning is also in line with ILA’s recommendations on *res judicata* effect of arbitral awards. According to the ILA’s Committee the recommendations should apply only in international commercial arbitration context, to partial final awards, final awards (including awards on agreed terms), and awards on jurisdiction²⁹³. Moreover, international arbitral awards should be treated differently than national court judgments, namely by having regard to the international character of arbitration rather than applying the unnecessary restrictive notion of *res judicata* that some national legal systems recognise. Thus, among the most important suggestions in the ILA report is the proposal for extending the notion of *res judicata* in international arbitration, so that the latter (i) covers issue preclusion²⁹⁴, (ii) incorporates narrow understanding of procedural unfairness or abuse of process²⁹⁵,

²⁹² See Born, *International Commercial Arbitration* (n 131) 3746.

²⁹³ de Ly and Sheppard, ‘ILA Final Report on Res Judicata and Arbitration’ (n 243) 69.

²⁹⁴ Ibid 76, 77.

²⁹⁵ See ibid 78, 79 where the Committee weights competing interests and objectives – on one hand claimant’s right to have access to justice and, on the other hand, respondent’s right to have a fair trial in conformity with internationally recognised principles and human right standards: “In arbitration, party autonomy to a large extent reigns and parties and their counsel should be given wide discretion in determining their strategies. Costs, psychological influences, relational elements, cross-cultural considerations, persuasiveness, political constraints and other aspects may be responsible for not instituting certain claims or for not raising certain causes of action or issues of fact or law, and caution is in order to avoid *res judicata* amounting to a patronizing review of what parties and counsel ought to have done in managing their case. On the other hand, policy objectives of efficiency and finality can also be taken into account to protect respondents from being exposed to further arbitration if a claimant fails to raise claims, causes of action or issues of fact or law in prior proceedings. Also, there is a legitimate public interest in having an end to arbitration as well as an end to the supportive and corrective powers of domestic courts supervising and reviewing the arbitral process and assisting at the recognition and enforcement stage. The doctrines of procedural fairness and abuse, in the view of the Committee, provide an acceptable compromise regarding the private and public interests at stake.”

and (iii) includes not only the dispositive part of an arbitral award, but also the underlying reasoning²⁹⁶.

The Committee's approach to *res judicata* and its related notions reveals preference to general considerations of legal certainty and stability, procedural efficiency, finality of arbitral awards and public interest "in having an end to arbitration as well as an end to supportive and corrective powers of domestic courts supervising and reviewing the arbitral process and assisting at the recognition and enforcement stage"²⁹⁷. The position of ILA, based on a four-year study of *res judicata*²⁹⁸ and incorporating observations and comments from both scholars and practitioners, is a manifest of a new approach to international commercial arbitration and its sources of law. The latter shares many common to international arbitration and national court proceedings objectives, namely considerations of legal certainty and predictability, procedural efficiency and public interest.

Thus, although ILA recommendations concern the effect of an international commercial award upon further or subsequent arbitration proceedings between the same parties, and as such they are not addressed to state courts faced with *res judicata* effects of arbitral awards in relation to jurisdiction, setting aside or enforcement questions, they "may constitute persuasive authority for domestic courts when considering *res judicata* effects of international commercial arbitral awards"²⁹⁹. By endorsing a broader notion of *res judicata* in international commercial arbitration, one that covers not only the dispositive part of an arbitral award but also the underlying reasoning, and by advocating for its adherence by national courts, ILA elevates the legitimacy and reputation of arbitral awards to the those of national court decisions. Furthermore, granting arbitral reasoning a *res judicata* effect is another step towards developing arbitral jurisprudence and acknowledging the existence of an arbitral precedent³⁰⁰.

²⁹⁶ Ibid 67.

²⁹⁷ Ibid 78, 79.

²⁹⁸ Ibid 67.

²⁹⁹ Ibid 68.

³⁰⁰ Granting arbitral awards a *res judicata* effect contributes to achieving consistency and even some degree of publicity. This elevates the status of arbitral awards from subsidiary means for

3.3.3 The Two Approaches to Lis Alibi Pendens and Res Judicata in International Commercial Arbitration

The judicialised approach to the role of arbitral awards in international arbitration is justified by the necessity for more legal certainty and procedural justice in a time of difficulties for international arbitration. Due to the increased use of international arbitration and the great amount of high-stake disputes brought to arbitration, the latter faces some unprecedented challenges. Since both principles of *res judicata* and *lis pendens* serve the purpose of legal security by precluding the possibility of re-litigating identical cases (*res judicata* situation) or avoiding the potential of divergent and conflicting decisions in identical cases (*lis pendens* situation), the proponents of judicialisation heartedly welcome those concepts to international commercial arbitration proceedings. It is argued that, despite the great divergence in national jurisdictions, the notions of *res judicata* and *lis pendens* can assist arbitral tribunals with situations where the conclusive and preclusive effect of arbitral awards has been challenged, i.e. when: (i) one of the parties is trying to commence court proceedings with respect to the subject matter covered by the arbitration agreement, or (ii) a national court has already been seized to rule upon a dispute, which addresses issues of essence to the outcome of the arbitration, or (iii) the defendant raises a *res judicata* defence, stating that the issue has already been litigated in a state court or in another arbitration.

The proponents of a more flexible position deny the need to resort to litigation-like concepts in order assert the conclusive and preclusive effect of arbitral awards. They dispute the applicability of the principle of *lis pendens* in arbitration and the extended effect of arbitral awards to third parties, non-signatories to the arbitration agreement. It is asserted that the mere existence and validity of arbitration agreement should constitute a bar to court proceeding or arbitration proceedings in a different

the determination of rules of law to a source of law. See Banifatemi and Gaillard, *IAI Series on International Arbitration No. 5* (n 241) 112.

seat of arbitration, and as such there is no place for *lis pendens* in international arbitration³⁰¹.

Despite the scarce amount of international commercial awards dealing with the principle of *res judicata*, the few decisions published by ICC indicate that arbitral tribunals take into account the doctrine, especially when the effect of partial and interim awards is considered in the next stage of the arbitration³⁰². As to any established practice with regard to the *res judicata* effect of national courts decisions, there is not any.

In a number of ICSID arbitrations, however, arbitral tribunals maintained that international arbitrators are not bound by decisions of national courts or other international tribunals. Also, several ICSID cases support such interpretation. In *Amco v. Indonesia*³⁰³, P. T. Wisma, a company indirectly controlled by the Indonesian government, has already initiated proceedings before the domestic courts of Indonesia, when Amco instituted ICSID arbitration to claim damages for seizure of their investment and cancellation of their investment license by Indonesia. In the ICSID proceedings, Indonesia submitted that Amco has waived their right to have their claim heard by an ICSID tribunal since they had cooperated in the domestic proceedings, had not objected the jurisdiction of the national court and had not requested a stay of the proceedings. The ICSID tribunal rejected these arguments on two grounds. Firstly, it was pointed out that the parties to the two proceedings were not identical, and, secondly, the tribunal unequivocally stated that “[i]n any case, an

³⁰¹ Julian D. M. Lew, ‘Concluding Remarks’ in Bernardo M. Cremades and Julian D. M. Lew (eds), *Parallel State and Arbitral Procedures in International Arbitration* (1st edn, Kluwer Law International 2006) 311.

³⁰² ICC Case 12510, procedural order of 12 April 2004 in *Special Supplement 2010: Decisions on ICC Arbitration Procedure A Selection of Procedural Orders issued by Arbitral Tribunals acting under the ICC Rules of Arbitration* (1st edn, ICC Publishing 2010); ICC Case 10021, Interim Award rendered 1999 in *Special Supplement 2011: Interim, Conservatory and Emergency Measures in ICC Arbitration* (1st edn, ICC Publishing 2011); ICC Case 10049, final award rendered in 2003 in (2007) 18 (1) ‘ICC International Court of Arbitration Bulletin’.

³⁰³ *Amco v. Indonesia* (Award, 20 November 1984), 1 ICSID Reports 413, 460 (1993), sustained in relevant part, *Amco v. Indonesia* (Decision on the Application for Annulment, 16 May 1986), 1 ICSID Reports 509, 526-527 (1993).

international tribunal is not bound to follow the result of a national court”³⁰⁴. It was further asserted by the ICSID tribunal that:

One of the reasons for instituting an international arbitration procedure is precisely that parties – rightly or wrongly – feel often more confident with legal institution which is not entirely related to one of the parties. If a national judgement was binding on an international tribunal such a procedure could be rendered meaningless. Accordingly, no matter how the legal position of a party is described in a national judgement, an international arbitral tribunal enjoys the right to evaluate and examine this position without accepting any *res judicata* effect of a national court. In its evaluation, therefore, the judgments of a national court can be accepted as one of the many factors which have to be considered by the arbitral tribunal.³⁰⁵

In another case ICSID tribunal was confronted with concurrent/parallel non-ICSID arbitration proceedings. Thus, in *SGS v. Pakistan*³⁰⁶, the Claimant instituted ICSID proceedings after the Respondent had already initiated arbitration in Pakistan under the PSI Agreement. In the ICSID proceedings Pakistan argued that SGS’s claim should be submitted to the exclusive jurisdiction of the arbitrator with seat in Pakistan. The tribunal uphold the position that the *lis pendens* principle did not bar it from hearing SGS’s claims, since treaty claims could co-exist. As such, the ICSID tribunal had jurisdiction with regard to the alleged violation of the treaty.

However, several commentators among which Georgios Zekos note that “[a]rbitrators are beginning to cite previous arbitral awards in rendering subsequent awards, in consequence gradually building up an arbitral case-law, an essential component of the modern *lex mercatoria* (...)”³⁰⁷

³⁰⁴ Ibid 177.

³⁰⁵ Ibid.

³⁰⁶ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision on Jurisdiction, 6 August 2003, 26-29.

³⁰⁷ Zekos (n 203) 448.

3.3.4 The Judicialised Approach to Arbitral Awards and the Evolving Concept of Arbitral Jurisprudence

On the grounds of the aforementioned, it becomes clear that arbitral tribunals might be held to interpret and apply the relevant national law in compliance with the decisions of the highest courts of that country. At least, this is “the approach maintained for international tribunals of public international law, for arbitrators sitting in England where the ascertainment of foreign law is generally regarded as a matter of fact and also for international arbitrators in general”.³⁰⁸ As for the arbitral precedents, it is quite controversial whether and under what circumstances they might exist; however it cannot be denied that despite not being formally obliged to follow the principles of *res judicata* and *stare decisis*³⁰⁹, arbitral awards frequently serve as decisive authority³¹⁰. As maintained by Emmanuel Gaillard and John Savage:

On reading the ICC awards and their commentaries, one significant phenomenon becomes clear: the more recent awards are based on earlier decisions, and the decisions reached are generally consistent. The publication of awards thus enhances their homogeneity. In both arbitration law and international commercial law, arbitral awards have now become a private source carrying considerable weight and have undoubtedly helped to create the arbitral component of *lex mercatoria*.³¹¹

Similar to national jurisdictions, the factors that determine the role and significance of case law in international commercial arbitration are: the objectives of international commercial arbitration, the role of arbitrators and the hierarchy of legal norms in arbitration. Apart from the latter, the theories of the nature and foundations of international commercial arbitration³¹², as well as the judicialisation agenda, might hold arbitrators to comply with the *stare decisis* principles. It is worth mentioning, however, that one empirical research³¹³ suggests that arbitrators do have resort to

³⁰⁸ Berger, ‘The International Arbitrators’ Application of Precedents’ (n 180) 10.

³⁰⁹ Ibid 5.

³¹⁰ Born, *International Commercial Arbitration* (n 131) 3823.

³¹¹ Gaillard and Savage, ‘Sources of International Commercial Arbitration’ (n 59) 188.

³¹² See p 247 and following.

³¹³ Weidemaier, ‘Judging-Lite’ (n 33).

case law either to support their argumentation or to justify the outcome of the case. Despite fears that arbitral decision-making rests on application of “Solomon-like principles of equity”³¹⁴, judging on arbitrators’ citation practices it appears that arbitral awards are not detached from the applicable law and “the evidence does not support the claim that arbitrators routinely disregard the law or decide cases in an *ad hoc* fashion”³¹⁵. Arbitrators, however, “tend to cite fewer precedents than judges, and they arguably engage in less depth with precedents they do cite”³¹⁶. The citation practices of arbitrators are of importance as they “offer insight into whether arbitration is capable of generating the public goods associated with precedent”.³¹⁷

It is perceived that despite not having binding force, “[i]n practice, arbitral awards frequently serve as decisive authority”³¹⁸. This is particularly true for maritime and shipping arbitration, sports arbitration and domain name arbitrations. Similarly, in some industries in comparison with others there is a greater pressure for re-evaluating the finality of arbitral awards and applicability of some judicial doctrines, such as *res judicata*, collateral estoppel, and *stare decisis*. Carlton Snow³¹⁹ argues that the aforementioned concepts should be regarded as general principles not only in the law of judgments, but also within the context of labour and grievance arbitration. The author further asserts that *res judicata*, collateral estoppel and *stare decisis* “might increase certainty, stability, and finality of labour arbitration awards” and “should be incorporated into the body of principles upon which arbitrators rely in their decision making process”.³²⁰ Although Snow looks at the abovementioned doctrines within the scope of labour arbitration, there is no doubt that the same reasoning can be applied to commercial arbitration and international arbitration in general. More clarity and firmer approach to the concepts of *res judicata* and *stare decisis* will bring certainty and predictability to the system. The objection is that these doctrines are not inherent to international arbitration, hence, they have to be introduced in a careful and precise way, so as to avoid contamination of this type of

³¹⁴ Ibid 1098.

³¹⁵ Ibid 1096.

³¹⁶ Ibid 1097.

³¹⁷ Ibid 1110.

³¹⁸ Born, *International Commercial Arbitration* (n 131) 3823.

³¹⁹ Snow (n 239).

³²⁰ Ibid 671.

dispute resolution with ideas which will deprive the parties from the flexibility they have agreed to enjoy.

Various ambiguities surround the concepts of *res judicata*, collateral estoppel, *stare decisis* when applied to international arbitration, and more specifically to the rules of procedural arbitrability and the requirement for finality of arbitral awards. For example, it is doubtful to what extent these doctrines may be applicable in a system without hierarchical structure of international courts and tribunals, where there is no requirement for the arbitrators to be in possession of a legal qualification, and where the arbitrator's power to resolve a dispute is granted by parties, so that once the latter has been achieved, the arbitrator's function is exhausted and the award is only binding for the parties of the dispute. Further, there is uncertainty whether the applicability of the principle of final and binding arbitral awards should be addressed in an appeal process before a national court or in subsequent arbitration proceedings, where the arbitral tribunal will act as an appellate or review body as to the initial arbitration. Moreover, it is necessary to examine whether the precedential effect of arbitral awards has certain duration, and if so, how to determine the latter. The answer to the question of duration of the potential precedential value of arbitral awards relates to the theories about the nature and effect of arbitral awards, the role and powers of arbitrators, and, ultimately, about the nature and foundation of mere arbitration.

In "An Arbitrator's Use of Precedent", Snow comments on the precedential value of prior arbitration decisions which, though referring to labour litigation, are indicative of the uncertainty which surrounds this matter.³²¹ The arbitrators' opinions that are cited suggest that various theories are considered to be applicable when deciding on the precedential effect and the duration of the latter, such as theories about the foundations of arbitration, the nature of arbitration agreement and the nature and effect of arbitral awards. Thus, in *Consolidation Coal Co.*³²² the arbitrator adopted the view that arbitrator's authority is found in and related to parties' contract which empowers the arbitrator to decide upon the case and "it follows logically that none of

³²¹ Snow (n 239) 694-697.

³²² 71 Lab. Arb. (BNA) 257 (1978).

these powers may extend beyond the life of the agreement under which they are exercised”.³²³ Another solution is suggested by Prof Marvin Hill, who is of the opinion that “the award is (...) binding until the parties themselves amend the language of the agreement” because a prior award is binding as a written stipulation between the parties.³²⁴ The latter proposition, however, undermines the possibility of arbitral awards to have a precedential effect in future arbitration proceedings (i.e. arbitration proceedings between parties not involved in the initial arbitration). Where an arbitral award is perceived as a supplement to or part of parties’ arbitration agreement, its effect cannot be extended to other arbitration proceedings and the award cannot be construed as establishing a rule which is to be followed in similar situation (i.e. the doctrine of *stare decisis* will not be found applicable in arbitration).

Snow observes that American courts apply various tests when being asked to enforce prior arbitral awards to new proceedings, such as: (i) “substantially identical” or “substantially similar” standard as a basis for reviewing arbitrable decisions³²⁵, where the court may decide to enforce an arbitral award in a later judicial action only if some later conduct of the party is “substantially identical” to the original grievance that resulted in an arbitration award³²⁶; (ii) “material factual identity” test, which is found to apply to a new dispute between the parties in case the facts of the new case are not materially different from the dispute decided in the prior arbitration process³²⁷; (iii) “positive assurance” which requires positive assurance that the prior arbitral award was intended to cover a latter dispute or was drafted in such a way that the language used by the arbitrator provided for application of the arbitral award

³²³ Snow (n 241) 694 citing *Consolidation Coal Co.*, 71 Lab. Arb. (BNA) 257, 259-260 (1978).

³²⁴ *Board of Educ. Of Cook County*, 73 Lab. Arb. (BNA) 310, 315 (1979) cited in Snow (n 241) 695.

³²⁵ Snow (n 241) 697-701.

³²⁶ Ibid.

³²⁷ Ibid 701-705, citing *Oil, Chemical & Atomic Workers International Union v. Ethyl Corp.*, 644 F. 2d 1044 (5th Cir. 1981). Although the court argued that the “substantially identity” test is stricter than the “material factual identity” test, it can be argued that in essence the two are sides of one and the same coin, namely that despite the exact approach a court adopts, the latter has to assess the similarity in the facts between the prior and the subsequent proceedings and where there are substantial or material differences in the facts of the cases, the precedential effect of the arbitral decision on the prior proceeding is denied in view of the new circumstance found in the subsequent proceedings.

in future proceedings³²⁸; (iv) “particularly egregious circumstances” test, according to which a court should review the merits of arbitral decisions to assign them precedential value only when there is enough evidence of a pattern of abuse and a bad faith disregard of prior arbitral awards³²⁹.

The discrepancy of the approaches that the courts apply when asked to rule on the precedential effect of previous arbitral awards together with the case law and case analysis cited by Snow³³⁰ shows that, on one hand, the courts are reluctant to intervene too much in arbitration process and to take a firm stand on disputable issues such as applicability of doctrines of *res judicata* and *stare decisis*, and, on the other hand, that such matters should in principle be decided either explicitly by the parties, or by the arbitral tribunal ruling on a subsequent dispute. Although the cases cited by Snow concern grievance claims in national labour arbitration proceedings, the arbitral and court reasoning might be useful to extract guidelines or principles that can also apply to international arbitration. Such concepts may relate to and promote the finality of arbitral awards, judicial economy, stability and certainty as to the application of the law, less court intervention in and control over arbitration process, and pro-arbitration interpretation of legal provisions and parties’ stipulations in case of dubious and ambiguous language. Thus, Snow, considering the national labour arbitration cases, concludes that:

[w]hen there is an attempt to use an arbitration award as precedent for new parties in the same industry, persuasive precedential value is appropriate when the prior award established a rule that reflects industry expectations and practices. It should be left to

³²⁸ *United Mine Workers of America v. Consolidation Coal Co.*, 666 F.2d 806 (3rd Cir. 1981) cited in Snow (n 239) 708.

³²⁹ Snow (n 239) 705-709.

³³⁰ Ibid 710-711. Snow cites the court reasoning in *Westinghouse Elevators of Puerto Rico Inc. v. S.I.U. de Puerto Rico*, where the latter took the position that unless parties have explicitly agreed something else, “an arbitrator’s award rendered in a prior proceeding – even between the same parties – does not stop either party from raising the issue in a subsequent arbitration” (*Westinghouse Elevators of Puerto Rico Inc. v. S.I.U. de Puerto Rico*, 583 F.2d 1184 (1st Cir.1978), 1187, citing *Federal Bearings Co.*, 22 Lab. Arb. (BNA) 721, 725-727 (1954)). In another case, cited by Snow at 712, *Little Six Corp. v United Mine Workers of America*, 701 F. 2d 26 (4th Cir. 1983), the court ruled that issues related to the preclusion effect of a prior arbitral award are to be decided in arbitration.

the arbitrator to decide whether the clause as interpreted in the prior arbitration proceeding has been breached in the new situation.³³¹

The author further states that:

[i]t generally is for an arbitrator, rather than a court, to evaluate questions of procedural arbitrability. Hence, approaches to the precedential value to be accorded prior arbitration awards that involve a court in an evaluation of the merits of a prior or existing grievance ought to be replaced by routine judicial procedures that send such disputes back to arbitration. To the extent that prior arbitration decisions have been incorporated into the contractual relationship of the parties, courts usually cannot analyze prior arbitral decisions without ruling on the merits of the dispute before the arbitrator. If, however, courts are to return such disputes to the arbitration forum, arbitrators need to formulate concrete principles covering the precedential value of prior arbitration awards.³³²

It is doubtful whether the doctrines of *res judicata*, collateral estoppel and *stare decisis* apply in national arbitration, however, it is even more dubious whether and to what extent arbitral tribunals can resort to those concepts in international arbitration. Taking into account the variety of laws and principles that apply to different aspects of arbitration, (i.e. arbitration agreement, arbitration process, merits of the dispute, enforcement of arbitral awards, court intervention and setting aside an arbitral award), the fact that the dispute has an international element to it³³³, and the diversity in the cultural and legal backgrounds of the arbitrators deciding upon a case, one is to question whether such rigid, “judicial” doctrines should be introduced to international arbitration. Surely, there is validity in the argument that attributing precedential value to prior arbitral awards and relying on the concepts of claim and issue preclusion will bring more certainty and stability in interpretation of the letter of the law, more uniformity in the application of the relevant legal provisions and in the treatment of the parties, and ultimately more predictable dispute outcomes. The

³³¹ Snow (n 239) 718.

³³² Ibid 719.

³³³ Some arbitration laws, such as the English Arbitration Act 1996 do not make a difference between national and international arbitration, however others do make this distinction, e.g. the Arbitration Law of the People's Republic of China, Chapter VII.

push for incorporation of doctrines which are not intrinsic to arbitration and its general principles³³⁴, however, raises concerns as to the flexibility of arbitration process and the role of arbitral tribunals, making some to fear of too far-stretching judicialisation of international arbitration: “[i]t is recognized that any call for an application of *res judicata* in arbitration is contrary to a growing concern with “creeping legalism” in arbitration proceedings”³³⁵.

Such distress might be overstated because arbitrators are aware that prior arbitral awards do not have any binding effect on subsequent arbitration processes. As Howan explains “[t]he reasoning upon which the award is based, i.e., the interpretation of the contractual relation, is analogous to the *ratio decidendi* of a judicial case”³³⁶, however “[i]n contrast to the judicial doctrine of *stare decisis*, an arbitrator’s interpretation of the contractual relation is not technically binding on a future arbitrator; [i]nstead, the arbitrator must exercise independent and impartial judgment in each case”³³⁷. Still, some uniformity in the process of reasoning is required to avoid contradictory decisions and undermining the authoritativeness of arbitral awards. It is too daring to advocate for a binding and precedential effect of arbitral awards and a “supranational *stare decisis*”³³⁸, however, there is no doubt that by having regard to the legal reasoning in previous arbitral awards, ruled on disputes linked to the same industry, arbitrators will contribute to the establishment of “*ipso facto stare decisis*”³³⁹. It may be argued that, indeed, international conventions and

³³⁴ See Anna Mantakou, ‘General Principles of Law and International Arbitration’ (2005) 58 RHDI 419–434.

³³⁵ Snow (n 241) 673.

³³⁶ Lillian T. Howan, ‘The Prospective Effect of Arbitration’ (1985) 7 Indus. Rel. L.J. 60–87, 62.

³³⁷ Ibid.

³³⁸ See DiMatteo, ‘The CISG and the Presumption of Enforceability’ (n 229) 132 stating: “Thus, national *stare decisis* is to be supplanted by an informal supranational *stare decisis*.” The comment is in relation to the interpretation and application of the CISG, however, it is relevant as the latter is often found to be the applicable law to the substantive matters of a dispute in international commercial arbitration proceedings.

³³⁹ The term ‘*ipso facto stare decisis*’ is used by René Henschel in Henschel (n 227), where the author explains that, within the context of international sales and conformity of goods under the CISG, “the principles in the *Mussels* case now seems to have widespread acceptance (...), making the judgement of the German Federal Supreme Court *ipso facto stare decisis*.”

model laws, such as the CISG³⁴⁰, UNCITRAL ML³⁴¹, UNIDROIT Principles³⁴², UN Convention on the Carriage of Goods by Sea (1978) (the Hamburg Rules)³⁴³, etc., encourage and promote the creation and establishment of *ipso facto stare decisis* doctrine to ensure uniform application of their provisions. Thus, the process of harmonisation and unification of international law, which requires a uniform approach in the interpretation and application of the law, affects the development of international arbitration. The latter is urged to re-evaluate or accustom to concepts which are not historically typical for it.³⁴⁴

The need for re-conceptualisation of the doctrine of *res judicata* is also highlighted in the “ILA Final Report on *Res Judicata* and Arbitration”, where the committee admits that it is necessary to develop transnational rules regarding “a more extensive notion of *res judicata* than is known in some civil law jurisdictions regarding claim preclusion, which not only covers the dispositive part of an arbitral award but also the underlying reasoning” and “the introduction of a standard of abuse of process and procedural unfairness”.³⁴⁵ With that respect International Law Association (ILA)³⁴⁶ asserts that the concept applied in arbitration should not be based on or

³⁴⁰ CISG, Art. 7 “(1) In the interpretation of this convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.”

³⁴¹ UNCITRAL ML, Art. 2A. International origin and general principles (As adopted by the Commission at its thirty-ninth session, in 2006) “(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.”

³⁴² UNIDROIT Principles, Art. 1.6 (Interpretation and supplementation of the Principles) “(1) In the interpretation of these Principles, regard is to be had to their international character and to their purposes including the need to promote uniformity in their application.”

³⁴³ Hamburg Rules, Art. 3 “In the interpretation and application of the provisions of this Convention regard shall be had to its international character and to the need to promote uniformity.”

³⁴⁴ See generally Born, *International Commercial Arbitration* (n 131); Also Derek Roebuck, ‘Sources for the History of Arbitration: A Bibliographical Introduction’ (1998) 14 *Arbitration International* 237–344; Michael Mustill, ‘Arbitration: History and Background’ (1989) 6 *Journal of International Arbitration* 43–56; Brunet, ‘Replacing Folklore Arbitration with a Contract Model of Arbitration’ (n 23).

³⁴⁵ de Ly and Sheppard, ‘ILA Final Report on Res Judicata and Arbitration’ (n 243) 67.

³⁴⁶ The International Law Association was founded in Brussels in 1873. Its objectives, under its Constitution, are “the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law”. The ILA has consultative status, as an international non-governmental organisation, with a number of the United Nations specialised agencies; see ILA’s website, accessible online at: <http://www.ila-hq.org/en/about_us/index.cfm>

associated with any domestic law, for which reason a more neutral term is recommended, namely “conclusive and preclusive effects of arbitral awards to encompass both positive and negative effects of awards”³⁴⁷. The latter is argued to cover the full scope of application of the doctrine of *res judicata*, however, only with respect to previous awards rendered between the same parties in international commercial arbitration proceedings.³⁴⁸ Yet, there is no uniform definition of “conclusive and preclusive effects of arbitral awards”, neither is there clear guidelines on the legal provisions or principles that govern the interpretation and application of this concept. As the Committee admits:

conflict of laws approach raises difficult characterization issues as to the substantive or procedural nature of conclusive and preclusive effects. (...) A conflict of laws perspective implies a difficult choice between three different legal systems: the law of the place of arbitration of the proceedings leading to the prior award; the law of the place of arbitration of the proceedings where *res judicata* is invoked; and the law governing the contract.³⁴⁹

Furthermore, as suggested by Christa Roodt “[w]ithout a clear-cut rule for finality, there is the risk of relitigation of claims or issues”³⁵⁰. To determine the point of finality of arbitral awards, the main point of reference should be the 1958 NYC.

There is a growing body of literature and arbitral awards, which suggest that arbitral jurisprudence is not a myth but a reality and that the question of the existence of arbitral case law is more pertinent than ever before. Thus it was stated in *Dow Chemical v Isover Saint Gobain* ICC interim award³⁵¹ that:

(...) ICC arbitral tribunals have already pronounced themselves to this effect. The decisions of these tribunals progressively create caselaw which should be taken into account, because it draws conclusions from economic reality and conforms to the needs

³⁴⁷ de Ly and Sheppard, ‘ILA Final Report on Res Judicata and Arbitration’ (n 243) 68.

³⁴⁸ Ibid 68, 69.

³⁴⁹ de Ly and Sheppard, ‘ILA Final Report on Res Judicata and Arbitration’ (n 243) 72.

³⁵⁰ Roodt (n 243) 488.

³⁵¹ Interim Award of September 23, 1982 in No. 4131, Yearbook Commercial Arbitration, P. Sanders (ed), Vol. IX (1984) 131, also available online at: <<http://www.trans-lex.org/204131>>

of international commerce, to which rules specific to international arbitration, themselves successively elaborated should respond.³⁵²

As further observed by Pierre Duprey, although, strictly speaking, arbitral awards lack the binding force of precedents, certain characteristic features of case law can be found in the tribunals' adjudicatory practice, namely sharing of the same rationale and established practice of reference to previous awards³⁵³.

3.4 *Lex Mercatoria* as a Source of Law

It is widely recognised that in international commercial arbitration parties to an arbitration agreement can choose a law beyond national law to govern the merits of their dispute³⁵⁴. It is party autonomy rather than the sovereign/state that gives authority and legitimacy to these sources of law³⁵⁵. Such rules of law can consist of codified rules, commercial customs and best practices, such as the UNIDROIT Principles, Principles of European Contract Law, IBA Guidelines on Conflicts of

³⁵² Ibid 135.

³⁵³ Pierre Duprey, 'Do Arbitral Awards Constitute Precedents Should Commercial Arbitration be Distinguished in this Regard from Arbitration Based on Investment Treaties' in Emmanuel Gaillard and others (eds), *Towards a Uniform International Arbitration Law* (1st edn, Juris Net 2005).

³⁵⁴ Parties' freedom to determine the procedure to be followed is considered as one of the advantages of international commercial arbitration over national litigation. This right is implicitly recognised by NYC, Art. V(1)(d) and explicitly stated in UNCITRAL ML, Art. 19 (1), as well as all modern institutional arbitration rules. The conclusion that party autonomy extends beyond the choice of a national law to govern the merits of the disputed is derived from UNCITRAL ML, Art. 28(1), which states that: "The arbitral tribunal shall decide the dispute in accordance with such *rules of law* as are chosen by the parties as applicable to the substance of the dispute" (emphasis added). See also Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Emmanuel Gaillard and John Savage (eds), Kluwer Law International 1999) 32, para 51 et seq.; Julian D.M. Lew, Loukas A. Mistelis, and Stefan Kröll, *Comparative International Commercial Arbitration* (1st edn, Kluwer Law International 2003) 417, para 17-18, 17-19; Alan Redfern, Martin Hunter, Nigel Blackaby, and Constantine Partasides, *Law and Practice of International Commercial Arbitration* (Alan Redfern and others (eds), 4th edn, Sweet & Maxwell 2004) 94, 95, para 2-34; Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (1st edn, OUP 2007) 188-200.

³⁵⁵ It should be noted, however, that the scope of party autonomy is regulated by both national laws and international conventions. See for example UNCITRAL ML, Art. 28(1).

Interest in International Arbitration, ILA Recommendations, on the one hand, or amorphous bodies of law commonly referred to as transnational rules, general principles of law or *lex mercatoria*³⁵⁶, on the other hand. Furthermore, the parties may authorise arbitrators to decide *ex aequo et bono* or as *amiable compositeur*, and as such apply equitable principles and non-legal standards in arbitrators' decision making.

This section does not endeavour to explore the theories behind the notion of *lex mercatoria*, determination of the concept of *lex mercatoria* or exploration of the historical development of the Law Merchant. The latter issues do not fall within the objectives of this chapter and, as such, their detailed presentation will not complement the discussion about the judicialisation of international commercial arbitration³⁵⁷. The focus of this section is to analyse the resort to *lex mercatoria* and

³⁵⁶ Gaillard and Savage, 'Sources of International Commercial Arbitration' (n 59) 102, paras 190-192; Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (n 354) 31, para 51.

³⁵⁷ On the development, existence and concept of the New Law Merchant, see Ole Lando, 'The Lex Mercatoria in International Commercial Arbitration' (1985) 34 *International Comparative Law Quarterly* 747-768; Goldman, 'The Applicable Law' (n 161); Christoph W. O. Stoecker, 'The Lex Mercatoria: To what Extent does it Exist?' (1990) 7 *International Arbitration* 101-125; Vanessa L.D. Wilkinson, 'The New Lex Mercatoria Reality or Academic Fantasy?' (1995) 12 *Journal of International Arbitration* 103-118; Lisa Bernstein, 'Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms' (1996) 144 *University of Pennsylvania Law Review* 1765-1821; Emmanuel Gaillard, 'Thirty Years of Lex Mercatoria: Towards the Discriminating Application of Transnational Rules' in Albert Jan van den Berg (ed), *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration, ICCA Congress Series, 1994 Vienna Volume 7* (Kluwer Law International 1996); Thomas E. Carbonneau, *Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant: A Discussion of the New Law Merchant* (N.Y. Yonkers (ed), Revised. Juris Publishing, Inc. 1998); Gesa Baron, 'Do the UNIDROIT Principles of International Commercial Contracts Form a New Lex Mercatoria?' (1999) 15 *Arbitration International* 11-130; Luke Nottage, 'The Vicissitudes of Transnational Commercial Arbitration and the Lex Mercatoria. A View from the Periphery' (2000) 16 *Arbitration International* 53-78; Francis D. Rose, *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds* (1st edn, Informa Law from Routledge 2000); Clive M. Schmitthoff, *The Sources of the Law of International Trade* (Clive M. Schmitthoff (ed), 1st edn, Stevens & Sons 1964); Schmitthoff, *Select Essays on International Trade Law*; Norbert Horn and Clive M. Schmitthoff, *The Transnational Law of International Commercial Transactions* (Kluwer Law International 1982); L. Yves Fortier, 'The New, New Lex Mercatoria, or, Back To The Future' (2001) 17 *Arbitration International* 121-128; Richard J. Howarth, 'Lex Mercatoria: Can General Principles of Law Govern International Commercial Contracts?' (2004) 10 *Canterbury L. Rev.* 36; Celia Wasserstein Fassberg, 'Lex Mercatoria - Hoist with Its Own Petard?' (2005) 5 *Chi. J. Int'l L.* 67-82; Bernardo M. Cremades and Steven L. Plehn, 'The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions' (1984) 2 *B.U. Int'l L. J.*

317–348; Pryles, ‘Application of Lex Mercatoria in International Commercial Arbitration’ ; Gesa Baron, ‘Do the UNIDROIT Principles of International Commercial Contracts Form a New Lex Mercatoria?’ (1999) 15 *Arbitration International* 11–130; Francis D. Rose, *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds* (1st edn, Informa Law from Routledge 2000); Goldman, ‘The Applicable Law: General Principles of Law - the Lex Mercatoria’ ; Peer Zumbansen, ‘Debating Autonomy and Procedural Justice: The Lex Mercatoria in the Context of Global Governance Debates - A Reply to Thomas Schultz’ (2011) 2 *Journal of International Dispute Settlement* 427–433; Helen E. Hartnell, ‘Living La Vida Lex Mercatoria’ (2007) 12 *Unif. L. Rev.* 733–76-; Michael Mustill, ‘The New Lex Mercatoria: The First Twenty-five Years’ (1988) 4 *Arbitration International* 86–119; Nikitas E. Hatzimihail, ‘The Many Lives-and Faces-of Lex Mercatoria: History as Genealogy in International Business Law’ (2008) 71 *Law and Contemporary Problems* 169–190; David W. Rivkin, ‘Enforceability of Arbitral Awards Based on Lex Mercatoria’ (1993) 9 *Arbitration International* 67–84; Peter M. Flanagan, ‘Demythologising the Law Merchant: The Impropriety of the Lex Mercatoria as a Choice of Law’ (2004) 15 *International Company and Commercial Law Review* 297–306; Joanna Jemielniak, ‘Lex Mercatoria in Arbitration’ in *Legal Interpretation in International Commercial Arbitration* (1st edn, Ashgate 2014); Alec Stone Sweet, ‘The New Lex Mercatoria and Transnational Governance’ (2006) 13 *Journal of European Public Policy* 627–646; Vanessa L.D. Wilkinson, ‘The New Lex Mercatoria Reality or Academic Fantasy?’ (1995) 12 *Journal of International Arbitration* 103–118; Christoph W. O. Stoecker, ‘The Lex Mercatoria: To what Extent does it Exist?’ (1990) 7 *International Arbitration* 101–125; Emmanuel Gaillard, ‘Thirty Years of Lex Mercatoria: Towards the Discriminating Application of Transnational Rules’ in Albert Jan van den Berg (ed), *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration, ICCA Congress Series, 1994 Vienna Volume 7* (Kluwer Law International 1996); Ana M. López-Rodríguez, *Lex Mercatoria and Harmonization of Contract Law in the EU* (1st edn, DJOFPublishing 2003); Mert Elcin, *The Applicable Law to International Commercial Contracts and the Status of Lex Mercatoria - With a Special Emphasis on Choice of Law Rules in the European Community* (1st edn, Dissertation.Com 2010); Gbenga Bamodu, ‘Exploring the Interrelationships of Transnational Commercial Law, “The New Lex Mercatoria” and International Commercial Arbitration’ (1998) 10 *Afr. J. Int’l & Comp. L.* 31–59; Jorge Jaramillo-Vargas, ‘Lex Mercatoria - A Flexible Tool to Meet Transnational Trade Law Needs Today’ (2002) 1 *Rev. E-Mercatoria* 1–18; Thomas E. Carbonneau, *Lex Mercatoria and Arbitration/a Discussion of the New Law Merchant: A Discussion of the New Law Merchant* (N.Y. Yonkers (ed), Revised. Juris Publishing, Inc. 1998); Andreas F. Lowenfeld, ‘Lex Mercatoria: An Arbitrator’s View’ (1990) 6 *Arbitration International* 133–150; Friedrich K. Juenger, ‘The Lex Mercatoria and Private International Law’ (2000) 60 *La L Rev* 1133–1150; Alec Stone Sweet, ‘The new Lex Mercatoria and transnational governance, *Journal of European Public Policy*’ (2006) 13 *Journal of European Public Policy* 627–646; Anthony Connerty, ‘Lex Mercatoria: Reflections from an English Lawyer’ (2014) 30 *Arbitration International* 701–720; Joachim G. Frick, ‘Anational Law (Lex Mercatoria)’ in *International Arbitration Law Library: Arbitration in Complex International Contracts (International Arbitration Law Library Series)* (1st edn, Kluwer Law International 2001); Dalhuisen, ‘The Operation of the International Commercial and Financial Legal Order: The Lex Mercatoria and its Application - Moving from the Theories of Legal Positivism and Formalism to the Practicalities of Legal Pluralism and Dynamism’ ; Abdul F. Munir Maniruzzaman, ‘The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?’ (1999) 14 *Am. U. Int’l L. Rev.* 657–734; Irineu Strenger, ‘*La Notion de Lex Mercatoria en Droit du Commerce International (volume 227)*’ *Collected Courses of the Hague Academy of International Law* (Brill 1991); Karyn S. Weinberg, ‘Equity in International Arbitration: How Fair is “Fair”? A Study of Lex Mercatoria and Amiable Composition’ (1994) 12 *B.U. Int’l L. J.* 227–254; Gerard Malynes, ‘Lex Mercatoria: Of Arbitrators and their Awards

the use of general principles of law as law governing the merits of the dispute to the extent that their application can demonstrate, or not, an on-going process of judicialisation.

(London, 1622)' (1993) 9 *Arbitration International* 323–328; Klaus Peter Berger, 'Lex Mercatoria Online: the CENTRAL Transnational Law Database at www.tldb.de' (2002) 18 *Arbitration International* 83–94; George Delaume, 'The Myth of Lex Mercatoria and State Contracts' in Thomas E. Carbonneau (ed), *Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant* (1st edn, Kluwer Law International 1998); Ralf Michaels, 'The True Lex Mercatoria: Law Beyond the State' (2007) 14 *Ind. J. Global Legal Stud.* 447–468; Luke Nottage, 'The Vicissitudes of Transnational Commercial Arbitration and the Lex Mercatoria. A View from the Periphery' (2000) 16 *Arbitration International* 53–78; Sülün Güçer, 'Lex Mercatoria in International Arbitration' (2009) 2 *Ankara B Rev* 30–39; Liukkunen, 'Lex Mercatoria in International Arbitration' ; Ole Lando, 'The Lex Mercatoria in International Commercial Arbitration' (1985) 34 *International Comparative Law Quarterly* 747–768; Klaus Peter Berger, *The Creeping Codification of the New Lex Mercatoria* (2nd edn, Kluwer Law International 2010); Michael Frischkorn, 'Definitions of the Lex Mercatoria and the Effects of Codifications on the Lex Mercatoria's Flexibility' (2005) 7 *Eur. J.L. Reform* 331–351; Gilles Cuniberti, 'Three Theories of Lex Mercatoria' (2014) 52 *Columbia Journal of Transnational Law* 369–434; Barton S. Selden, 'Lex Mercatoria in European and U.S. Trade Practice: Time to Take a Closer Look' (1995) 2 *Ann. Surv. Int'l & Comp. L.* 111–130; Gordon Humphreys, 'Lex mercatoria in International Arbitration: Some Differences in the Anglo-French Points of View' (1992) 7 *International Business Law Journal* 849–856; DiMatteo, 'Soft Law and the Principle of Fair and Equitable Decision Making in International Contract Arbitration' ; Hong-lin Yu, 'Choice of Property Law vs. Public Policy' (2008) 1 *Contemp Asia Arb J* 107–148; Waincymer, 'Promoting Fairness and Efficiency of Procedures in International Commercial Arbitration - Identifying Uniform Model Norms' ; Margaret L. Moses, 'Applicable Laws and Rules' in *The Principles and Practice of International Commercial Arbitration* (1st edn, Cambridge University Press 2008); Karton, 'Norms Arising from the Values Shared by International Commercial Arbitrators' ; Pierre Mayer, 'The Laws or Rules of Law Applicable to the Merits of a Dispute and the Freedom of the Arbitrator' in *Dossier of the ICC Institute of World Business Law: Is Arbitration Only As Good as the Arbitrator? Status, Powers and Role of the Arbitrator* (1st edn, ICC Publishing 2011); William W. Park, 'The Predictability Paradox - Arbitrators and Applicable Law' in Fabio Bortolotti and Pierre Mayer (eds), *Dossier of the ICC Institute of World Business Law: The Application of Substantive Law by International Arbitrators* (1st edn, ICC Publishing 2014); Horacio Grigera Naón, *Recueil des cours, Collected Courses, Tome/Volume 289 (2001), Choice-of-Law Problems in International Commercial Arbitration* (1st edn, Brill Nijhoff 2002); Rogers, 'Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration' ; Simon Greenberg, Christopher Kee, and J. Romesh Weeramantry, 'Applicable Substantive Law' in *International Commercial Arbitration: An Asia-Pacific Perspective* (1st edn, Cambridge University Press 2011); Christopher R. Drahozal, 'Contracting out of National Law: An Empirical Look at the New Law Merchant' (2005) 80 *Notre Dame Law Review* 523–552; Lisa Bernstein, 'Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms' (1996) 144 *University of Pennsylvania Law Review* 1765–1821; Clayton P. Gillette, 'The Law Merchant in the Modern Age: Institutional Design and International Usages Under the CISG', 2004; Emily Kadens, 'The Myth of the Customary Law Merchant' (2012) 90 *Tex. L. Rev.* 1153–1206; Gilles Cuniberti, 'Three Theories of Lex Mercatoria' (2014) 52 *Columbia Journal of Transnational Law* 369–434; Joanna Jemielniak, 'Lex Mercatoria in Arbitration' in *Legal Interpretation in International Commercial Arbitration* (1st edn, Ashgate 2014).

When considering the possible implications of the judicialisation process in view of the use and reference to *lex mercatoria* in international commercial arbitration two general approaches are possible. The first one is by analysing the theoretical foundations of *lex mercatoria* in order to establish whether there is a prevailing position in the literature with regard to the acknowledgement of *lex mercatoria* as a source of law in international commercial arbitration and the scope of its application. Refusal to recognise *lex mercatoria* as a source of law, or a formalistic view of *lex mercatoria* as to its interpretative and applicative function, as well as adherence to the idea that *lex mercatoria* has a supplementary role to national legal systems, will be an indication of a more rigorous and judicialised view on the source of law in international commercial arbitration. In contrast, arbitration users who support the position that *lex mercatoria* is truly autonomous and does not bear any reference to any particular national system of law will favour a more flexible approach, which aims to foster the “alternative dispute resolution” nature of international commercial arbitration and uphold the principle of party autonomy. The second approach to the issue *lex mercatoria*-judicialisation process is by examination of the resort to *lex mercatoria* in arbitrations in order to assess to what extent parties actually rely on it and how arbitrators ascertain the *lex mercatoria* in their decisions.

These two approaches undoubtedly complement each other. It is important to be demonstrated whether *lex mercatoria* is capable of being an autonomous, a-national source of law, which can govern international trade contracts without any reference to national legal systems, however, it is equally important to analyse whether parties designate *lex mercatoria* as the governing law and how arbitrators construe *lex mercatoria*. This section will examine whether the implications of the judicialisation process can be traced to either of the two approaches to *lex mercatoria*.

The dynamics of the debates³⁵⁸ about the existence of *lex mercatoria* have certainly changed in the last decades. As Emmanuel Gaillard precisely explains them:

³⁵⁸ Emmanuel Gaillard eloquently summarises some debates surrounding *lex mercatoria* in Gaillard, ‘Thirty Years of Lex Mercatoria’ (n 357) 570: “On one side of the divide stand authors attacking *lex mercatoria* on ideological, theoretical as well as practical grounds. On the ideological front, *lex mercatoria* has been presented as a ‘less than candid pseudo-legal caprice’ (citing A. Zaki, *L’Etat et l’arbitrage* (Alger 1979) p. 225 et seq.), or, in more moderate terms, ‘essentially ... a doctrine of *laissez-faire*’ (citing M. Mustill, ‘The New Lex Mercatoria: The

Certain scholars readily recognized and promoted the transnational rules alternative. Others, however, denied its existence; then, when confronted with the reality of its existence, challenged its advisability as an option available to the parties; and, when confronted with the wide acceptance of that option in practice, its availability as a choice open to arbitrators in the absence of any choice of law expressed by the parties. Today, (...) the debate has refocused on issues of sources and methodology. Indeed, transnational rules or *lex mercatoria* in whatever form are now sufficiently established for the heart of the controversy to have shifted, concentrating more recently on the establishment in further detail of the content of those rules or the more systematic assessment of the means to do so.³⁵⁹

Even only on the ground of this single paragraph it could be easily recognised that two positions as to existence and application of *lex mercatoria* can be identified among scholars and practitioners. The first one is more formalistic and can be linked to the process of judicialisation in international commercial arbitration, while the second one appreciates the role of international commercial arbitration as an alternative dispute resolution method and advocates for the elevation of *lex mercatoria* to the level of a supranational, non-national or transnational source of law, or even an autonomous legal order.

First Twenty-five Years', in M. Bos, ed., *Liber Amicorum for Lord Wilberforce* (Oxford 1987) p. 149, esp. p. 181, study reproduced in 4 *Arbitration International* (1988) 86; De Ly, op. cit. note 2, no. 449, p. 289). On the theoretical level, some reproach *lex mercatoria* for not having the characteristics of a complete legal system (citing P. Lagarde, 'Approche critique de la *lex mercatoria*' in Ph. Fouchard, ed., *Le droit des relations économiques internationales. Etudes offertes à Berthold Goldman* (Litec 1982) p. 125. Adde, same author, note on Paris, 13 July 1989, *Valenciana*, *Rev. arb.* (1990) p. 663), which naturally leads to the conclusion that *lex mercatoria* does not exist (citing Stoecker, 'The Lex Mercatoria: To what Extent does it Exist?' (n 357) 101). Finally, on the practical level, the principles of *lex mercatoria* have been portrayed both as few and far between, and as inconsistent with each other. For many, *lex mercatoria* is only 'vague law' (citing A. Kassis, *Théorie générale des usages du commerce*, (LGDJ 1984) esp. p. 561 et seq.; G. Delaume, 'The Proper Law of State Contracts and Lex Mercatoria: A Reappraisal', 3 *ICSID Rev.* (1988) p. 79), bringing together principles allegedly as contradictory as the binding force of contracts and the theory of unforeseeability. The *coup de grâce* is delivered by those who, very pragmatically, point out that the tremendous amount of academic attention devoted to *lex mercatoria* has only given rise to a very limited number of principles. In contrast, some authors take an extremely broad view of *lex mercatoria*, finding examples of *lex mercatoria* principles in the most diverse sets of circumstances."

³⁵⁹ Emmanuel Gaillard, 'Transnational Law: A Legal System or a Method of Decision Making?'. (2001) 17 *Arbitration International* 59–71, 60.

The non-recognition of *lex mercatoria* as an autonomous or a non-national source of law is in line with the more rigid approach to the sources of law in international arbitration. Those who favour this formalistic view belong to a very wide spectrum of arbitration users – from such that deny the existence of modern *lex mercatoria*, through those who challenge the ability of *lex mercatoria* to solely govern the merits of trade disputes, to professionals and scholars who dispute the law-ascertaining methods of the new Law Merchant.

The proponents of the formalistic approach to *lex mercatoria* support the position that the latter is not an independent source of law detached from the national legal systems, rather they are applied to the extent parties have explicitly or implicitly agreed on their application or the applicable law makes reference to them. The umbilical cord that connects *lex mercatoria* with a national legal system is demonstrated by the permissive or restrictive regime that national laws adopt with regard to the option arbitrators have to choose transnational rules when parties have not specified the applicable national law³⁶⁰.

According to the formalistic approach *lex mercatoria* is not elevated to a non-national or above-national legal system. On contrary, it is asserted that modern *lex mercatoria* consists of general principles of international law, trade customs, practices and transnational rules, which originate or are rooted in national legal systems. It is claimed that even where arbitral tribunals apply *lex mercatoria* as rules of law governing the merits of the dispute, those rules are of such universal character³⁶¹, i.e. so widely recognised and accepted, that they can be considered common for all or the majority of the legal systems. This suggests that *lex mercatoria* is not a separate legal order detached from the national legal systems, which are inadequate to regulate international trade relations, rather the New Law

³⁶⁰ See the analysis of Gaillard, 'Transnational Law' (n 359) 60, pointing out that some arbitration laws provide arbitrators with the option to chose transnational rules when parties have not specified the applicable law, e.g. French law since 1981 (New Code of Civil Procedure, Art. 1496), Dutch law since 1986 (Code of Civil Procedure, Art. 1054); Swiss law since 1987 (Private International Law Act, Art. 187). In contrast, the UNCITRAL ML, Art. 28, English Arbitration Act 1996, s 46, and German Arbitration Act 1985 (ZPO), Art. 1051(2) reject such possibility.

³⁶¹ Such rules are for example the obligation to adhere to parties' common intention and the binding force of contracts, as well as the duty to perform contractual obligations in good faith.

Merchant is the common ground of customs and usages applicable in many jurisdictions. As such *lex mercatoria* does not supersede national legal systems and cannot be applied neither as means of placing the contract above the law or displacing the law chosen by the parties, nor as an excuse to use equitable principles and considerations where parties have not authorised arbitrators to decide *ex aequo et bono*.

The formalistic approach to *lex mercatoria* as a source of law can be associated with the process of judicialisation in international arbitration. Despite being more rigid, this view focuses on the importance of achieving legal certainty in the way international trade disputes are resolved.

The acknowledgement of independent existence of *lex mercatoria* as a non-national source of law in international arbitration, however, does not fit entirely into the traditional classification and understanding of sources of law. The latter cannot explain the authoritativeness and legitimacy of *lex mercatoria* since it does not originate from the state or the sovereign³⁶². Although many national laws recognise the binding role of customs as sources of law³⁶³, the concept of *lex mercatoria* being

³⁶² Mert Elcin, *The Applicable Law to International Commercial Contracts and the Status of Lex Mercatoria - With a Special Emphasis on Choice of Law Rules in the European Community* (1st edn, Dissertation.Com 2010) 16.

³⁶³ Customary rules developed by traders were gradually incorporated in English common law in seventeenth century and were later implemented in the English Sale of Goods Act 1893, similarly the American Uniform Commercial Code. "Law Merchant" was considered to be "a number of usages, each of which exist among merchants and persons engaged in mercantile transactions, not only in one particular country, but throughout the civilized world, and each which has acquired notoriety, not only amongst those persons, but also in the mercantile world at large, that courts of this country will take judicial notice of it" (Lethulier's Case (1692) 2 Salk 443 (per Holt, CJ)). In common law systems customs were also considered a source of law and were applied, especially after nineteenth century, to the extent the code permits their use. As explained in Jan H. Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law, Volume 1: Introduction - The New Lex Mercatoria and its Sources* (5th edn, Hart Publishing 2013) Section 1.4.7 Autonomous Legal Sources: Custom and Practice: "Although immanent law, custom as an autonomous source of law is not contractual but *hard law* as such, no different from other sources of law including legislation and case law. It means that it must be applied by judges or arbitrators if its other conditions of applicability are met. That was indeed the position in civil law at least until the nineteenth century, but it was also the original position in common law. (...) [T]he nineteenth-century civil law of the codification became in principle hostile to custom as an independent source of law. (...) Custom was thus affected, and at least in private law it became ignored unless statutes specifically referred to it. That was done mainly in matters of contract interpretation where custom normally figured

an autonomous legal order capable of governing international commercial contracts and disputes independently and separately from national legal systems challenges the conventional, formalistic approach to source of law. The fundamental theory of Professor Goldman goes beyond the provisions of national legal systems and determines *lex mercatoria* as “a set of general principles, and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of law.”³⁶⁴

Those who support Prof Goldman’s opinion and view *lex mercatoria* as an a-national source of law reconcile the conflict with the prevalent positivist tradition in legal thought with the arguably binding force of *lex mercatoria* by emphasising its conceptual nature and the exclusiveness of business community – a prudent businessperson is considered to have undertaken to adhere to the rules created by the international community of merchants:

The distinguishing feature of (modern *lex mercatoria*’s) (...) mandatory element from that of medieval law merchant is the consensual aspect of modern international trade which has roots in an idea from the seventeenth-century natural law arguing that the keeping of one’s word is in harmony with the social nature of men and principle of good faith. Thus, the contract becomes the inherent source of law, from which other components of law merchants are derived, in modern business relationships (...).³⁶⁵

The supporters of *lex mercatoria* maintain with confidence that “[t]he issues is not whether an arbitral law merchant exists, but rather: what form does it take, how effective is it as a body of law, how extensive is its scope, and does it have a mandatory character?”³⁶⁶ Those in favour of a more flexible approach to the sources of law in international commercial arbitration, and in particular in favour of arbitral autonomy in the form of *lex mercatoria*, argue that not only the application of transnational rules of law does not lead to more uncertainty but, on contrary, it fills

besides good faith notions in this respect; see French Code Civil Article 1135; and the German Civil Code (BGB) section 157.”

³⁶⁴ Goldman, ‘The Applicable Law’ (n 161) 113, 116.

³⁶⁵ Elcin (n 360) 17.

³⁶⁶ Thomas E. Carbonneau, *Carbonneau on International Arbitration: Collected Essays* (1st edn, Juris Net Llc 2011) 82.

the gap left open by national and international instruments by providing either a list of codified rules³⁶⁷ or a specific toolbox for ascertaining the rules of law (a method of decision-making)³⁶⁸.

Thus, it is to be noted that where parties fail to specify the law governing the dispute, arbitrators are required to explicitly designate rules of law that they consider to be appropriate for the resolution of the dispute at hand.³⁶⁹ Only after so determining the applicable rules the tribunal shall take steps to interpret the contract in compliance with such rules. Thus, it is maintained that arbitrators are not entitled to avoid the application of laws or rules of law and interpret the contract in a “legal vacuum”:

The requirement in art.21(1) (ICC Rules) that the Tribunal apply rules of law is to be contrasted with the provision in art.21(3) that the parties may agree that the Tribunal decide *ex aequo et bono* or as *amiable compositeur*, and therefore without applying strict rules of law. In some Awards, Tribunals appear to avoid relying on the applicable law and instead rely solely on the construction and interpretation of contract provisions. This approach does not appear to be compatible with art.21(1). Although Tribunals are to take into account the terms of the contract under art.21(2), a contract cannot be interpreted in a legal vacuum. The various legal systems and other rules of law, such as the UNIDROIT Principles (...), set out principles of interpretation. Moreover, terms used in a contract may have a special meaning depending on the relevant rules of law. Therefore, with the exception of interpretation of arbitration clauses themselves and then only in France, it appears that a Tribunal should determine which “rules of law” are applicable and apply those rules.³⁷⁰

The requirement for arbitrators to firstly designate appropriate rules of law and only then interpret and apply contractual provisions in compliance with those rules can be seen as an implication of the process of judicialisation in international commercial

³⁶⁷ See Cuniberti, ‘Three Theories of Lex Mercatoria’ (n 357) 391.

³⁶⁸ Gaillard, ‘Thirty Years of Lex Mercatoria’ (n 355); Gaillard, ‘Transnational Law’ (n 359).

³⁶⁹ See ICC Rules 2012, Art. 21(1); LCIA Arbitration Rules 2014, Art. 22.3; SIAC Arbitration Rules 2013, Art. 27.1; HKIAC Arbitration Rules 2013, Art 35.1; SCC Arbitration Rules 2010, Art. 22(1). In contrast, see Swiss Rules of International Arbitration 2012, Art. 33(1) stipulate that in the absence of a choice of law provision, arbitrators shall decide the dispute by applying the rules of law with which the dispute has the closest connection.

³⁷⁰ Webster and Bühler (n 249) 298-299, paras 21-10, 21-11.

arbitration. Such an obligation clearly identifies arbitrator's function – to decide the dispute at hand according to the relevant rules of law (unless parties have explicitly granted the arbitrator power to decide *ex aequo et bono* or as *amiable compositeur*). If the arbitrator's vocation is analysed in connection with the increased legalisation of arbitration, i.e. cases being handled by legal counsel, particularly by litigation specialists, rather than in-house or corporate lawyers, proliferation of legal practices, such as prehearing motions, extensive discovery, preparation of witnesses and increased importance of cross-examination, as well as an upsurge in the eloquence and formality of written and oral presentations³⁷¹, it becomes an overstatement to maintain that international commercial arbitration achieves nothing but rough justice because arbitrators' objectives unlike judges' ones does not include achieving accuracy³⁷² and rendering justice³⁷³ in accordance with the law.

The relevant provisions in the various arbitration rules suggest that where parties fail to agree a choice of law provision, the arbitral tribunal may resort to *lex mercatoria* as a common intent of the parties or neutral rules of law. Furthermore it has been argued that by applying *lex mercatoria* to their disputes "parties avoid the technicalities of national legal systems as well as rules which are unfit for international contracts."³⁷⁴ If the latter is true one will expect to encounter many arbitral awards where *lex mercatoria* is either specifically designated as the law

³⁷¹ For a more detailed analysis on the implications of judicialisation process in the context of international commercial arbitration proceedings, see Chapter 4. For some general views on judicialisation and/or Americanisation of international arbitration, see Lawrence W. Newman and Michael Burrows, *The Practice of International Litigation* (2nd edn, Juris Net Llc 2013) V-244.

³⁷² On arbitrators and accuracy, see William Park, 'Arbitrators and Accuracy' (2010) 1 *Journal of International Dispute Settlement* 25–53; Neil Andrews, 'Affordable and Accurate Civil Justice – Challenges Facing the English and Other Modern Systems' (2014) 25 *Eur. Bus. L. Rev.* 545–563.

³⁷³ On arbitration and justice, see Alberti (n 240); Gregory M. Beresford Hartwell, 'The Commercial Way to Justice' in Stefan Kröll and others (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (1st edn, Kluwer Law International 2011); Horvath (n 23); Nana Japaridze, 'Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration' (2007) 36 *Hofstra L Rev* 1415–1446; Peer Zumbansen, 'Debating Autonomy and Procedural Justice: The Lex Mercatoria in the Context of Global Governance Debates - A Reply to Thomas Schultz' (2011) 2 *Journal of International Dispute Settlement* 427–433.

³⁷⁴ Petar Šarčević, *Essays on International Commercial Arbitration* (Petar Šarčević (ed), Graham & Trotman/ Martinus Nijhoff 1989) 144.

governing the dispute or is an applied set of rules of law in absence of a choice of law clause.

Klaus Peter Berger, however, argues that the New Law Merchant does not provide an international arbitrator with unlimited discretion to consider what is fair and equitable in a given case, rather arbitrators are entrusted to consider the basis of the general principles of law and rules of transnational commercial law applicable to the dispute³⁷⁵.

Although parties are free to choose non-national rules of law to govern the substantive issues of their dispute and such choice of law agreements are enforceable, it has been maintained that incorporating clauses, which designate *lex mercatoria* or general principles of law as the substantive law creates more problems than it solves.

Georgios Zekos argues that *lex mercatoria* has its important place among the sources of law in international commercial arbitration and suggests that the customary nature of the Law Merchant is one of the reasons for parties to select arbitration as a dispute resolution mechanism over national litigation:

[t]here is *ratio decidendi* in arbitration that does not follow the road of certainty of courts. Custom of usages or trade usage, common trade terms or industrial practices are illustrative norms which comprise a sort of “rule of industry” that should be regarded as rule of law because the written law is the reflection of industrial norms and practice. Customary law in the form of industry norms prevails and some merchants chose arbitration to plainly avoid the application of legal principles. In other words, law in the form of written or customary form plays a role in the arbitration award. In the words of Justice Blackmun: “[A]rbitrators are not bound by precedent”³⁷⁶ but by the form of litigation precedent because arbitrators use a guidance regarding the interpretation of law applying to specific facts according previous awards. Written arbitration awards

³⁷⁵ Berger, *The Creeping Codification of the New Lex Mercatoria* (n 357) 80, 81.

³⁷⁶ Zekos (n 205) 447 citing *Shearson/American Express v. McMahon* 482 U.S. 220 (1987), 259 (Blackmun concurring in part and dissenting in part).

can guide an arbitrator when deciding a similar case. It has to be taken into consideration that law is rooted in custom (“customary law”).³⁷⁷

Other authors also share the opinion that arbitral case law together with general principles of law and trade customs constitute customary law, which may have persuasive effect upon arbitrators in their decision-making. They, however, limit the scope of the arbitral case law to arbitral awards decided on the basis of *lex mercatoria* application: “it might be assumed that the *lex-mercatoria*-based arbitral decisions form a *sui generis* case law, influencing further awards and establishing decisional patterns, followed not due to their official binding force but because of the persuasive force of the presented reasoning”³⁷⁸. Also, as maintained by Ana M. Lopez-Rodriguez:

[m]ore precisely, *lex mercatoria* is the result of a substantive method of adjudication, alternative to traditional conflictual techniques (...). Due to the persuasive character of the reasoning of some arbitral decisions, it gradually develops into a body of case law, which *de facto* serves the same function as national law, in the resolution of international commercial disputes.³⁷⁹

3.4.1 The 2010 QMUL Survey and ICC Statistical Reports

The assumptions regarding the two approaches to *lex mercatoria* can be best tested in the light of an empirical study on parties’ choice of law governing the dispute. The case study aims to reveal (i) whether arbitration users choose *lex mercatoria* or transnational law as rules of law governing the substance of the disputes, and (ii) how *lex mercatoria* is being applied, i.e. what law-ascertaining method is used in arbitral awards which designate *lex mercatoria* to govern the dispute. Arbitration users’ preference for choosing national laws rather than transnational rules of law to

³⁷⁷ Ibid.

³⁷⁸ Joanna Jemielniak and Przemysław Miklaszewicz, *Interpretation of Law in the Global World: From Particularism to a Universal Approach* (Joanna Jemielniak and Przemysław Miklaszewicz (eds), 1st edn, Springer Berlin Heidelberg 2010) 12, 13.

³⁷⁹ Ana M. López-Rodríguez, *Lex Mercatoria and Harmonization of Contract Law in the EU* (1st edn, DJOFPublishing 2003) 111.

govern the disputes, as well as arbitrators' construction of *lex mercatoria* shall indicate, or not, a judicialised approach to the sources of law in international commercial arbitration, and in particular to the New Law Merchant.

A natural difficulty and limitation of this case study is the scarce data – a handful of the arbitral awards are published and there are almost no empirical studies on the choice of governing law in international commercial arbitration. However, some information is available and accessible through statistical reports of arbitration institutions, as well as thanks to surveys conducted by law firms in cooperation with research universities.

A particular attention must be paid to the 2010 QMUL Survey on parties' choice of law in international arbitration³⁸⁰ because of its approach to the explored issues. Although the study appears similar to the themes explored in the 2006 and 2008 QMUL Surveys³⁸¹, the 2010 QMUL Survey does not test perceptions but goes a step further in exploring the choices and the motives behind the choices that arbitration users make³⁸². The study consisted of two stages – an online questionnaire completed by 136 respondents and in-depth interview of 67 respondents. With regard to the choice of law governing the substance of the dispute the study revealed that the choice is mostly influence by perceived neutrality and impartiality of the legal system with regard to the parties and their contract (66% of the respondents), the appropriateness of the law for the type of contract (60% of the respondents) and the party's familiarity with and experience of the particular law (58% of the respondents).³⁸³ The answers suggest that the choice of governing law is an important decision for arbitration users. This proposition is supported by the findings that 68% of the corporations participating in the study have a dispute resolution policy, and that the law governing the substance of the dispute is usually the first stipulation agreed between the parties. Hence, the choices of experienced arbitration users do not represent random decision-making but are a result of careful

³⁸⁰ QMUL Survey 'Choices in International Arbitration' (2010), available at: <<http://www.arbitration.qmul.ac.uk/docs/123290.pdf>>

³⁸¹ See 2006 QMUL Survey (n 2), 2008 QMUL Survey (n 3).

³⁸² 2010 QMUL Survey (n 380) 'Introduction'.

³⁸³ Ibid 11.

consideration and can be indicative of certain ongoing processes in international commercial arbitration.

With regard to transnational laws or rules the respondents were asked whether they have used either one of four categories of rules to govern their disputes: (i) broad concepts of fairness and equity (such as *ex aequo et bono*), (ii) international treaties and conventions (e.g. CISG), (iii) commercial practices and rules of law related to trade and international contracts (e.g. UNIDROIT Principles and INCOTERMS)³⁸⁴,

³⁸⁴ UNIDROIT Principles are commonly recognised as being part of *lex mercatoria* by representing widely used commercial and contract practices. See Baron, ‘Do the UNIDROIT Principles of International Commercial Contracts Form a New Lex Mercatoria?’ (n 357); Fabrizio Marrella, ‘The UNIDROIT Principles of International Commercial Contracts in ICC Arbitration, 1999-2001’ (2001) 12 ICC International Court of Arbitration Bulletin 49–55; Baron, ‘Do the UNIDROIT Principles of International Commercial Contracts Form a New Lex Mercatoria?’ ; Julian D.M. Lew, ‘The UNIDROIT Principles as Lex Contractus Chosen by the Parties and Without an Explicit Choice-of-Law Clause : The Perspective of Counsel’ in *Special Supplement 2002: UNIDROIT Principles of International Commercial Contracts: Reflections on their Use in International Arbitration* (1st edn, ICC Publishing 2002); Pierre Lalive, ‘The UNIDROIT Principles as Lex Contractus, With or Without an Explicit or Tacit Choice of Law: An Arbitrator’s Perspective’ in *Special Supplement 2002: UNIDROIT Principles of International Commercial Contracts: Reflections on their Use in International Arbitration* (1st edn, ICC Publishing 2002); Fabrizio Marrella, ‘The UNIDROIT Principles of International Commercial Contracts in ICC Arbitration, 1999-2001’ (2001) 12 ICC International Court of Arbitration Bulletin 49–55; Yves Derains, ‘The Role of the UNIDROIT Principles in International Commercial Arbitration (1): A European Perspective’ in *Special Supplement 2002: UNIDROIT Principles of International Commercial Contracts: Reflections on their Use in International Arbitration* (1st edn, ICC Publishing 2002); E. Allan Farnsworth, ‘The Role of the UNIDROIT Principles in International Commercial Arbitration (2): A US Perspective on their Aims and Application’ in *Special Supplement 2002: UNIDROIT Principles of International Commercial Contracts: Reflections on their Use in International Arbitration* (ICC Publishing 2002); Michael Joachim Bonell, ‘The UNIDROIT Principles as a Means of Interpreting and Supplementing International Uniform Law’ in *Special Supplement 2002: UNIDROIT Principles of International Commercial Contracts: Reflections on their Use in International Arbitration* (1st edn, ICC Publishing 2002); Marcel Fontaine, ‘The UNIDROIT Principles: An Expression of Current Contract Practice?’ in *Special Supplement 2002: UNIDROIT Principles of International Commercial Contracts: Reflections on their Use in International Arbitration* (1st edn, ICC Publishing 2002); Hilmar Raeschke-Kessler, ‘The UNIDROIT Principles in Contemporary Contract Practice’ in *Special Supplement 2002: UNIDROIT Principles of International Commercial Contracts: Reflections on their Use in International Arbitration* (1st edn, ICC Publishing 2002); Fabio Bortolotti, ‘Reference to the UNIDROIT Principles in Contract Practice and Model Contracts’ in *Special Supplement 2005: UNIDROIT Principles: New Developments and Applications* (ICC Publishing 2005); Pierre Mayer, ‘The Role of the UNIDROIT Principles in ICC Arbitration Practice’ in *Special Supplement 2002: UNIDROIT Principles of International Commercial Contracts: Reflections on their Use in International Arbitration* (1st edn, ICC Publishing 2002); François Dessemontet, ‘Use of the UNIDROIT Principles to Interpret and Supplement Domestic Law’ in *Special Supplement 2002: UNIDROIT Principles of International*

(iv) other international rules of law (e.g. UCP). The answers of the participants in the survey demonstrate a limited use of transnational laws or rules of law in international arbitration and a general preference for designating particular national law in arbitration agreements. More than 50% of the respondents answered that they have never chosen general principles of law, commercial principles of fairness and equity, *amiable compositeur* or *ex aequo et bono*, international treaties or conventions or other international rules to govern their disputes (58% have never resorted to general principles of law, commercial principles of fairness and equity, 81% have never empowered arbitral tribunal to decide as *amiable compositeur* or *ex aequo et bono*, and 53%, respectively 57%, have never designated either international treaties and conventions or other international rules as the law governing their dispute). The only exception to the otherwise consistent answers is the occasional use of commercial law rules contained in codifications, such as the UNIDROIT Principles and INCOTERMS – 48% of the respondents pointed out that they sometimes choose such rules to govern their disputes. This information, however, needs to be interpreted together with the answer of 39% of the participants who specified that they have never designated codified commercial law rules to govern the disputes. Moreover, all interviewees highlighted that transnational laws and rules are often used as supplementary or definitional concepts alongside a governing national law, rather than as a law that is intended to regulate all substantive legal issues.³⁸⁵

The results of the 2010 QMUL Survey demonstrate a judicialised approach to *lex mercatoria* and the transnational rules of law. They suggest that arbitration users have a higher regard for the legal certainty associated with the application of a national law rather than the flexibility of the *ad hoc* justice achieved by *lex mercatoria*. Even though it is often suggested that a-national or transnational rules of law provide a neutral legal framework for parties' contractual relationships that is better suited to address business's needs, the survey demonstrates a preference for selecting a national law to govern the contract. Commercial practices and general principles of law play primarily a supplementary or definitional role in international

Commercial Contracts: Reflections on their Use in International Arbitration (ICC Publishing 2002); Connerty, 'Lex Mercatoria: Reflections from an English Lawyer' ; Webster and Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials*

³⁸⁵ 2010 QMUL (n 380) 15.

commercial arbitration agreements. In fact, *lex mercatoria* is almost never chosen as the exclusive governing law. It usually has only a limited, auxiliary role, such as filling the gaps in the applicable national law.

With that regard, even more revealing is the analysis of the ICC statistical reports available in the ICC Dispute Resolution Library. The reports date back to 1997, however more detailed information about the choice of law clauses in parties' contracts is available in the reports as of 2000. Examination of ICC awards and ICC-related practices is worthwhile and indicative of common trends going on in international commercial arbitration for two reasons. The first one is that ICC international arbitration is truly multinational. Since its creation in 1923, the ICC International Court of Arbitration has administered more than 20,000 disputes involving parties and arbitrators from nearly 200 countries and independent territories.³⁸⁶ As of 1997 the number of parties participating in ICC arbitration and the countries from which those parties come from is steadily growing. In 1997, 1,290 parties from 103 countries took part in ICC arbitrations. In the last three years (2012-2014) the numbers almost doubled and are respectfully 2,023, 2,120 and 2,222 parties from 137, 138 and 140 countries from all over the world (see figure 1):

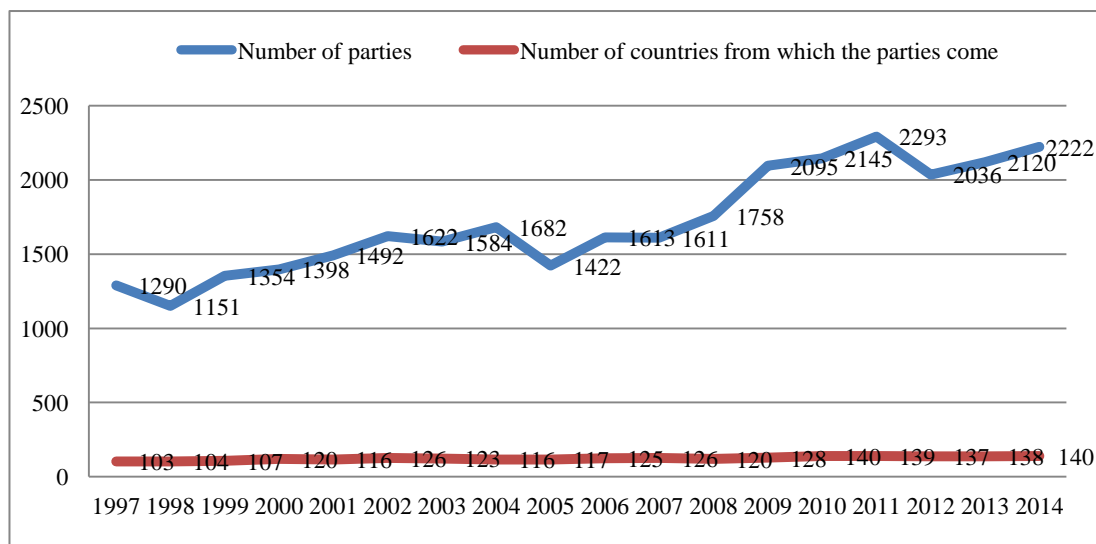


FIGURE 1: Number of parties and number of the countries from which those parties originate in ICC arbitrations for the period 1997-2014 (source: ICC Bulletins)

³⁸⁶ See the statistics and information on the ICC website, available at: <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/>

The second reason why ICC statistics are not only worth exploring, but also suggestive of ongoing global trends, is the caseload of ICC arbitrations. ICC arbitrations represent a substantial share of international arbitrations administered by leading arbitration institutions (see figure 2):

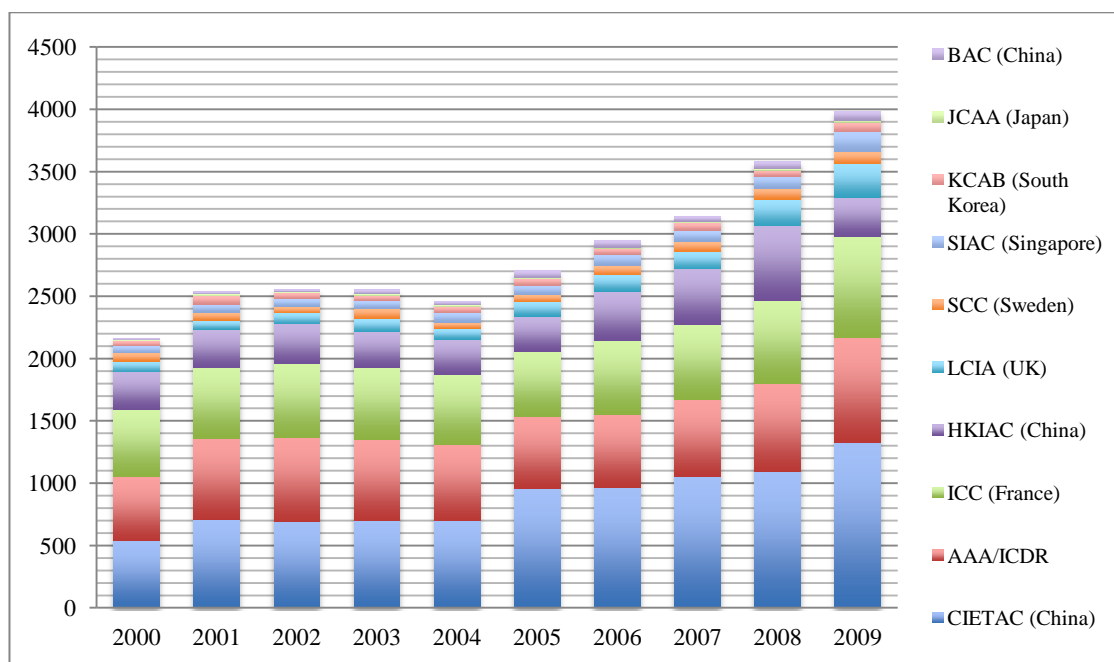


FIGURE 2: Arbitration caseload of 8 major arbitration institutions for the period 2000-2009. The figures represent international cases only. Source: websites of arbitration institutions and Global Arbitration Review (see Mark Bezant, James Nicholson, Howard Rosen, "Trends in International Arbitration in the New World Order", available at: <<http://globalarbitrationreview.com/reviews/67/sections/232/chapters/2683/trends-international-arbitration-new-world-order/>>)

ICC statistical reports covering the period 1999-2013 reveal that at average in 80% of all new cases parties have included choice of law clauses in their contracts. Of these contracts only a handful of the contracts designate a-national rules of law to govern the dispute (see Figure 3):

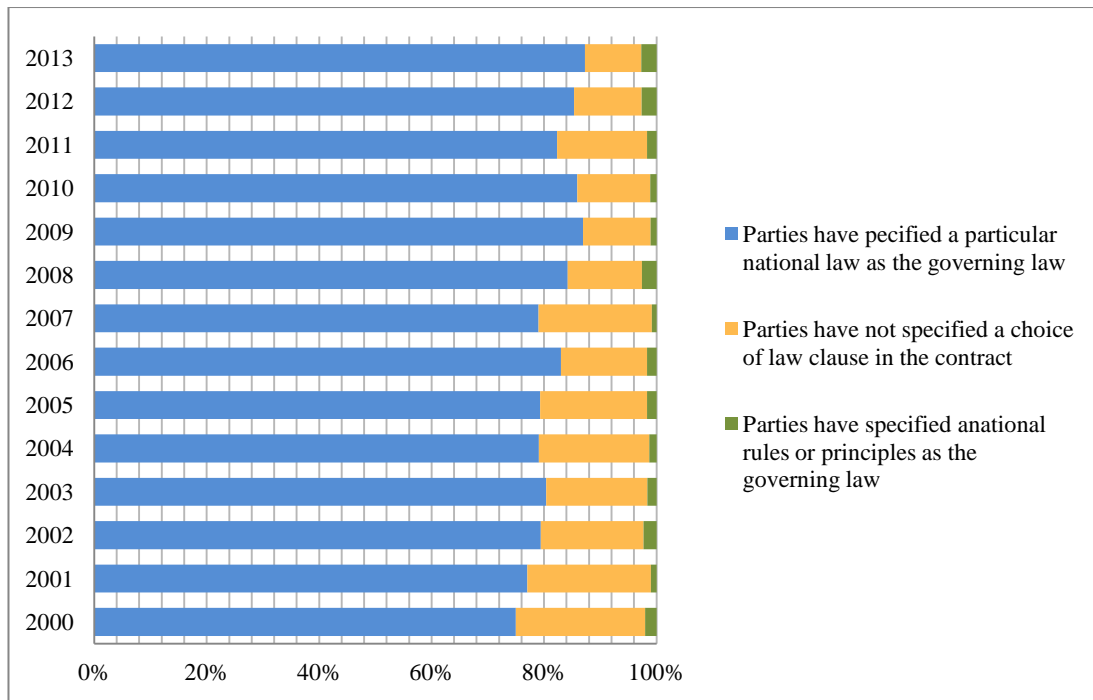


FIGURE 3: New cases for the period 2000-2013, in which parties have specified a particular national law or a-national law as the law/rules of law governing the contract, as well as percentage of the new case in which there is no choice of law clause (source ICC Bulletins)

The above reveals an increasing preference of ICC arbitration users for specifying a particular national law as the law governing the dispute. These figures unequivocally indicate that parties favour the certainty of choice of law clauses containing specific national law over the ambiguities that a-national rules of law can bring. Although *lex mercatoria* can arguably govern trade contracts and provide for greater flexibility of commercial transactions in international context, it is almost never the preferred choice of law. Indeed, in very few cases do businesses choose a-national rules of law to govern their contracts. The analysis of ICC statistical reports shows that parties most often select the CISG, the UNIDROIT Principles, EU law, INCOTERMS, general principles of law, and general principles of equity as the governing law. Isolated references are made to other sources such as *lex mercatoria*, international usages of distribution, private international law, the laws of the Dubai International Financial Centre, the law of the Organization for the Harmonization of Business Law in Africa (OHADA), and international trade law and international arbitration law.

It needs to be noted that these figures reflect the positive choices that parties have made when drafting their contracts and they do not take into account the decisions that arbitrators made on the applicable law once the proceedings have commenced. In order to examine whether arbitrators' approach to *lex mercatoria* is similar to the parties' one, in particular in cases, where parties have not incorporated a choice of law clause in their contracts, a more detail analysis of the data contained in the ICC Dispute Resolution Library is required. The latter contains about 700 arbitral awards and a search of the database revealed only a handful of decisions, which mention *lex mercatoria*. In almost all of those decisions³⁸⁷ *lex mercatoria* is either (i) plead but

³⁸⁷ ICC Case 5904, final award rendered in 1989 in (1992) 3(2) 'ICC International Court of Arbitration Bulletin'; ICC Case 9029, final award rendered in 1998 in (1999) 10(2) 'ICC International Court of Arbitration Bulletin'; ICC Case 9419, final award rendered in 1998 in (1999) 10(2) 'ICC International Court of Arbitration Bulletin'; ICC Case 9875, partial and final awards rendered respectively in 1999 and 2000 in (2001) 12(2) 'ICC International Court of Arbitration Bulletin'; ICC Case 11976, final award rendered in 2003 in (2012) 23(1) 'ICC International Court of Arbitration Bulletin' 51; ICC Case 5314, interim award rendered in 1988 in (1993) 4(2) 'ICC International Court of Arbitration Bulletin'; ICC Case 5717, interim award rendered in 1988 in (1990) 1(2) 'ICC International Court of Arbitration Bulletin' 22; ICC Case 7319, partial award rendered in 1992 in (1994) 5(2) 'ICC International Court of Arbitration Bulletin' 56; ICC Case 11754, interim order rendered in 2003 in *Special Supplement 2010: Decisions on ICC Arbitration Procedure A Selection of Procedural Orders issued by Arbitral Tribunals acting under the ICC Rules of Arbitration* (1st edn, ICC Publishing 2010); ICC Case 12111, partial award rendered in 2003 in (2010) 21(1) 'ICC International Court of Arbitration Bulletin' (in the case at hand *lex mercatoria* and, particularly UNIDROIT Principles, are held to be the governing rules of law, since parties explicitly designated international law as the law governing the contract; however, this award does not demonstrate how the arbitrator ascertains the *lex mercatoria*); ICC Case 12949, procedural order of 7 October 2004 in *Special Supplement 2010: Decisions on ICC Arbitration Procedure A Selection of Procedural Orders issued by Arbitral Tribunals acting under the ICC Rules of Arbitration* (1st edn, ICC Publishing 2010) (in the case at hand *lex mercatoria* and, particularly UNIDROIT Principles, are held to be supplementary rules of law to the governing Mexican law; however, this order does not demonstrate how the arbitrator ascertains the *lex mercatoria*); ICC Case 10385, final award rendered in 2002 in *Special Supplement 2005: Principles UNIDROIT: nouvelles évolutions et applications* 87 (in the case at hand, before ruling on the merits of the dispute, the arbitral tribunal considers among the preliminary issues the question of the applicable law; the tribunal recognises the divergent approaches to *lex mercatoria* and holds that the applicability of *lex mercatoria* will be assessed if there are any gaps in the contractual stipulations); ICC Case 9879, partial award rendered in 1999 in [2001] 'Chronique de jurisprudence arbitrale de la CCI, in Cahiers de l'arbitrage, Gazette du Palais' (in this case *lex mercatoria* is applied with regard to issues of document production and is equated to general principles of law which are considered common to all nations); ICC Case 14208/14236 (n 233); ICC Case 7110, partial awards rendered in 1995, 1998, 1999 in (1999) 10(2) 'ICC International Court of Arbitration Bulletin' 39.

disregarded by the arbitral tribunal³⁸⁸, or (ii) is applied by arbitrators but the principles applied are of such universal character that they could be considered as customary rules rather than a-national law or transnational legal order³⁸⁹, or (iii) is applied but somehow misconstrued³⁹⁰.

One of the few arbitral decisions that contain a relatively detailed analysis of *lex mercatoria*'s applicability represents a stark example of the rigorous approach that arbitral tribunals take to *lex mercatoria*. In Final Award in Case 9029³⁹¹ the arbitral tribunal rejects Respondent's claims based on *lex mercatoria* and UNIDROIT Principles, which the latter argues should be taken into account as a supplement to national law (Italian law) and a reflection of the relevant legal rules and the applicable commercial usages. The arbitral tribunal dismisses Respondent's arguments on three grounds: (i) firstly, because Respondent has failed to prove that

³⁸⁸ ICC Case 9029 (n 387); ICC Case 9419 (n 387); ICC Case 7319 (n 387); ICC Case 5717 (n 387). In ICC Case 5717 absent any indication of the law governing the contractual relationship, Claimant argues that the international principles of law and *lex mercatoria* should apply to the contract. Although the sole arbitrator holds that parties have agreed that their dispute should be resolved by a neutral international tribunal under a *neutral* set of laws and rules, the arbitrator resorts to rules of conflict to determine the national legal system most closely connected to the contract. According to the arbitrator "[t]he conflict of laws principles that arbitrators in international commercial cases most frequently consider to determine the governing law are (1) application of the choice of law system in force at the seat; (2) cumulative application of the choice of law systems of the countries having a relation with the dispute; (3) application of general principles of conflict of laws; and (4) application of a rule of conflict chosen directly by the arbitrator." Applying the so-designated rules of conflict the sole arbitrator determines the national legal system with the greatest connection to the dispute. ICC Case 11754 (n 387). In ICC Case 11754 it is common ground between the parties that the terms and conditions of the contract are silent about the applicable substantive law. The Claimant argues that a reference to certain Indian policy in the contract is indicative of a implied choice of law, or in alternative that the arbitrator should apply (1) general principle of international law, (2) principle of *lex mercatoria*, (3) recognised international treaties and conventions, and (4) rules of conflict of law. Respondent disagrees that parties have expressly or tacitly agreed to Indian law and objects the application of *lex mercatoria* as governing law. According to Respondent, the arbitrator should take the following approach in determining the applicable substantive law: (1) "[t]o ascertain and to apply existing international conventions which regulate conflict of laws concerning international sale of goods; and (2) [i]n the event that such international conventions do not apply to the instant case, to ascertain the applicable substantive law on the basis of certain general rules of connection of international private law." After noting the disagreement and disparities in parties' submission, the sole arbitrator tries to find the common ground in parties' interpretations and proposals. On that basis the arbitrator considers the rule of closest connection appropriate for determining the law to be applied to the merits of the dispute in the case at hand.

³⁸⁹ ICC Case 9875 (n 387).

³⁹⁰ ICC Case 5904 (n 387); ICC Case 11976 (n 387); ICC Case 7110 (n 387).

³⁹¹ ICC Case 9029 (n 387).

UNIDROIT Principles invoked are part of *lex mercatoria* and widespread “interpretative and applicative trends in international commercial circles”, (ii) secondly, because parties are precluded to rely on *lex mercatoria* and shape the procedure in accordance with rules, which do not belong to the national law that has been expressly and precisely identified by the parties as the law applicable to the contractual relationship, and (iii) thirdly, because the applicable provisions in the national law, specified by the parties, are considered to come under the rules of public policy, hence their binding nature excludes the application of *lex mercatoria*. Regarding the first ground for dismissal, the arbitral tribunal clarifies that the UNIDROIT Principles are not a source of law *per se*, since they “are not part of normative sources of production, and (...) they are designed to constitute a uniform model for regulating the negotiation of contractual relations”. As to their relationship with *lex mercatoria* and international trade usages, the tribunal highlights that it is questionable to what extent the UNIDROIT Principles reflect *lex mercatoria*, as they are “only partly declaratory, being innovatory in many respects”:

(...) although the UNIDROIT Principles constitute a set of rules theoretically appropriate to prefigure the future *lex mercatoria* should international commercial practice adapt to the Principles, at present there is no necessary connection between the individual Principles and the rules of the *lex mercatoria*, so that recourse to the Principles is not purely and simply the same as recourse to an actually existing international commercial usage.³⁹²

The second ground on which the arbitrators dismiss Respondent’s claims speaks even more loudly about the narrow construction of and the rigorous approach to *lex mercatoria* in international commercial arbitration. The arbitral tribunal clearly states in its reasons that *lex mercatoria* cannot be applied and used for adapting the procedure where parties have specified explicitly a national legal system to apply to their relationship. This is the case even when the national legal system contains references to *lex mercatoria*. The arbitrators take into account that the national law chosen by the parties, i.e. the Italian law and, in particular, the relevant Art. 834 of the Code of Civil Procedure, makes reference to “international commercial usages”, however, they clarify that the latter do not take precedence over national law and

³⁹² Ibid.

they are “of strictly interpretative and integrative value, to the extent that there are gaps in national regulations that could usefully be filled by the aforesaid usages”. Thus, *lex mercatoria* is unequivocally distinguished from international commercial usages and customs on the grounds that the former is “an expression of notoriously very wide scope and interpretation, and could even be termed imprecise and debatable”.

This award suggests that arbitrators take a restrictive and rigorous approach to *lex mercatoria* and do not allow the latter to be used by the parties to substitute an explicit choice of law provision in the contract or to shape the procedure in a way which does not comply with the designated national legal system. In fact, arbitrators are concerned about the fairness of the process and strongly adhere to fundamental judicial rules that guarantee its justice. Such is, for example, the “rule that the onus (to prove that the rules invoked are part of *lex mercatoria*) is on the party that has invoked the application of the *lex mercatoria* and UNIDROIT Principles”³⁹³. Only when there is a gap in the national law and a party, relying on the usages, proves (with the necessary degree of certainty) that particular, rather than theoretical and speculative, interpretative and applicative trends are part of international commercial practices, arbitrators can apply them to the contractual relationship. Such an approach undoubtedly takes into account and favors international commercial community’s need for greater legal certainty and predictability in international business transactions, as well as its appeal for fairness and justice in the arbitration procedures.

This conclusion is further supported by the legal reasoning in another arbitral award, which concerns an agreement between parties that have not specified a choice of law provision. In Final Award in Case 9419³⁹⁴ Claimant invokes the application of *lex mercatoria* by arguing that the latter is “a kind of codification which can be found in the principles of international commercial contracts drawn up by UNIDROIT”, and that arbitrator’s power to apply *lex mercatoria* in absence of any reference to a specific national law is vested in “universally acknowledged principles of

³⁹³ Ibid.

³⁹⁴ ICC Case 9419 (n 387).

international commerce”. The sole arbitrator dismisses Claimant’s plea for application of *lex mercatoria* and even states that the latter does not exist. It has to be noted that in this award arbitrator’s reasoning is based on the provisions of Art. 13.3 ICC Rules of Conciliation and Arbitration 1988, which stipulate that in absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict, which he deems appropriate. Following the rules of conflict, the arbitrator necessarily ends up designating a specific national legal system to apply to the contractual relationship. Since the ICC Rules of Arbitration 2012 in Art. 21(1) grant the arbitrators greater adjudicative freedom to determine the applicable rules of law in the absence of any choice of law agreement between the parties, i.e. the arbitral tribunal designates the rules of law that are most appropriate not necessarily following a conflict of laws analysis, the sole arbitrator’s decision on the applicable law might have been different if the case were to be decided in view of the 2012 ICC Rules.

It is worth noticing that the sole arbitrator in this arbitration comments on the applicability of UNIDROIT Principles, conceding that they may be considered as “a kind of codification of the *lex mercatoria*”³⁹⁵. The arbitrator, however, states that the UNIDROIT Principles:

(...) cannot constitute a normative body in themselves that can be considered as an applicable supranational law to replace a national law, at least as long as the arbitrator is required to identify the applicable law by choosing the rule of conflict that he considers most appropriate, in accordance with the provisions laid down by the international conventions and as provided for in the rules of arbitration within the scope of which he operates.³⁹⁶

The above suggests that, absent a choice of law provision in the contract, when arbitrators follow the rules of conflict³⁹⁷ in order to determine the appropriate rules

³⁹⁵ Ibid.

³⁹⁶ Ibid.

³⁹⁷ Whether and to what extent arbitrators follow rules of conflict in order to designate the law/rules of law applicable to the contractual relationship is a very pertinent question when discussing the process of judicialisation in international commercial arbitration. If it is demonstrated that arbitrators do follow a conflict of law analysis that is very similar to the law-ascertaining method

of law applicable to the contract, they would always arrive at a at the designation of a specific national legal system and national law. Only in case the latter contains gaps and makes specific reference to the application of international commercial usages, the UNIDROIT Principles and *lex mercatoria* can be invoked as interpretative and applicative trends. This method of law ascertaining provides for a very limited use of *lex mercatoria*. It ultimately aims to minimise the uncertainty that the lack of choice of law creates.

The limited interpretative and applicative function of *lex mercatoria* is demonstrated in another case where the parties have not specified a choice of law provision³⁹⁸. The

of national courts, this could be taken as an implication of the judicialisation process. Since this issue concerns the application of the sources of law in international commercial arbitration, this question will be considered in Chapter 5, which focuses on the mechanics of arbitral decision-making. For the sake of the analysis here, however, it is worth pointing out that absent choice of law clauses arbitrators can ascertain the law either by determining a conflict of law system, which will point to the applicable national law, or by application of substantive rules of law without having recourse to any conflict of laws system. With that respect arbitrators can enjoy greater freedom than national courts because, on the one hand, they can determine the applicable rules of law without reference to the rules of conflict (see ICC Case 2172, Doc. No. 410/2384 (1974) where the arbitrator did not apply any conflicts rule but based their decision on a substantive position common to German and Swiss law: “it is necessary to underline from the outset that the question of the law applicable is only of interest if there exists between the systems of law to which the parties are submitted a true conflict of laws. As German and Swiss laws impose similar solutions in matters of the law of obligations and of commercial law, one may thus, as a general rule abandon the research for the applicable law.”), and on the other hand, they do not have an automatically applicable set of conflict of laws rules to apply (see Filip de Ly, ‘Conflicts of Law in International Arbitration - An Overview’ in Franco Ferrari and Stefan Kröll (eds), *Conflict of Laws in International Arbitration* (Sellier European Law Publishers 2011) 3 maintaining that “[t]he difficulties and complexities of the topic of private international law in international commercial arbitration (...) stem from the fact that arbitrators in international commercial cases are not only facing a conflict of laws question (which law applies) but also a conflict of conflicts of law question (which system of private international law applies.”) Once, arbitrators choose to apply a conflict of law system, however, their law-ascertaining method resemble the one of national courts. The arbitrators’ mandate with respect to choosing the applicable substantive law is viewed as a two-part responsibility by Gary Born (Born, *International Commercial Arbitration* (n 131) 2620): “First, the arbitral tribunal must select a conflict of laws rule, from among various possible conflicts systems, to be applied to choose the applicable law. This task arises because the arbitral tribunal differs from a national court, among other things, because it does not necessarily have an automatically-applicable set of conflict of laws rules to apply – as a national court does. Second, after selecting a conflict of laws rule, the arbitrators must then apply that rule to the parties’ dispute and determine what substantive law the relevant conflicts rules select. At this stage of its mandate, the arbitral tribunal’s task is similar to that of a national court, applying a conflict of laws rule to particular facts and issues, in order to select an applicable system of law.”

³⁹⁸ ICC Case 9875 (n 387).

case concerns several licensing agreements granting exclusive distribution to one of the parties. It is plead by the parties that either French or Japanese law should apply to the dispute at hand. The arbitral tribunal disagrees and states that the difficulties to find decisive factors qualifying one or the other national law as applicable to the contract reveal the inadequacy of the choice of a domestic legal system to govern this case. According to the arbitrators:

[t]he most appropriate ‘rules of law’ to be applied to the merits of this case are those of the *lex mercatoria*, that is the rules of law and usages of international trade which have been gradually elaborated by different sources such as the operators of international trade themselves, their associations, the decisions of international arbitral tribunals and some institutions like UNIDROIT and its recently published Principles of International Commercial Contracts.³⁹⁹

While in the Partial Award the arbitral tribunal designates *lex mercatoria* as the applicable rules of law, in the Final Award the arbitrators ascertain its content. It is found that the principles to be applied in the case at hand are consideration/reference to the intention of the parties and parties’ conduct, as well as the principle of good faith, which is construed as parties’ obligation to abide by the contractual terms⁴⁰⁰. The principles so ascertained are of such universal and general nature that they could be considered common for all civilised legal systems. In fact, what the arbitral ultimately do to reach a decision is careful consideration of the facts of the case, including contractual stipulations between the parties and parties’ conduct. It is difficult to see how the designation of *lex mercatoria* as applicable rules of law to the dispute has helped the arbitral tribunal in their decision-making. According to Art. 17(2) ICC Rules of Arbitration 1998 the arbitral tribunal shall take account of the provisions of the contract and the relevant trade usages in all cases. This is indeed what the tribunal in ICC Case 9875⁴⁰¹ has done and the reference to *lex mercatoria* does not seem to contribute much more with regard to the legal reasoning

³⁹⁹ Ibid.

⁴⁰⁰ Ibid. In particular, the arbitral tribunal says that “[i]t would be contrary to (...) (the principle of good faith and fair dealing in international trade) to do indirectly what the contract prevents from doing directly.”

⁴⁰¹ ICC Case 9875 (n 387).

applied. *Lex mercatoria* is narrowly construed as being identical to trade customs and usages.

Another award further demonstrate the limited interpretative and applicative function of *lex mercatoria*. In ICC Case 11976⁴⁰² the parties have specifically designated Brazilian law to govern their contractual relationship. The sole arbitrator nevertheless rules that reference to *lex mercatoria* is allowed because Art. 17(2) ICC Rules of Arbitration compels arbitrators to take into account the trade usages and the contractual stipulations. Once again *lex mercatoria* is narrowly construed as being equivalent to trade usages. The result is careful consideration of parties' knowledge or ignorance of certain facts, their experience and competences, in order to adequately construe the contract in compliance with the common intention of the parties. This interpretative technique can be considered as common for both arbitrators and courts, and the designation of *lex mercatoria* as supplementary rules of law does not really make any difference as to the legal reasoning applied.

A further reference to an arbitral award⁴⁰³ in the ICC Dispute Resolution Library can be used as an illustration of the insufficiency of *lex mercatoria* and its impotence to govern all issues arising out of international trade contracts without any referral to a national legal system. In ICC Case 5904⁴⁰⁴ the parties have explicitly selected general principles and normal usages of international trade to govern their contract. The arbitral tribunal, however, rules that *lex mercatoria* does not prove advantageous in filling some of the gaps in parties' agreement. Instead of trying to ascertain the *lex mercatoria* in an attempt to fill the void, the arbitrators directly apply standards of commercial reasonableness and relevance in order to determine the national legal system most closely connected to the contract.

Finally, the two approaches to *lex mercatoria* are starkly demonstrated in Partial Awards in Case 7110 (Extracts)⁴⁰⁵, where, absent explicit choice of law provisions, one of the issues to be determined by the arbitral tribunal is the question of

⁴⁰² ICC Case 11976 (n 387).

⁴⁰³ ICC Case 5904 (n 387).

⁴⁰⁴ Ibid.

⁴⁰⁵ ICC Case 7110 (n 387).

governing law. The case concerns a long-term contractual relationship between two parties resulting in a number of contracts covering the sale, supply, modification, maintenance and operation of equipment, and support services relating thereto. Claimant argues for the application of either (i) general principles of private international law or (ii) [the] private international law [of State X], while Respondent contends instead that “the proper law of the Contracts is English law or, alternatively, that the tribunal should apply general principles of law”⁴⁰⁶.

On the ground that six out of nine of the contracts contain the expressions “natural justice”, “rules of natural justice” or “laws of natural justice” in association with the resolution of disputes through commercial arbitration, the majority of the arbitral tribunal concludes that parties did not want to have recourse to “legal notions of one of the national juristic systems the application of which is at stake”⁴⁰⁷, and rules that the meaning and the scope of the expression “natural justice” should be ascertained from the autonomous perspective of both private international law and international commercial arbitration. As such it is held that:

[b]eing international and commercial state contracts, reference in the Contracts to natural justice or the like, together with the absence of reference to any national law, can then be only reasonably construed as pointing to the application of such substantive legal rules and principles adapted to the Contracts and the facts and circumstances surrounding them, which, by not belonging to any discrete national legal system, satisfy the parties’ concerns as to the neutrality of the applicable proper law. Substantive rules and principles fulfilling such requirements may only be general legal rules and principles regarding international contractual obligations and enjoying wide international consensus.⁴⁰⁸

The majority of the arbitral tribunal further decides that *lex mercatoria*, or the “general legal rules and principles enjoying wide international consensus, applicable to international contractual obligations”, is reflected by the UNIDROIT Principles⁴⁰⁹.

⁴⁰⁶ Ibid.

⁴⁰⁷ Ibid.

⁴⁰⁸ Ibid.

⁴⁰⁹ It is interesting to note that the majority of the arbitrators consider the UNIDROIT Principles to be the central component of the general rules and principles regarding international contractual

It is also suggested that parties' concerns about the enforceability of an award based on general legal rules and principles applicable to international obligations, should be dispelled since learned opinions indicate that an award based on *lex mercatoria* is enforceable, "particularly when the award has not been rendered in England or is not subject to English law and the laws of the national jurisdiction in which the award is made do not render invalid an award made on such terms"⁴¹⁰. This statement, however, suggests that national courts could have a rather rigorous and formalistic approach to arbitral awards based on *lex mercatoria* on account of the vagueness and lack of precision of the principle on which the award is rendered.

The reasoning of the majority of the arbitrators demonstrate the flexible approach to *lex mercatoria* as a source of law in international commercial arbitration and its capability to govern international trade contracts. In contrast, the opinion of the dissenting arbitrator evidences a disposition to a more formalistic approach. According to the dissenting arbitrator a lack of explicit choice of law does not necessarily indicate the unwillingness of the parties to abide by the law of a national legal system when a dispute needs to be formally resolved. Following this line of reasoning, it should be construed, in the opinion of the dissenting arbitrator, that parties have not explicitly contracted out of the application of accepted legal rules

obligations, and to enjoy wide international consensus, for several reasons, namely: (1) the UNIDROIT Principles are a restatement of international legal principles applicable to international commercial contracts made by a distinguished group of international experts coming from all prevailing legal systems of the world, without the intervention of states or governments, both circumstances redounding to the high quality and neutrality of the product and its ability to reflect the present stage of consensus on international legal rules and principles governing international contractual obligations in the world, primarily on the basis of their fairness and appropriateness for international commercial transactions falling within their purview; (2) at the same time, the UNIDROIT Principles are largely inspired [by] an international uniform-law text already enjoying wide international recognition and generally considered as reflecting international trade usages and practices in the field of the international sales of goods, which has already been ratified by almost 40 countries, namely, the 1980 Vienna Convention on the International Sale of Goods; (3) the UNIDROIT Principles are specially adapted to the Contracts being the subject of this arbitration, since they cover both the international sale of goods and supply of services; (4) the UNIDROIT Principles (see their Preamble) have been specifically conceived to apply to international contracts in instances in which, as it is the case in these proceedings, it has been found that the parties have agreed that their transactions shall be governed by general legal rules and principles; and (5) rather than vague principles or general guidelines, the UNIDROIT Principles are mostly constituted by clearly enunciated and specific rules coherently organised in a systematic way. ICC Case 7110 (n 387).

⁴¹⁰ Ibid.

for determination of the applicable law, such as the rules of conflict of laws. Contrary to what is held by the tribunal, the dissenting arbitrator states that the reference to “natural justice” simply indicates:

only a desire on the part of the framers of those Contracts to stress that all arbitral procedures adopted, and all steps taken by the arbitral tribunal or any of its members, must be consistent with the rules of natural justice – understandable enough, since otherwise there is a real risk that any award would be vulnerable to attack in many countries as being unenforceable, in the same way as would a foreign judgement arrived at after a similarly defective process.⁴¹¹

It is further contended that the lack of any reference to “general principles of law” or “UNIDROIT Principles” should be interpreted as nothing more than a lack of explicit choice of law provision. According to the dissenting arbitrator this triggers the second sentence of Art. 13(3) of the then-applicable ICC Rules of Arbitration 1988, namely the reference to rules of conflict, which in turn designates the proper law to the contracts. This reasoning of the dissenting arbitrator seems to be in line with the majority of arbitral awards rendered under the ICC Rules of Arbitration 1988 and in particular Art. 13(3).

Given the foregoing it could be concluded that the process of judicialisation can be traced in both parties’ and arbitrators’ approach to *lex mercatoria* and general principles of law as sources of international commercial arbitration. Although the existence of the New Law Merchant is no longer largely disputed and the debates on *lex mercatoria* has re-focused on its content and ascertaining, the application of *lex mercatoria* in the arbitral awards demonstrates the limitations of its interpretative and applicative functions.

On the one hand, *lex mercatoria* and general principles of law are rarely the express choice of law stipulated in the contract. In fact, the analysis of the ICC statistical reports demonstrates that there is a declining tendency for designating a-national law to govern parties’ contract. On the other hand, the available arbitral awards indicate that arbitrators do not readily resort to *lex mercatoria* and general principles of law;

⁴¹¹ Ibid.

and when they do the applied rules of law are of such universal character that it renders *lex mercatoria* very similar to customary rules of law.

Moreover, except when parties have explicitly stipulated *lex mercatoria* as the governing law, arbitral tribunals apply a rigorous approach in the determination of the applicable law often resorting to the conflict of laws rules. In the handful of cases where the applicability of *lex mercatoria* is considered, arbitrators either dismiss the claims for application of *lex mercatoria*, or construe the *lex mercatoria* narrowly, or even misconstrue it. Regardless of whether *lex mercatoria* governs a contract, arbitral tribunals strive to ascertain with certainty parties' intentions and have regard to the facts of the cases and parties' conduct. Indeed, arbitrators base their decisions on careful consideration of the contractual stipulations and invoke the applicable law only to fill the gaps thereto:

(arbitrators) prefer to rely on a direct assessment of the facts and circumstances of each instance in order to determine the actual or supposed intention of the parties to be bound by the arbitration clause, or to sanction behaviour considered abusive. Such an approach is certainly explained by the essentially factual nature of the issue ... It ... depends above all on a precise analysis of the facts of each case, which makes the question of deciding on the applicable law less essential.⁴¹²

Such an approach leaves limited room for the application of *lex mercatoria*, which often even proves to be unsuitable when specific issues are concerned, e.g. interest.

Conclusion

It follows from the above that the prevailing approach to the sources of law in international commercial arbitration is a legalistic, judicialised one. The strict adherence to judicial precedents, the incipient arbitral jurisprudence and the diminishing use of *lex mercatoria* foster the process of judicialisation. While there is

⁴¹² Statement of Claimant's expert in ICC Case 14208/14236 (n 233). This conclusion is reaffirmed in another ICC Case 517, award rendered in 2000 in (2005) 16(2) 'ICC International Court of Arbitration Bulletin' 80, esp. 81.

merit in suggesting that by following national court decisions arbitrators uphold the rule of law and contribute to the stability of the legal systems and the certainty in parties' commercial dealings, there are also strong arguments in favour of a more flexible and autonomous approach, particularly with regard to arbitral awards and *lex mercatoria*. When rendering a decision arbitrators should be governed by the particularities of the case at hand and should not be tempted to step into the lawmaker's shoes and attempt to advance matters of policy, which do not necessarily apply or are suitable in international commercial arbitration settings.

This is not to say that considerations of legal certainty and predictability are not relevant in international commercial arbitration but that arbitrators should carefully balance between competing interests, i.e. certainty and flexibility, predictability and efficiency, etc. It is worth considering, for example, whether the need for certainty and predictability with regard to the rules of law applicable in the arbitral process is similar to the one concerning the rules of law applicable to the merits of the dispute. While, it may be appropriate to assign a quasi-*stare decisis* effect to awards or interim awards dealing with procedural issues in order to ensure that institutional arbitration rules will be applied in a consistent manner, it is strongly suggested that arbitrators should maintain the flexibility of their decision-making when it comes to the substantive issues of the dispute.

Finally, it is also argued that arbitrators should distinguish between cases where parties have indicated the law governing the contract and those in which they have not. This is because the arbitrator's approach should be tailored to the specifics of the dispute before them and parties' expectations. Thus, for example, in absence of a choice of law provision and in light of the particular facts of the case, arbitrators are encouraged to avoid the rigidity of the conflict of law rules and search for a flexible solution. By doing so arbitrators interpret and apply the sources of law less like judges and more like professionals within the industries.

CHAPTER 4 FACTORS DRIVING THE PROCESS OF JUDICIALISATION IN INTERNATIONAL ARBITRATION PROCEEDINGS

Objectives

The analysis in this chapter focuses on the most significant factors driving the judicialisation of international arbitral process, namely the pursuit of fair and just arbitral process, increasing regulation of arbitration proceedings and proliferation of litigation-style practices. The objective is to evaluate the level of judicialisation that has been achieved in international arbitration proceedings and examine whether internal or external to the arbitral process forces are fostering the changes. These findings will shed light on the impact of the judicialisation process on arbitration users and provide the informative basis for a discussion as to whether the effects of the judicialisation process can be controlled.

Although it can be successfully argued that the commercialisation of international commercial arbitration also serves as an impetus for the judicialisation process, the correlation between these developments will not be examined here. For the purposes of this chapter it is considered sufficient to point out that with the success of international commercial arbitration came expectations for greater predictability and consistency in arbitral decision making, certainty of what the arbitral process entails, including the costs associated with it, and raising demands for transparency⁴¹³. While the impact of parties' expectations on the mechanics of arbitral decision making is analysed in Chapter 5, the changes that the commercialisation of international commercial arbitration brings and the correlation between the processes of

⁴¹³ See e.g. Catherine A. Rogers, 'Transparency in International Commercial Arbitration' (2006) 54 University of Kansas Law Review 1301–1338; Anibal Sabater, 'Towards Transparency in Arbitration (A Cautious Approach)' (2010) 5 Berkeley J. Int'l L. Publicist 47–53; R. Doak Bishop and Margrete Stevens, 'The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy' in A. J. van den Berg (ed), *Arbitration Advocacy in Changing Times, ICCA Congress Series No. 15* (1st edn, Kluwer Law International 2011); Malatesta and Sali (n 238); Elina Zlatanska, 'To Publish, or Not to Publish Arbitral Awards: That is the Question' (2015) 81 The International Journal of Arbitration, Mediation and Dispute Management 25–37.

commercialisation and judicialisation are areas outside the scope of this thesis and require further research.

Another topic that is not discussed in detail in this chapter but is linked to the changes observed in international commercial arbitration proceedings is costs. While it is tempting to think of the rising costs of international commercial arbitration as a factor driving the process of judicialisation⁴¹⁴, the increased costs associated with international arbitration proceedings are, in fact, an implication of the judicialisation process. High costs can often be the result of cumbersome, inefficient and legalised arbitration proceedings. In order to understand what drives up the costs of the arbitral process, it is considered important to examine the underlying developments and practices that foster the process of judicialisation in international commercial arbitration proceedings. This approach will help achieving the objectives of this chapter, namely to inform the arbitration users of the consequences of judicialised arbitration and suggest ways of curbing the negative effects of the process of judicialisation.

4.1 The Pursuit of Fair and Just Process

Privatisation of civil justice⁴¹⁵ by delegating adjudicative function to international arbitral tribunals is both encouraging and challenging. International commercial arbitration is seen as a viable alternative to the public civil justice system⁴¹⁶, particularly in countries where the courts are slow, cumbersome or even corrupted. It provides flexible solutions to the business community and almost universal

⁴¹⁴ See e.g. Lynch (n 23) 20: “There is an increasing concern over the ‘judicialization’ of international commercial arbitration, however, referring to a system which is increasingly legalistic and formal with associated delays and increased costs.”

⁴¹⁵ See Peter L. Murray, ‘Privatization of Civil Justice’ (2007) 12 *Willamette J. Int’l L. & Dis. Res.* 133–154

⁴¹⁶ According to Prof Brekoulakis international arbitration not only stands as an alternative to public civil justice system but the remarkable rise of the former “has challenged the traditional concept of public justice” as such. See in Stavros Brekoulakis, ‘Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making’ (2013) 4 *Journal of International Dispute Settlement* 553–585, 554.

enforceability of arbitral awards. “The commercial way to justice”⁴¹⁷, however, poses challenges and inherent controversies, since justice is being rendered by “somebody who has no intrinsic authority, being neither a Judge nor any officer of the State”⁴¹⁸. The consequences of this “anomaly”, e.g. disputes are decided by arbitrators without any qualification, arbitrators do not have any (contractual) relationship with counsel or any disciplinary power over them, arbitral awards do not have any precedential value, etc., are gradually being remedied by the process of judicialisation. International commercial arbitration has evolved from a lawless alternative dispute resolution method⁴¹⁹ and potentially abuse-ridden process to a transnational system of justice⁴²⁰ constituting an integral part of the system of global governance⁴²¹, which not only facilitates the resolution of trade disputes but also fosters economic development⁴²² and enforces the rule of law⁴²³.

The pursuit of fairness and justice by upholding the principles of due process and fair treatment of the parties is one of the perennial problems of international commercial arbitration. Due to the increasing privatisation of civil justice, as well as the rise in the size and complexity of cases brought to arbitration, international commercial arbitration is no longer concerned only with the “mere” resolution of disputes⁴²⁴. Emphasis has been placed on the way disputes are resolved⁴²⁵. In the

⁴¹⁷ See Hartwell (n 371).

⁴¹⁸ Ibid 230.

⁴¹⁹ See Drahozal, ‘Is Arbitration Lawless?’ (n 136); Ilhyung Lee, ‘Introducing International Commercial Arbitration and Its Lawlessness, by Way of the Dissenting Opinion’ (2011) 4 *Contemp Asia Arb J* 19–35; Carbonneau, *Carbonneau on International Arbitration* (n 366) 233; McConaughay, ‘The Risks and Virtues of Lawlessness’ Arbitration’ (n 134); Kenneth S. Abraham and J. W. Montgomery, ‘The Lawlessness of Arbitration’ (2003) 9 *Conn. Ins. L. J.* 355.

⁴²⁰ See Gaillard, ‘The Present – Commercial Arbitration as a Transnational System of Justice’ (n 191); Dezalay and Garth, *Dealing in Virtue* (n 23).

⁴²¹ See Walter Mattli and Thomas Dietz, *International Arbitration and Global Governance: Contending Theories and Evidence* (1st edn, OUP 2014); Cutler (n 113).

⁴²² See Philip J. McConaughay, ‘The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles’ (2013) 1 *PKU Transnational Law Review* 9–31.

⁴²³ See Lord Neuberger, ‘Lord Neuberger - Arbitration and the Rule of Law’, 20 March 2015, available at: <<https://www.supremecourt.uk/docs/speech-150320.pdf>>; David W. Rivkin, ‘The Impact of International Arbitration on the Rule of Law: The 2012 Clayton Utz/University of Sydney International Arbitration Lecture’ (2013) 29 *Arbitration International* 327–360.

⁴²⁴ In Pierre Lalive, ‘Arbitration – The Civilised Solution’ (1998) 16 *ASA Bulletin* 483–497 arbitration is described as “an old and peaceful method of settling commercial disputes (...) by

words of Susan Franck there is a paradigm shift from a dispute resolution method which is informal, fast and equitable to one that is legitimate in the eyes of both the parties and the state and guarantees equal access to justices by cherishing due process and neutrality⁴²⁶:

Historically, arbitral awards were not revered so much for their legal analysis, but more for their sense of fairness and industry knowledge. But with the proliferation of alternative dispute resolution, or ADR, mechanisms, international business has become more sophisticated resolution of disputes. Arbitrators are no longer prized for their capacity to reach compromise outcomes, particularly where other ADR mechanisms, such as mediation and negotiation, can achieve this objective more effectively. Today, businesses use international arbitration to provide a neutral, adjudicative dispute resolution process where arbitrators independently apply the law to facts, and this in turn promotes the legitimacy of international arbitration. (...) [C]urrent literature suggests that arbitrators' urge to render neutral and impartial decisions reflects the "judicialization" of arbitration (...).⁴²⁷

Traditionally the application of due process in national legal systems is divided into two categories, namely a) substantive due process, and b) procedural due process, on account of the distinction made between the two types of law⁴²⁸. The substantive law creates, defines and regulates rights, whereas the procedural law governs the exertion of rights or the enforcement of substantive law generally speaking. In international commercial arbitration, however, the emphasis is placed on procedural due process

resorting to the binding decision of a third person chosen by the parties themselves – instead of going to the State courts”.

⁴²⁵ See Richard W. Naimark and Stephanie E. Keer, 'International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People' (2002) 30 Int'l Bus Law 203–209. The survey conducted by Richard W. Naimark and Stephanie E. Keer on the perceptions and expectations of attorneys and their clients in international commercial arbitration reveal that the overwhelming majority of the participants rank 'a fair and just result' of arbitration as the most important aspect of international commercial arbitration (90% for respondents, 75% for claimants, and 81% combined).

⁴²⁶ See also Rogers, 'Fit and Function in Legal Ethics' (n 64); Catherine A. Rogers, 'Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct' (2005) 41 Stan. J. Int'l L. 53–121, 66.

⁴²⁷ Susan D. Franck, 'The Role of International Arbitrators' (2006) 12 ILSA J. Int'l & Comp. L. 504, 507.

⁴²⁸ Fabrizio Fortese and Lotta Hemmi, 'Procedural Fairness and Efficiency in International Arbitration' (2015) 3 Groningen Journal of International Law 110–124, 111.

because of the lack of recourse against arbitral awards on account of error of law. With the exception of some jurisdictions⁴²⁹, most national laws do not allow review of arbitral awards to correct errors of law⁴³⁰. Thus, in international commercial arbitration procedural due process serves two functions – it not only manifests the fairness of the proceedings, but also becomes a measurement of the correctness of the award and ultimately the legitimacy of the whole arbitral process⁴³¹.

The significance of due process to international arbitration is demonstrated by the inclusion of provisions in the 1958 NYC to safeguard the arbitration proceedings. In particular an award may be refused recognition and enforcement on account of inability of a party to present their case⁴³², as well as because of violation of the arbitral procedure by conducting the latter not in accordance with the agreement of the parties or not in accordance with the law of the country where the arbitration took place⁴³³. Art. IX ECICA and Art. 36 UNCITRAL ML⁴³⁴ are almost a verbatim adoption of Article V of the NYC, thus reiterating the importance of due process in international commercial arbitration. In addition to those general provisions the UNCITRAL Arbitration Rule 1976⁴³⁵ (now substituted by the UNCITRAL

⁴²⁹ See e.g. English Arbitration Act 1996, s 69.

⁴³⁰ See e.g. a recent decision by the Singapore High Court in the case of *Quarella SpA v Scelta Marble Australia Pty Ltd* [2012] SGHC 166, in which the Court has once again dismissed an attempt to set aside an arbitral award on the purported basis that the arbitrator had wrongly interpreted the choice of law clause, which parties had chosen to govern the distributorship agreement.

⁴³¹ According to Yves Dezalay and Bryant Garth, ‘Fussing about the Forum: Categories and Definitions as Stakes in a Professional Competition’ (1996) 21 Law & Social Inquiry 285–312, 285, 299 cited in Christopher R. Drahozal, ‘Commercial Norms, Commercial Codes, and International Commercial Arbitration’ (2000) 33 Vand. J. Transnat’l L. 79–146, 96: “The legitimacy of international commercial arbitration is no longer built on the fact that arbitration is informal and close to the needs of business; rather legitimacy now comes more from a recognition that arbitration is formal and close to the kind of resolution that would be produced through litigation – more precisely, through the negotiation that takes place in the context of U.S.-style litigation”.

⁴³² NYC, Art. V(1)(b).

⁴³³ NYC, Art. V(1)(c); see also Maxi Scherer, ‘New York Convention: Violation of Due Process, Article V(1)(b)’, 2013.

⁴³⁴ See also UNCITRAL ML, Art. 18 Equal Treatment of Parties, which emphasises the significance of fair process “The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case”.

⁴³⁵ See for example UNCITRAL Arbitration Rules 1976, Art. 15(1): “Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided

Arbitration Rules 2010), ICC Rules of Arbitration and Conciliation 1988 (now substituted by the ICC Arbitration Rules 2012)⁴³⁶, LCIA Arbitration Rules 1998⁴³⁷ (now substituted by the LCIA Arbitration Rules 2014), and the rules of other arbitration institutions⁴³⁸ have contributed to the development of a legal framework

that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case”.

⁴³⁶ ICC Rules of Arbitration and Conciliation, Art. 11 does not contain provisions that build on the protection of arbitral process; instead it they make reference to the municipal procedural law that may be applied by the arbitrators. In contrast ICC Rules of Arbitration, Art. 22 reads “1) The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute. 2) In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties. 3) Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information. 4) In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case. 5) The parties undertake to comply with any order made by the arbitral tribunal.”

⁴³⁷ See LCIA Arbitration Rules 1998, Art. 14.1(i) “The parties may agree on the conduct of their arbitral proceedings and they are encouraged to do so, consistent with the Arbitral Tribunal’s general duties at all times: (i) to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent.” Art. 14.2. “Unless otherwise agreed by the parties under Article 14.1, the Arbitral Tribunal shall have the widest discretion to discharge its duties allowed under such law(s) or rules of law as the Arbitral Tribunal may determine to be applicable; and at all times the parties shall do everything necessary for the fair, efficient and expeditious conduct of the arbitration.”

⁴³⁸ See for example CAMCA Arbitration Rules 1996, Art. 17: “1. Subject to these rules, the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case. 2. Documents or information supplied to the tribunal by one party shall at the same time be communicated by that party to the other party or parties.” In contrast to the simplicity of the earlier provisions safeguarding the arbitral process, the provisions of some most current arbitration rules strike with their comprehensiveness and profoundness, e.g. ICDR International Dispute Resolution Procedures (Including Mediation and Arbitration Rules) 2014, Art. 20 Conduct of Proceedings: “1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case. 2. The tribunal shall conduct the proceedings with a view to expediting the resolution of the dispute. The tribunal may, promptly after being constituted, conduct a preparatory conference with the parties for the purpose of organizing, scheduling, and agreeing to procedures, including the setting of deadlines for any submissions by the parties. In establishing procedures for the case, the tribunal and the parties may consider how technology, including electronic communications, could be used to increase the efficiency and economy of the proceedings. 3. The tribunal may decide preliminary issues, bifurcate proceedings, direct the order of proof, exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations on issues whose resolution could dispose of all or part of the case. 4. At any time during the proceedings, the tribunal may order the parties to produce documents, exhibits, or other evidence it deems necessary or appropriate. Unless the parties

safeguarding the arbitration proceedings. This legal framework of international conventions and institutional arbitration rules is complemented by general notes, guidelines and recommendations aimed at assisting parties, counsel and arbitrators in resolving trade disputes in compliance with the principle of due process.

The principle of due process is governed by a complex system of sources of law applicable in and to arbitration⁴³⁹ that shapes the notions of fairness, justice and equal treatment in international commercial arbitration. It comprises (i) the *lex arbitri*, namely the international conventions, national laws and case law, where applicable⁴⁴⁰, that contain the procedural safeguards or the quality standards of due process⁴⁴¹; (ii) arbitral procedural law⁴⁴²; (iii) institutional arbitration rules or rules

agree otherwise in writing, the tribunal shall apply Article 21. 5. Documents or information submitted to the tribunal by one party shall at the same time be transmitted by that party to all parties and, unless instructed otherwise by the Administrator, to the Administrator. 6. The tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence. 7. The parties shall make every effort to avoid unnecessary delay and expense in the arbitration. The arbitral tribunal may allocate costs, draw adverse inferences, and take such additional steps as are necessary to protect the efficiency and integrity of the arbitration.”

⁴³⁹ For the difference between the law applicable to arbitration and the law applicable in arbitration see Paulsson, ‘Arbitration in Three Dimensions’ (n 61); Alastair Henderson, ‘Lex Arbitri, Procedural Law and the Seat of Arbitration: Unravelling the Laws of the Arbitration Process’ (2014) 26 Singapore Academy of Law Journal 886–910.

⁴⁴⁰ For the relevance of national court decisions as a source of law in international commercial arbitration see Sections 2.1 and 2.2.

⁴⁴¹ See Simon Greenberg, Christopher Kee, and J. Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (1st edn, Cambridge University Press 2010) 58, para 2.14 “The *lex arbitri* legitimises and provides a general legal framework for international arbitration. The relevant law itself might be found in an independent statute on international arbitration or it might be a chapter in another law, such as a civil procedure code or a law also governing domestic arbitration. However, the *lex arbitri* of a given jurisdiction can also include other statutes and codes (even those not specifically dealing with arbitration), and case law which relates to the basic legal framework of international arbitrations seated there.”

⁴⁴² It has been argued that arbitral procedural law is not necessarily the *lex arbitri* governing the arbitration. See *ibid* 59, para 2.16: “The procedural law sets out the parameters of the procedure and support for international arbitration. It provides, for example, mandatory rules about how arbitration can be conducted. These include rules requiring equal treatment, due process and the independence of arbitrators.” *Ibid* 60, para 2.18, 2.19, 2.20, 2.21: “The arbitral procedural law and the *lex arbitri* are rarely separated. For this reason, many people do not distinguish between *lex arbitri* and procedural law, or alternatively use the terms as synonyms. While this approach is understandable, it is nevertheless problematic and better avoided. (...) The potential for confusion and need for a clear distinction arise from the fact that arbitrating parties in some jurisdictions may select an arbitral procedural law that is different from the *lex arbitri*. This means that the parties may seat their arbitration in one jurisdiction and choose the procedural law of a different jurisdiction. (...) There is English authority on point that may be instructive, at

applicable in *ad hoc* arbitration; (iv) arbitration agreements, which according to the principle of party autonomy may be used by contracting parties to tailor the arbitral process; (v) other rules of law, guidelines, recommendations or general principles of fairness and due process; and above all (vi) parties' stipulations to the extent they do not violate mandatory rules of law. The abovementioned sources of law form an elaborate legal framework that not only safeguards the arbitral process and upholds the principles of due process and fair treatment of the parties, but also suggests an emerging hierarchy of norms in international commercial arbitration⁴⁴³. In this developing system of legal rules and social norms⁴⁴⁴, mandatory rules of law and rules of transnational public policy, such as natural justice and due process, occupy the highest level of the hierarchy of norms.

The growing number of sources of law in international commercial arbitration, the increasing regulation of arbitration proceedings and the quest for due process can be seen as implications of the process of judicialisation. Some authors perceive these new developments as detrimental to some of the intrinsic features of arbitration, such as the informality and flexibility of the arbitral process and the broad discretion of

least for common law jurisdictions. Lord Justice Kerr clearly recognised in *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep. 116, at p. 120 (English Court of Appeal) that "there is equally no reason in theory which precludes parties to agree that an arbitration shall be held at a place or in country X but subject to the procedural laws of Y". In *Union of India v McDonnell Douglas Corporation* [1993] 2 Lloyd's Rep 48 the Queen's Bench Division of the Commercial Court was asked to determine the *lex arbitri* where the arbitration clause selected London as the seat of arbitration but expressly identified the Indian Arbitration Act 1940 as applicable. Justice Saville noted that the English law admitted the theoretical possibility of parties choosing the procedural law notwithstanding a contradictory choice of seat. (...) Justice Saville ultimately concluded that choosing a foreign procedural law could not have been the parties' intentions. Also Blackaby, Partasides, Redfern, and Hunter (n 24) 183, para 3.60 "It is true, of course, that the *lex arbitri* may deal with procedural matters – such as the constitution of an arbitral tribunal where there is no relevant contractual provision – but (...) the *lex arbitri* is much more than a purely procedural law."

⁴⁴³ See Renner, 'Towards a Hierarchy of Norms in Transnational Law?' (n 62). The emerging hierarchical system of the norms in international commercial arbitration give rise to a new model of arbitral governance, different from the contractual and judicial models, namely the constitutional mode. As explained in Sweet, 'The Evolution of International Arbitration (n 36): "The constitutional model supplements the judicial model, embedding the arbitral legal order within an overarching legal framework that includes general principles of law, international economic law, and human rights, including property rights and guarantees of due process."

⁴⁴⁴ See Karton, 'Norms Arising from the Values Shared by International Commercial Arbitrators' (n 138).

the arbitral tribunal to seek a fair rather than legalistic outcome to the dispute⁴⁴⁵. They go to argue that these new trends threaten the mere existence of arbitration as a dispute resolution method:

Changes to the international arbitration environment over recent decades (...) have led to the increasing judicialisation of international arbitration: judicial procedures, judicial style regulation and judicial behavioural norms have all been adopted, and even judicial structures, such as a supervisory division, are being contemplated. As a result, the simple and idealistic understanding of international arbitration has become increasingly less accurate. If this continues to occur, the risk is that a highly effective and successful dispute resolution mechanism will be lost to the international business community. (...) The judicialisation of international arbitration must cease and, indeed, a process of de-judicialisation should be carried out.⁴⁴⁶

Others are much more optimistic suggesting that “[i]t is possible that the pursuit of fairness and justice, with its increasing desirability, will guarantee continued viability of the process without interfering with the practical feasibility of arbitration.”⁴⁴⁷

⁴⁴⁵ These new developments are sometimes referred to as “formalisation” or “legalisation” of international commercial arbitration (see for example Phillips (n 23)); Helmer (n 1); Catherine A. Rogers, *Ethics in International Arbitration* (1st edn, OUP 2014) 29, 30, paras 1.36, 1.37). The “formalisation” of international commercial arbitration is seen by the author of this thesis as one of the implications of the process of judicialisation rather than as a separate and distinguished trend. This is because the judicialisation process encompasses developments associated with the formalisation of international commercial arbitration but also can explain other trends, such as the increased transparency (regarding arbitrators’ appointments, disclosure and decision-making), the development of arbitral precedents, the declining use of *amiable compositeur* and *lex mercatoria*, and the proliferation of adversarial approach to international commercial arbitration. The formalisation can be observed at both procedural and substantive level. At a procedural level, this trend is associated with the development of rules that govern and standardise issues related to arbitrators’ disclosure, taking and evaluation of evidence, rendering arbitral decisions with reasons, etc. At a substantive level, formalisation is linked to declining use of *amiable compositeur* and *lex mercatoria*. Since the presence of choice of law clauses in the arbitration agreements requires application of national law, the scope for employment of equitable principles is limited. The result is increased predictability and certainty as to the outcome of the dispute as, on one hand, the application of law that is not well developed or not codified is avoided, and, on the other hand, arbitrators are not granted the power to reconcile the legal rules with what is considered fair and equitable but simply authorised to apply the law.

⁴⁴⁶ Horvath (n 23) 270.

⁴⁴⁷ Japaridze (n 371) 1416.

Despite the potential loss of some core characteristics of international commercial arbitration, the expanding regulation and the globalisation of the arbitral process⁴⁴⁸ are instrumental in the development of international arbitration and its transformation into a “transnational system of justice”⁴⁴⁹. The globalisation of the arbitral process results in a “growing consensus among national legal systems about general principles of arbitration procedure”⁴⁵⁰, which safeguard due process and equal treatment of the parties. As Gabrielle Kaufmann-Kohler points out, the implications of the globalisation process are somewhat paradoxical. On the one hand, the UNCITRAL ML has contributed to the harmonisation of national arbitration laws⁴⁵¹ – with a great majority of states having adopted the territoriality principle under the UNCITRAL ML with some or no adjustments. On the other hand, even though it is now commonly accepted that an international commercial arbitration is governed by the national arbitration law of the seat of arbitration (not the rules of the local civil procedure), the “national law has less and less actual bearing on the arbitration proceedings”⁴⁵², thus allowing for an unlimited number of states to recognise the legitimacy of the adjudication process⁴⁵³.

These developments, namely the expanding harmonisation of national arbitration laws together with the declining use of the particular mandatory laws of the seat of

⁴⁴⁸ See Gabrielle Kaufmann-Kohler, ‘Globalization of Arbitral Procedure’ (2003) 36 Vand. J. Transnat’l L. 1313–1333.

⁴⁴⁹ Gaillard, ‘The Present – Commercial Arbitration as a Transnational System of Justice’ (n 191).

⁴⁵⁰ Kaufmann-Kohler, ‘Globalization of Arbitral Procedure’ (n 448) 1318.

⁴⁵¹ See Status of UNCITRAL ML, statistics managed by the UNCITRAL Secretariat, available online: <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>

⁴⁵² Kaufmann-Kohler, ‘Globalization of Arbitral Procedure’ (n 448) 1315.

⁴⁵³ For the difference between the three representations of international arbitration, i.e. the monolocal view, the Westphalian vision, and the transnational vision, see Gaillard, ‘The Present – Commercial Arbitration as a Transnational System of Justice’ (n 191) 66, 67: “These visions, mental constructs or representations, strongly influence the views held on a number of questions ranging from whether the arbitrators are empowered to determine their own jurisdiction, the conduct of the arbitral proceedings, the determination of the law applicable to the merits of the dispute, or the fate of the resulting arbitral award, including the controversial question of whether an award set aside in the country of the seat of the arbitration may nevertheless be enforced in other jurisdictions.” See also Thomas Schultz, *Transnational Legality: Stateless Law and International Arbitration* (1st edn, OUP 2014); Joshua Karton, ‘International Arbitration Culture and Global Governance’ in Walter Mattli and Thomas Dietz (eds), *International Arbitration and Global Governance: Contending Theories and Evidence* (1st edn, OUP 2014).

arbitration, result in the establishment of a general consensus about the applicability of two major principles in international commercial arbitration, i.e. party autonomy and due process. The scopes of those principles, however, vary from national legal system to national legal system. As pointed out by Gabrielle Kaufmann-Kohler, the term “due process” can refer to:

(...) a number of notions with varying names under different national laws, including natural justice, procedural fairness, the right or opportunity to be heard, the so-called *principe de la contradiction* and equal treatment. More recently, procedural efficiency has been increasingly advocated by scholarly writers and taken into account in practice by arbitral tribunals and courts. However, it has not achieved the same recognition as the first two principles. (...) Consensus on principles does not mean agreement on details.⁴⁵⁴

Fabrizio Fortese and Lotta Hemmi suggest a good starting point for developing a working definition of due process in international arbitration:

(...) due process in international arbitration requires, first, that the parties’ agreement to arbitrate their dispute will be respected and enforced, that they will effectively have access to arbitration as their chosen means of justice, and that they will have a meaningful opportunity to participate in the lawful constitution of the arbitral tribunal. The core guarantees of procedural due process comprise the arbitrator’s duty to treat the parties equally, fairly and impartially, and to ensure that each party has an opportunity to present its case and deal with that of its opponent. It also comprises the arbitral tribunal’s duty to deal with all of the issues that are put to it. Therefore, access to arbitration is not enough; the procedure itself must also be fair.⁴⁵⁵

The importance of due process guarantees in international arbitration is demonstrated by the fact that both national legislation and international conventions recognise and impose requirements of due process. Within this general framework of due process the arbitration community relies on self-regulation mechanisms to develop and refine the notion of due process. For example, arbitration institutions have introduced explicit provisions in the most recent editions of their arbitration

⁴⁵⁴ Kaufmann-Kohler, ‘Globalization of Arbitral Procedure’ (n 448) 1321, 1322.

⁴⁵⁵ Fortese and Hemmi (n 426) 112.

rules that the proceedings should be conducted in an expeditious manner⁴⁵⁶. The latter requirement reflects the trite law that justice delayed is justice denied and invites the tribunals to carefully balance fundamental principles of international arbitration, such as the parties' right to be heard and their right to a speedy trial, as well as the parties' freedom to tailor the arbitral process and the arbitrator's duty to ensure the efficient and timely completion of their mandate to resolve the dispute at hand.

In those difficult conundrums, one can trace the process of judicialisation where solutions that guarantee procedural discipline by all participants in the arbitration proceedings are being favoured⁴⁵⁷. As mentioned above, the increasing regulation of

⁴⁵⁶ See for example ICC Arbitration Rules 2012, Art. 22(1); SIAC Arbitration Rules 2013, Rule 16.1; SCC Arbitration Rules, Art. 19(2).

⁴⁵⁷ Arbitral tribunals face a delicate counterpoise between fairness and efficiency, legal certainty and procedural flexibility. Arbitrator's mandate to render a final and binding decision between the parties is subject, on the one hand, to mandatory rules of law and general principles such as due process or natural justice and, on the other hand, to parties' instructions regarding the management of the case. Party autonomy and procedural flexibility are counterbalanced by procedural efficiency, fairness and transparency regarding the rights and duties of all participants in the arbitral process. Given that the process of judicialisation is characterised by increased regulation of arbitration proceedings, formalisation of the arbitral process, and heightened focus on reasonable conduct and fair treatment in the proceedings, the implications of the same process can be discern in arbitral awards and court decisions that promote observance of procedural discipline and parties' right to access to justice. Example of the latter include appropriate disclosure, promptly and timely raised objections regarding violation of due process, safeguarding parties' right to access to justice by giving the parties the opportunity to comment and make submissions on matters that are likely to form the subject of decision, etc. The following decisions and arbitral awards demonstrate this approach. In its decision 4A_352/2007 in (2008) 26 ASA Bulletin 322, the Federal Tribunal (the Supreme Court of Switzerland) considered whether or not the appellant's right to be heard had been violated by the arbitral tribunal to the extent that a number of arguments submitted by the party had not been considered by the arbitrators. In rejecting the appeal, the Federal Tribunal reiterated that international arbitrators sitting in Switzerland did not have to address every single point of fact or law raised by the parties. A violation of the right to be heard – Swiss parlance for due process – is only found where the arbitral tribunal refuses or fails to consider some essential points. Thus, in its decision 4A_433/2009 in (2011) 29 ASA Bulletin 673, the Federal Tribunal held that the right of the parties to be heard did not require reasons to be included in an international arbitral award. However, this right was breached when some important arguments or evidence were overlooked by the arbitrators. The Federal Tribunal annulled the arbitral award as it found that the arbitral tribunal did not take into consideration an argument made by claimant in the post-hearing submissions. In its decision 4A_682/2011 in (2014) 32 ASA Bulletin 137 the Federal Tribunal confirmed previously stated opinion that a party taking the view that the right to be heard was violated must raise the issue in the arbitral proceedings immediately and give the arbitral tribunal the opportunity to remedy the violation. A party failing to do so forfeits the right to raise the argument of a violation of due process in front of the Federal Tribunal. In

international arbitration and the globalisation of arbitral process contributes significantly to safeguarding the principle of due process by refining the rights and obligations of parties, arbitrators and counsel in arbitration proceedings. The pursuit of fair and just process is further enhanced by developments relating to arbitrators' neutrality, such as proposals to reconsider the limitation of arbitrators' liability, the introduction of a double standard to ensure an unbiased tribunal, and the shift of control over the arbitral process.

4.1.1 Arbitrator's Vocation and the Double Standard for Arbitrator's Impartiality and Independence

The foundations of the judicialisation process can be associated with some theories about the nature of international commercial arbitration, in particular the

Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd [1985] 2 E.G.L.R. 14 it was held that whilst an arbitrator can rely on his expertise in general matters, specific matters likely to form the subject of decision should be exposed to the comments and submissions of the parties. The arbitrator had failed to do this in the case of two such specific considerations, which appeared in those paragraphs of the award setting out the reasons for his decision. Furthermore, in a recent decision by the Paris Court of Appeal, namely Cour d'appel de Paris, 17 November 2011, Pôle 1, Ch. 1. RG n° 09/24158, *Société Licensing Projects (LP) et autres contre Société. Pirelli & C. SPA et autres*, parties' right to access to justice was elevated to a new level. The Paris Court of Appeal annulled an ICC award because the counterclaim of the respondent, which had been put into liquidation by a Spanish Court, was withdrawn when the respondent failed to pay the separate advance on costs that had been fixed in relation thereto. Finally, state courts support arbitral tribunals in refusing unreasonable requests for document production and rarely set aside arbitral awards on the ground that the tribunal has rejected production of documents. A recent case before the Higher Regional Court (Oberlandesgericht; OLG) of Frankfurt (OLG, 17 Feb. 2011, 26 Sch 13/10, decision upheld by the German Supreme Court with a resolution dated 2 Oct. 2010 (III ZR 8/11)) attracted the attention of practitioners as the Court set aside an award because the arbitral tribunal rejected document production request in violation of the procedure agreed upon by the parties. In its decision the Court held that the arbitral tribunal violated the agreement of the parties as laid down in the procedural order by refusing to order the production of all documents that had been made available to the party-appointed experts. The Court further stated that it is only in the discretion of the tribunal to order or not to order document production when the tribunal itself established the procedural rules. In contrast, in the case at hand, the arbitral tribunal was bound by the parties' agreement and had to grant the request for production of documents. The Court found that the requirement under §1059(2) No. 1 (d) Zivilprozessordnung (the German Code of Civil Procedure), namely that the violation of the parties' agreement affected the award, was met. It was held that a different outcome would have been possible if the agreed procedure had been respected. This decision, in fact, reiterates the importance of observing the principle of due process, particularly in disputes where one of the parties does not have access to documents, on which it relies to prove its case (as was the situation in the case at hand).

jurisdictional theory and some aspects of the hybrid theory⁴⁵⁸, while its implications can be traced in various new developments relating to the arbitral process, such as, for example, the establishment of a double standard for arbitrator's neutrality.

According to the jurisdictional theory arbitrator's adjudicative function resembles the judicial one. This is so because, on the one hand, arbitrator's power is drawn from the state by means of state's support of arbitration, and, on the other hand, the arbitrator, just like a judge, is required to apply the rules of law and their award is "regarded as having the same status and effect as a judgement handed down by judges sitting in a national court"⁴⁵⁹. However, the theory that is widely endorsed today is the hybrid or mixed theory, which is a compromise between the jurisdictional and the contractual theories:

[t]he liberal attitude adopted by most states towards international arbitration generally supports the mixed or hybrid theory as the most reflective of the juridical nature of international commercial arbitration.⁴⁶⁰

According to the hybrid theory arbitration has both contractual and jurisdictional elements. The former are rooted in parties' agreement giving rise to arbitration and parties' freedom to select arbitrators, the rules governing the arbitration procedures and the seat of arbitration, while the latter are linked to the supervisory powers of the courts at the seat of arbitration and the mandatory rules of national legal regimes which govern the arbitrability of the dispute, the compliance of arbitration procedures with general principles of due process, and the enforceability of the arbitral awards. According to the distinguished Alan Redfern and Martin Hunter:

International commercial arbitration is a hybrid. It begins as a private agreement between the parties. It continues by way of private proceedings, in which the wishes of the parties play a significant role. Yet it ends with an award that has binding legal force and effect and which, on appropriate conditions, the courts of most countries of the world will recognise and enforce. In short, this essentially private process has a public

⁴⁵⁸ Yu (n 198); Emilia Onyema, *International Commercial Arbitration and the Arbitrator's Contract* (1st edn, Routledge 2010).

⁴⁵⁹ Yu (n 198) 258.

⁴⁶⁰ Onyema (n 456) 58.

effect, implemented with the support of the public authorities of each State and expressed through that State's national law.⁴⁶¹

Indeed, international arbitration is a private process that has a public effect and the focus on the latter is constantly increasing. With more and more disputes being brought to arbitration and the majority of those disputes being high-stake ones⁴⁶², parties' expectations as to the quality of the arbitration services and the neutrality of the process are rising. This assertion is supported not only by the findings of a recent survey⁴⁶³ but also by the fact that arbitrators' independence and impartiality has been a topic of heated debates for some time now. Since the supervising role of national courts is intentionally minimised "to insulate decision-making process from national bias or interference" and states' "support for international arbitration has traditionally taken the form of policies of non-interference", "primary regulators of international arbitrators are the arbitral institutions"⁴⁶⁴ and other professional bodies, such as the International Bar Association and Swiss Arbitration Association. They shape and refine the standards of arbitrator neutrality by amending the rules of arbitration institutions, promoting new guidelines and recommendations on conflicts of interest in international commercial arbitration and advocating for tighter requirements for arbitrator disclosure. These new developments are congruent with the quest for fair and just arbitral process. The regulation of arbitrator's duties and conduct and the increased transparency in the selection and appointment of arbitrators safeguard the legitimacy of the arbitral process and guarantee the fairness of the proceedings and the equal treatment of the parties. They, however, inevitably lead to a more formalised and judicialised process.

An often-heard criticism of regulation of international commercial arbitration by means of procedural soft law is that it leads to judicialisation of the arbitral process. William Park rightly observes that "[a]t first blush, judicialised arbitration may seem

⁴⁶¹ Blackaby, Partasides, Redfern, and Hunter (n 24) 29, para 1.84.

⁴⁶² See n 549.

⁴⁶³ See the survey conducted by Richard W. Naimark and Stephanie E. Keer on the perceptions and expectations of attorneys and their clients in international commercial arbitration commented in Naimark and Keer (n 425).

⁴⁶⁴ Catherine A. Rogers, 'The Vocation of the International Arbitrator' (2005) 20 Am U Int'l L Rev 957–1020, 970, 971.

a contradiction in terms”⁴⁶⁵ and proceeds to ask the question “[b]ut is this really so bad?”⁴⁶⁶. The author contends that the answer to this question should be negative on the grounds that “[a]rbitration proceeds in the shadow of judicial power, enlisted to seize assets and grant *res judicata effect* to awards. So it is not at all surprising that litigants expect ordered arbitral proceedings.”⁴⁶⁷

It is therefore also not surprising that the judicialisation of international commercial arbitration by means of increased regulation and rise of the transparency and fairness of the arbitral process have a positive impact on the perceived legitimacy of the proceedings. With the issues of conflicts of interest becoming ever more pertinent⁴⁶⁸, a judicialised arbitral process provides for greater legal certainty, legitimacy and justice.

A significant change in the regulation of arbitrator’s vocation was the introduction of a double standard an arbitrator to be both independent and impartial. Although the UNCITRAL ML contains the requirement every arbitrator to be independent and impartial⁴⁶⁹, the ML has not been adopted universally. There are national arbitration laws, such as the Swiss PILA, Art. 180, that simply require independence on the part of arbitrators. Some institutional arbitration rules also used to specify only arbitrator’s independence as a standard for neutrality. For example Art. 7 ICC Rules 1998 stated: “every arbitrator must be and remain independent of the parties involved in arbitration”. With the growing popularity of international commercial arbitration and the heightened focus on how justice is rendered, these discrepancies

⁴⁶⁵ Park, ‘The Procedural Soft Law of International Arbitration’ (n 138) 145.

⁴⁶⁶ Ibid.

⁴⁶⁷ Ibid 146.

⁴⁶⁸ See Detlev F. Vagts, ‘The International Legal Profession. A Need for More Governance?’ (1996) 90 Am J Int’l L 250, 250 where the author described the community of international arbitrators as ‘an exclusive club in the international arena’; also in Rogers, ‘The Vocation of the International Arbitrator’ (n 464) 960 it is argued that the access to arbitration market is “essentially controlled by what might be considered a governing ‘cartel’ of the most elite arbitrators.”

⁴⁶⁹ See UNCITRAL ML, Arts. 11(5) and 12. The requirement of the UNCITRAL ML that an arbitrator must be independent and impartial is considered to be a mandatory provision from which parties may not derogate, however parties are free to agree that certain disclosed relationship between an arbitrator and a party shall not be considered sufficiently substantial as to qualify as a justifiable doubt and to lead to the disqualification of the selected arbitrator.

between various national laws and institutional arbitration rules as to the arbitrators' standard of impartiality raise doubts about the neutrality of the proceedings and the legitimacy of the process in general.

The differences in the wording of the provisions laid down in the institutional arbitration rules relating to the independence and impartiality of arbitration have been minimised with the latest amendments of the rules. Thus, Art. 11 ICC Arbitration Rules 2012 states that “[e]very arbitrator must be and remain impartial and independent of the parties involved in arbitration”; according to Art. 14 SCC Arbitration Rules 2010 “[e]very arbitrator must be impartial and independent”; Art. 9 Swiss Rules of International Arbitration 2012 states: “[a]ny arbitrator conducting an arbitration under these Rules shall be and remain at all times impartial and independent of the parties”; Art. 11.1 HKIAC Arbitration Rules 2013 states: “[a]n arbitral tribunal confirmed under these Rules shall be and remain at all times impartial and independent of the parties”; according to Art. 10.1 of the SIAC Arbitration Rules 2013 “[a]ny arbitrator, whether or not nominated by the parties, conducting an arbitration under these Rules shall be and remain at all times independent and impartial, and shall not act as advocate for any party”; S 15 DIS Arbitration Rules 1998 states: “[e]ach arbitrator must be impartial and independent”; and according to Art. 5.3 LCIA Arbitration Rules 2014 “[a]ll arbitrators conducting an arbitration under these Rules shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocates for any party”.⁴⁷⁰

The unification of the wording of the arbitration rules regarding arbitrators' impartiality and independence demonstrates, on the one hand, the role of arbitration institutions in regulating matters of public interest, and, on the other hand, the efforts of the international commercial arbitration community to safeguard the neutrality of the arbitration process. Since it is often claimed that “arbitration is only as good as

⁴⁷⁰ DIS Arbitration Rules 1998, SCC Arbitration Rules 2010, ICC Arbitration Rules 2012, HKIAC Arbitration Rules 2013, SIAC Arbitration Rules 2013, LCIA Arbitration Rules 2014.

the arbitrators”⁴⁷¹ the focus on arbitrator’s vocation and conduct is significant. The double requirement underpins the whole arbitral process and serves as a guarantee for its integrity and fairness. Arbitrators must meet the standard of neutrality in order to be able to perform their adjudicative function, as the latter is incompatible with any prejudgement or predisposition towards one of the parties.

The principle that arbitrators must be and remain independent and impartial is now universally accepted⁴⁷². There is a general consensus that the requirement an arbitrator to remain impartial entails lack of bias or prejudice against, or predisposition towards a particular party, counsel or party’s case, while arbitrator’s independence is “a situation of fact or law, capable of objective verification”⁴⁷³, i.e. independence from the parties and parties’ counsel is lack of any personal, professional, financial, or social relations between the arbitrator and the party or the counsel. Thus, the obligation on an arbitrator to be impartial and independent covers both subjective and objective appearance of bias and prejudice. The first one relates to arbitrator’s state of mind or attitude, while the second one is usually materialised in a relationship between an arbitrator and a party/its counsel. The concepts of independence and impartiality can often overlap and the boundaries between the two notions can be blurred, but the co-existence of the two requirements guarantees that

⁴⁷¹ See Laurent Lévy and Yves Derains, *Is Arbitration only As Good as the Arbitrator? Status, Powers and Role of the Arbitrator, Dossiers of the ICC Institute of World Business Law, Volume 8* (Laurent Lévy and Yves Derains (eds), 1st edn, Kluwer Law International 2011).

⁴⁷² For more detailed analysis on the requirement arbitrators to be independent and impartial, see M. Scott Donahey, ‘The Independence and Neutrality of Arbitrators’ (1992) 9 *Journal of International Arbitration* 31; Alan Scott Ray, ‘On Integrity in Private Judging’ (1998) 14 *Arbitration International* 115–155; Hong-lin Yu and Laurence Shore, ‘Independence, Impartiality, and Immunity of Arbitrators - US and English Perspectives’ (2003) 52 *International Comparative Law Quarterly* 935–967; Steyn, ‘England: The Independence and/or Impartiality of Arbitrators in International Commercial Arbitration’ [2008] *ICC Special Supplement 2007: Independence of Arbitrators* 91; François Terré, ‘Independence and Arbitrators’ [2008] *ICC Special Supplement 2007: Independence of Arbitrators* 101; Dominique Hascher, ‘Independence and Impartiality of Arbitrators: 3 Issues’ (2012) 27 *Am. U. Int’l L. Rev.* 789; Martin Maisner, ‘Liability and Independence of the Arbitrator’ in Alexander J. Bělohávek and Naděžda Rozehnalová (eds), *Czech and Central European Yearbook of Arbitration - 2012: Party Autonomy versus Autonomy of Arbitrators* (1st edn, Juris Net Llc 2012).

⁴⁷³ Emmanuel Gaillard and John Savage, ‘The Status of the Arbitrators’ in Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 563.

the whole spectrum of situations where there might be (an appearance of) bias, prejudice or pre-disposition will be covered.

Despite the worldwide acknowledgement of the double requirement on arbitrators to be independent and impartial, the quest for fairness and justice in international commercial arbitration is far from over. It is claimed that:

Even today, the status of the arbitrators is largely a matter for private rules and ethical codes. However, the development of arbitration has been accompanied by a perceived deterioration of its moral standards. The rights and obligations of arbitrators are called into question increasingly often, and while national law often remains highly elliptical on these issues, they have become a matter of some concern to the courts and practitioners.⁴⁷⁴

Impartiality and independence are fundamental standards of arbitrator's conduct, however they may be difficult to prove. Since impartiality is a state of mind, it is often difficult for the parties to provide direct proof of it. While independence is easier to prove and, in principle, it is sufficient to guarantee the arbitrators' freedom of judgment and the fairness of the arbitral process, a link of dependence with one of the parties or parties' counsel does not necessarily lead an arbitrator to be biased and predisposed. Thus, for example, it is commonly recognised that in trade arbitrations parties and arbitrators are professionals in the same field and, as such, the mere fact of existing business relationships may not necessarily justify arbitrator's disqualification⁴⁷⁵. The difficulties to provide a comprehensive definition of the qualities of independence and impartiality required of arbitrators, the exclusiveness of the arbitrators' club⁴⁷⁶, as well as the inherent conflict between the principle of

⁴⁷⁴ Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (n 354) 556, para 1010.

⁴⁷⁵ In *Philipp Brothers v. Drexel et al*, Tribunal de Grande Instance de Paris, 1990 Rev. Arb. 497, first and third decisions, the French court showed willingness to make special allowance for familiarity in trade arbitrations. It was held that the mere fact that business relationships has existed and that arbitrator has had a commercial dealings with a party does not deprive the arbitrator from the independence of their mind.

⁴⁷⁶ See Dezalay and Garth, *Dealing in Virtue* (n 23) 49; Michael McIlwrath, *International Arbitration and Mediation. A Practical Guide* (1st edn, Kluwer Law International 2010) 255; Richard W. Naimark and Christopher R. Drahozal, *Towards a Science of International Arbitration: Collected Empirical Research* (Richard W. Naimark and Christopher R. Drahozal

party autonomy, manifested by party's freedom to appoint an arbitrator, and the principle of due process, continue to be driving factors for the business community's search for more ways to guarantee the neutrality of the arbitral process.

Currently, there are four general trends in that direction. The first one is associated with national courts' approaches to arbitrator's bias and the tests applied to safeguard the neutrality of the arbitral process. The second trend is related to the on-going regulation of international commercial arbitration by means of procedural soft law, such as the IBA Guidelines on Conflicts of Interest in International Arbitration 2014 and AAA Code of Ethics. These sets of rules aim to introduce more specific provisions regarding arbitrator's duty of disclosure and burden of disclosure. The continuing regulation of arbitrators' duty to disclose is closely linked to the third trend, which seeks the establishment of a general rule of full disclosure for arbitrators and greater transparency in the arbitral process. The forth trend reflects the increasing calls for abandoning the system of party-appointed arbitrators in order to eliminate the innate conflict between the principle of due process and parties' right to appoint arbitrator. Without going into too much detail on the specifics of those developments, the latter will be analysed from the perspective of the (fear of) judicialisation of international commercial arbitration. What is of importance to the analysis in the following paragraphs is whether any or all of those trends can be linked to the process of judicialisation either as a driving factor for its development or as an implication or a consequence of its existence.

As stated above, the first trend relates to variations in national courts' approaches to assessing arbitrators' impartiality and independence. Since conducting a comparative research on judicial tests for arbitrators' bias goes beyond the objectives of this part, for the purposes of the latter the position of English courts shall be taken as an illustration of this first development⁴⁷⁷. Under English law, the double requirement that an arbitrator is impartial and independent is derived from different sources of law. The impartiality rule flows from the statutory law, namely Arbitration Act 1996,

(eds), 1st edn, Kluwer Law International 2004) 156; also Jan Paulsson, 'Ethics, Elitism, Eligibility' (1997) 14 J. Int'l Arb. 19, arguing against the term "mafia".

⁴⁷⁷ Among the reasons for choosing the position of the English courts as an example is the fact that the decisions of those courts are in English and are easily accessible.

s 33(1)(a), which provides that “The tribunal shall act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent (...)”; while the independence standard is applicable by virtue of common law and institutional rules.

It is undisputed in the case law and in the literature that actual bias is always actionable, i.e. an award rendered by an arbitrator who was biased against one of the parties or their counsel will be null and void, hence unenforceable, in every jurisdiction. As stated by Sam Luttrell “this rule is so widely accepted that it is part of the *lex mercatoria*. It is so well settled as to be uncontroversial (...)”.⁴⁷⁸ National courts will always protect the principle of due process and public policy by refusing to enforce an award that is rendered in manifest disregard of natural justice.

Thus, the diversity in national courts’ approaches is observed not with regard to actual arbitrators’ bias, rather than with regard to apparent bias or objective bias. Despite the universal acceptance of the principle of parties’ equal treatment, the uniformity brought in the challenge provisions and the provisions dealing with arbitrators’ independence and impartiality⁴⁷⁹ both in national laws and arbitration rules, the approaches of national courts to apparent bias vary from jurisdiction to jurisdiction. According to English Arbitration Act 1996, s 24(1)(a) a party to arbitral proceedings may apply to the court to remove an arbitrator if there are circumstances that give rise to justifiable doubts as to his impartiality. English courts resort to three competing tests to evaluate arbitrators’ apparent bias and rule on arbitrators’ challenges. These are: (i) the “reasonable apprehension” test or the “*Sussex Justices*” test⁴⁸⁰, according to which an apparent bias is proven if “a fair minded and informed observer”⁴⁸¹ would have a “reasonable apprehension” that the arbitrator

⁴⁷⁸ Sam Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a ‘Real Danger’ Test (International Arbitration Law Library Series)* (1st edn, Kluwer Law International 2009) 6.

⁴⁷⁹ See text to n 470.

⁴⁸⁰ *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256.

⁴⁸¹ For the meaning of ‘a fair minded and informed observer’ see also *R v Gough* [1993] AC 646; *Locabail (UK) Ltd v Bayfield Properties Ltd and another* [1999] EWCA Civ 3004; *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte No 2* [2000] 1 A.C. 119; *A & S Enterprises Ltd v Kema Holdings Ltd* [2004] EWHC 3365 (QB).

was biased; (ii) the “real possibility” test or the “*Porter v Magill*”⁴⁸² test, which requires “a fair minded and informed observer” to conclude that there was a “real possibility” that the arbitrator was biased; and (iii) the “real danger” test or the “*Gough*” test⁴⁸³, according to which the court must find that there was a “real danger” of bias for apparent bias to be proven⁴⁸⁴.

Currently the prevailing test applied by English courts is the “real possibility” test⁴⁸⁵. This approach is less intrusive for the arbitral proceedings than the “reasonable apprehension” test, since it sets higher standard of proof than the “*Sussex Justices*” test, hence leads to lower chances for court intervention:

While a suspicion (or apprehension) may be *reasonably* founded insofar as it has been formed in the mind of a person as a result of his or her exercise of the faculty of reason, the facts upon which the suspicion is based may not necessarily interact to produce the result that the apprehended outcome is a *real* possibility. (...) The evidentiary burden imposed by the ‘real possibility’ test is (...) markedly higher than that which an applicant must discharge to make out a reasonable apprehension under *Sussex Justices*.⁴⁸⁶

Justice Deane of the High Court of Australia maintained in *Webb v The Queen*⁴⁸⁷ that the “real danger” test standard replaced “apparent bias” with a new form of “actual (but unconscious) bias” focused on evidence rather than on the perception of the parties. On the other hand the “real danger” test does not differ much from the “real possibility” test. In *Re Medicaments (No. 2)*⁴⁸⁸, Lord Phillips MR examined extensively the test applied by English courts in order to conclude that there is not any substantial difference between a real risk or danger, and a real possibility. What is of importance for the court is to find an answer to the question “Is there a real danger of injustice having occurred as a result of bias” and according to the

⁴⁸² *Porter v Magill* [2002] 2 AC 357, [2002] 1 All ER 465.

⁴⁸³ *R v Gough* (n 481).

⁴⁸⁴ See Luttrell (n 476) 7 et seq.

⁴⁸⁵ Ibid 35.

⁴⁸⁶ Ibid 38.

⁴⁸⁷ (1994) 181 CLR 41.

⁴⁸⁸ *Re Medicaments (No. 2)* CA 21 Dec. 2000 [2001] 1 WLR 700.

“*Gough*” test “[a] real danger clearly involves more than a minimal risk, less than a probability”.⁴⁸⁹

Under English law, arbitrators are subject to the same standard of impartiality as judges are, and the courts have dismissed appeals for application of a more stringent standard to be applied to arbitrators. In *Norbrook Laboratories Ltd v. Tank*⁴⁹⁰ and *ASM Shipping Ltd of India v TTMI Ltd of England*⁴⁹¹ the court applied the test for apparent bias established in *Re Medicaments (No. 2)*⁴⁹² and *Rustal Trading v Gill & Duffus*⁴⁹³. The position of the English courts is in conformity with the “status” school of thought, which view the adjudicative function of arbitrators as a quasi-judicial function. The latter grants the arbitrator an element of “status” that entitled them to treatment similar to that of a judge.⁴⁹⁴

Such an approach can be linked to the process of judicialisation of international commercial arbitration on account of the trust vested in arbitrators to perform their duties to the required standard of independence and impartiality. The “real danger” or the “real possibility” tests guarantee fair conduct of the arbitral process, while, at the same time, safeguard the proceedings against unnecessary court intervention. It is argued that this brings greater certainty in the arbitral process and avoids arbitrators’ disqualifications on the grounds of mere suspicion or apprehension of bias. Furthermore, the evidentiary burden imposed by “real danger” or the “real possibility” tests also shields the proceedings from parties and counsel who want to challenge arbitrators in order to delay or impede the arbitral process. This approach undoubtedly contributes to the quest for fairness, certainty and justice in international commercial arbitration.

⁴⁸⁹ This is one of several propositions that Simon Brown L.J. set out in *R v. Inner West London Coroner, ex parte Dallaglio* [1994] 4 All ER 139 at p. 151-152; the propositions are based on the test applied in *R v Gough* (n 481).

⁴⁹⁰ *Norbrook Laboratories Ltd v. Tank* [2006] EWHC 1055.

⁴⁹¹ *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm).

⁴⁹² *Re Medicaments (No. 2)* (n 488).

⁴⁹³ *Rustal Trading v Gill & Duffus* [2001] 1 Lloyd's Rep 14.

⁴⁹⁴ Blackaby, Partasides, Redfern, and Hunter (n 24) 329, para 5.51.

The growing practice of arbitrators' challenges has become notoriously known as the "black art" of bias challenge⁴⁹⁵. One factor that has contributed to the increasing

⁴⁹⁵ Luttrell (n 478) 279. It is worth mentioning that some state courts have taken serious measures to disciplining parties and counsel who frivolously challenge arbitrators or engage in dilatory tactics after the conclusion of the arbitration. In *Landmark Ventures Inc. v. Cohen and Int'l Chamber of Commerce*, No. 13 Civ. 9044, 2014 WL 6784397 (Nov. 26, 2014) the U.S. District Court for the Southern District of New York denied claimant's request for vacatur of the award and found that the arbitrator and arbitral institution – both named as defendants – had absolute immunity from suit based on the parties' contract incorporating Art. 40 of the ICC Rules and the federal common law doctrine of arbitral immunity. The court found that the "acts that Landmark allege[d] the Arbitrator and ICC improperly performed were all done in connection with the arbitration. The ICC Rules, which the parties agreed to follow, granted the Arbitrator the authority to make discovery rulings, manage case deadlines, award attorney's fees, and interpret the contract at issue in the dispute in connection with the arbitration" (at 3). In addition, "under well-established Federal common law, arbitrators and sponsoring arbitration organizations have absolute immunity for conduct in connection with an arbitration". "Such absolute immunity for actions done in connection with arbitration is 'essential to protect the decision-maker from undue influence and [to] protect the decisionmaking process from reprisals by dissatisfied litigants'" (quoting *Austern v. Chicago Bd. Options Exch. Inc.*, 898 F.2d 882, 886 (2d Cir. 1990)). The court imposed on the Landmark attorney a \$20,000 sanction for filing a frivolous claim "to deter repetition of the conduct or comparable conduct by others." In another case, namely *DigiTelCom, Ltd. v. Tele2 Sverige AB*, No. 12 Civ. 3082, (Jul. 25, 2012) the Federal court in the Southern District of New York imposed sanctions on the loser in an arbitration that sought to vacate the award. The court justified its decision by explaining that "(...) Plaintiffs do not cite any particular principle of law that the Tribunal is supposed to have ignored or any reason beyond pure speculation to conclude that the Tribunal was not fair and impartial (...). Citing virtually no relevant authority, Plaintiffs merely identify the standard for vacating an arbitration award at the outset of their papers and then proceed to attack the Tribunal's findings, as well as its integrity, by suggesting that it was biased (...) without providing any basis whatsoever for such an accusation. This kind of petition serves only to cause the parties to incur unnecessary expense and delay the implementation of the Award". In *DMA International, Inc., v. Qwest Communications International Inc.*, 585 F.3d 1341 (10th Cir. 2009) the US Court of Appeals for the Tenth Circuit (Tenth Circuit) sanctioned lawyers for appealing the confirmation of an arbitral award and ordered those lawyers *personally* to pay the opposing party's attorneys' fees. The English High Court takes a different approach to unmeritorious or frivolous challenges against arbitral awards. Where the Court finds some form of abuse of process or an apparent lack of merits of the challenge in question the Court orders the successful party's costs to be assessed on an indemnity basis. This approach is followed in *Konkola Copper Mines v U&M Mining Zambia Ltd* [2014] EWHC 2374) where the High Court dismissed a challenge against an award rendered in four consolidated LCIA arbitrations. The Court commented on the high proportion of unfounded challenges, suggesting that costs sanctions would deter parties from making frivolous challenges. (See also *Exfin Shipping (India) Ltd Mumbai v Tolani Shipping Co Ltd Mumbai* [2006] EWHC (Comm)). The Hong Kong courts have gone even further by holding that in the absence of special circumstances, as a matter of principle indemnity costs will normally be appropriate in unsuccessful challenges to an arbitral award. In *Pacific China Holdings Ltd v Grand Pacific Holdings Ltd* CACV 136/2011 (May 9, 2012) the Hong Kong Court of Appeal unanimously overturned the decision of the Hong Kong Court of First Instance and reinstated the award, finding that the matters raised by the applicant did not constitute grounds for setting aside the award under Art. 34(2) of the UNCITRAL ML. The Court clarified that 'only a sufficiently serious error' undermining due process could be regarded as a violation

instances of challenges is the ever-bigger expectations of arbitrators to be independent and impartial and arbitration to provide the same level of fair play as the public adjudicatory process. The judicialisation of international commercial arbitration, the latter otherwise being a mechanism of private and alternative nature, and, as such, not necessarily abiding by the standards applicable to the public civil justice system, evolves as a trend that aims to address such expectations. Judicialised arbitration is concerned not only with the question whether justice is served but how it is served. One needs to be reminded, however, that arbitrators cannot be likened to judges in all respects. After all arbitrators are directly appointed by parties because of their expertise, predisposition to certain issues, and professional and cultural background. In that respect the legal fiction of arbitrator being judge may have outlived its usefulness and applicability in modern arbitration. It is, however, a viable notion in judicialised arbitration, where the balance between the principles of party autonomy and due process is tipped to the latter one.

The other factor that has contributed to the increasing instances of arbitrators' challenges is less likely to be linked to a sudden boom in arbitrators' misbehaviour, but more so to the variety of norms, guidelines and recommendations that have been laid down by the arbitration community in the last few years. Although the procedural soft law seeks to safeguard the arbitral process and assist arbitration users in the execution of their obligations, it may indeed provide greater opportunities for mischievous counsel to obstruct the proceedings and cause unnecessary delays.

As already mentioned above⁴⁹⁶, the second, third and fourth trends aiming to ensure greater fairness in the arbitral process are linked to increasing regulation of

of Art. 34(2)(a)(ii) (this was the principal ground on which Pacific China had based its application). In order to establish a breach, it must be shown that the conduct of the arbitral tribunal was of a 'serious' or even 'egregious' nature. The Court also reiterated that the tribunals enjoy wide, discretionary case management powers. Following the decision in *Gao Haiyan & Anor v Keeneye Holdings Ltd & Anor (No2)* [2012] 1 HKC 491, the Hong Kong Court of Appeal awarded indemnity costs against the applicant who attempted unsuccessfully to set aside an arbitral award. The Court of Appeal held that, even if the court was not bound by the decision in *Gao Haiyan v Keeneye*, it would find that indemnity costs were appropriate where a party unsuccessfully argues to set aside an arbitral award. The above cases demonstrate the courts' willingness to sanction parties and counsel engaging in dilatory tactics or frivolous actions that undermine the finality of arbitral awards.

⁴⁹⁶ See the text following n 170.

arbitrator's duty to disclose, appeals for establishing a full disclosure requirement, and even calls for abolishing the system of party-appointed arbitrators. These developments are the result of lack of regulation of the nature and scope of arbitrators' duty to disclose, which in view of the growing popularity of international commercial arbitration undermines not only the efficiency of the arbitral process, but also its legitimacy. An arbitrator should enter the arbitral process free of disposition and in conformity with the reasonable measure of integrity. Indeed, "[a] relative measure of distance from troubling connections to litigants, along with a willingness to listen carefully to both sides of a dispute, constitutes essential elements of basic due process"⁴⁹⁷ and natural justice.

Although the double requirement for arbitrator's independence and impartiality sets high and thorough standards for conformity – high because the arbitrator is obliged to disclose any information which is likely to give rise to justifiable doubts as to his/her impartiality and independence, and thorough because the standards include both subjective and objective appearance of bias, the sources of arbitrator's obligation to remain impartial and independent do not provide explicit framework as to whether an arbitrator has an absolute or less-than-full duty to disclose. Until recently, there was also neither hard, nor soft law clarifying the evidentiary burden in the disclosure process. It was unclear whether the arbitrator or the parties should seek disclosure of information and transparency in the proceedings. Even though the determination of those issues is often fact-specific and, as such, there is no one-suits-all-situations answer, the lack of any regulation in the field raised many concerns among the arbitration community. The latter's response was the introduction of guidelines and recommendations embodied in soft law instruments, such as the IBA Guidelines on Conflicts of Interest in International Arbitration, since they provide some directions as to what needs be disclosed and what standards should apply.

The guidelines, however, are not binding upon arbitrators and parties, unless parties have explicitly agreed to their applicability to arbitration. Furthermore, the set of rules has no bearing on the national judges who may be called to decide on arbitrator's challenge. Some jurisdictions have adopted the position that breach of

⁴⁹⁷ William W. Park, 'Arbitrator Integrity: The Transient and the Permanent' (2009) 46 San Diego Law Review 629–704, 632.

ethical standards as set in arbitration rules does not suffice for setting aside an arbitral award because arbitration rules and codes of ethics do not have normative, hence binding nature.⁴⁹⁸ Moreover, the binding effect of such soft law instruments is called into question, even where parties have agreed on their applicability, because the prospective waiver of party's right to seek transparency in the process by placing the whole burden of disclosure on the arbitrator could be considered unenforceable.

Thus, despite the fact that IBA Guidelines and other rules of ethics provide some clarity about the extent of the double requirement for independence and impartiality

⁴⁹⁸ In Gary B. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (3rd edn, Kluwer Law International 2010) 78 the author maintained that "The IBA Guidelines are not binding on either national courts or arbitral institutions, and have been the subject of some criticism, on the grounds that they are needlessly detailed and susceptible of encouraging challenges to both arbitrators and awards. They nonetheless provide an important perspective on customary attitudes towards an arbitrator's obligations of independence and impartiality." See also *W Limited v M SDN BHD* [2016] EWHC 422 (Comm) where the Court held that the applicable law was English law and IBA Guidelines on Conflicts of Interest in International Arbitration simply did not apply. The Court, however, pointed out that the even though the Guidelines were not binding, they could still be of assistance to the Court (following *Sierra Fishing Company and others v Farran and others* [2015] EWHC 140 (Comm); [2015] 1 All ER (Comm) 560 at [58] per Popplewell J and *Cofely Limited v Anthony Bingham* [2016] EWHC 240 (Comm) at [109] per Hamblen J; but cf. *A and Others v B and Another* [2011] EWHC 2345 (Comm); [2011] 2 Lloyd's Rep 591 at [73] to [78] per Flaux J) and proceeded to examine them. The Court concluded that the Guidelines could not get judicial approval as they contain some weaknesses. The Court found it hard to understand why a situation where advice is being given to an affiliate and the arbitrator is not involved in that advice (particularly without reference to the arbitrator's awareness or lack of awareness of that advice) should automatically fall in the Non-Waivable Red List. To determine whether there could be a conflict (apparent or real) required 'case-specific judgment'. The Court also suggested that if a disclosure of such a situation were made, it should be open to the parties to accept that situation by waiver. The Court also considered some of the situations allocated to the 'Waivable Red List', which, amongst others, included where the arbitrator had given legal advice on the dispute to a party. The Court considered that "these situations would seem potentially more serious than the circumstances of the present case; again suggesting that the circumstances of the present case do not sit well within a 'Non-Waivable Red List'". This case identifies the potential weaknesses of soft law instruments that attempt to introduce too rigid and non case-sensitive guidelines. A mechanical application of any rules or guidelines, without the application of careful judgment as to the specific circumstances of the case and the possibility for parties to accept any deviations from the rules by waiver, is clearly not the correct approach to take in a system that exists to serve the needs of international business. See, however, *Cofely Ltd* where the Court considered the disclosure requirements under Rule 3 of the Chartered Institute of Arbitrators' Code of Professional and Ethical Conduct for Members (October 2000). The Court noted that the CI Arb acceptance of nomination form called for disclosure of 'any involvement, however remote' with either party over the last five years. This suggests that strict disclosure requirements will be binding upon arbitrators when the appointment acceptance form incorporates by way of reference a code of ethics or guidelines on professional conduct.

of arbitrators and the scope of their disclosure duty, a lot of issues remain unsettled. For example, although the guidelines place the burden to seek information on arbitrators, there are no guarantees that parties will be excused from making (reasonable) enquires. The increasing regulation of arbitrator's vocation aims to guarantee the fairness of arbitration proceedings and level the playing field for arbitration users. Those in favour of this trend argue that the introduction of more rigorous regulation of the arbitral process and arbitrator's conduct, in particular, will bring greater efficiency, justice and predictability in arbitrations. The critics of the overregulation of international commercial arbitration contend that the latter results in formalisation of the arbitral process⁴⁹⁹, while adding little value to the arbitration itself. By reminding that everything is in flux, William Park alludes to the fact that the current search for ethical standards applicable to arbitrators may be futile because "[n]ew patterns of misbehavior create new types of ethical challenges. Few criteria for evaluating arbitrator independence and impartiality will likely stay foolproof for long, given how ingenious fools often prove themselves to be."⁵⁰⁰

The pursuit for fairness and justice via regulation of the arbitral process and professionalisation of arbitrator's vocation⁵⁰¹ can undoubtedly be linked to the judicialisation of international commercial arbitration. While some regulation is welcome as it increases the trust in the system, the introduction of ever more rigorous guidelines on arbitrator's conduct⁵⁰² does not necessarily benefit arbitration users. The adoption of the "real possibility test" by national courts is an example of a balanced approach to the need to ensure the fairness of the arbitral process. It safeguards the impartiality of the arbitration proceedings, while at the same time guaranteeing that court intervention is not excessive.

Different is the approach adopted by soft-law instruments, such as the IBA Guidelines on Conflicts of Interest in International Arbitration. Although, their purpose is to clarify the rights and obligations of both arbitrators and parties

⁴⁹⁹ On the formalisation of international arbitration, see Rogers, *Ethics in International Arbitration* (n 445) 29-30.

⁵⁰⁰ Park, 'Arbitrator Integrity' (n 497) 630, 631.

⁵⁰¹ On the professionalisation of arbitrator's vocation see Section 5.1.

⁵⁰² For the debate as to whether international arbitrators are over-regulated or under-regulated see Rogers, *Ethics in International Arbitration* (n 445) 57-60.

particularly with regard to situations giving rise to conflicts of interest, the establishment of rigid lists and water-tight rules is incompatible with the nature of international commercial arbitration and the function of arbitrators. The latter are service providers who should remain impartial and independent in the process of adjudicating the dispute but are nevertheless appointed by the parties. Thus, there is an inherent dichotomy associated with the arbitrator's mandate. The development of rigid soft-law instruments offers a judicialised approach to resolving the issues arising out of this dichotomy. It confines party autonomy and leads to unnecessary disqualification of arbitrators.

In order to level the playing field and guarantee the impartiality of the arbitral process it has been suggested that the system of party-appointed arbitrators should be abolished. It has further been argued that the codification of ethical rules and standards would increase the authoritativeness of the system and promotes arbitrator's professionalisation. In our view, the above would lead to overregulation and judicialisation of international commercial arbitration as fundamental features of this alternative method for dispute resolution are discarded.

Requiring arbitrators to abide by strict disclosure rules could inflict unnecessary restrictions on parties' autonomy to choose arbitrators, as well as on the ability of arbitrators to rely on their professional judgement, experience and even cultural background in these matters. William Park argues that, while the increase of ethical rules and standards is, without doubt, an ongoing trend, it is less than clear whether it is a healthy one:

Simply put, soft law serves as a constraint on arbitral autonomy. Any regulatory instrument will limit "flexibility" and "discretion" – those hallowed words that can trigger genuflection in even the most impious of arbitrators.⁵⁰³

The confidence in the professional conduct of arbitrators may be shaken if more regulation is introduced on the premise that arbitrators are not prone to be and remain independent and impartial. It needs to be appreciated that international

⁵⁰³ Park, 'The Procedural Soft Law of International Arbitration' (n 136) 142.

arbitrators are operating in a constantly developing market and, as such, they adapt and adjust in order to provide competitive services. Moreover, it is widely acknowledged that today's international commercial arbitration, even absent of binding rigorous rules for ethics, has enough mechanisms to ensure that the process between disputing parties will be handled with the necessary diligence and impartiality. These mechanisms are embedded in the way arbitral process is conducted and the decision is made.

Thus, an arbitrator may be challenged only if circumstances exist that give rise to *justifiable* doubts as to their impartiality or independence (Art. 12(2) UNCITRAL ML). A party is also entitled to seek recourse against the award on the grounds of Art. 34(2)(a)(iv) UNCITRAL ML, namely if the arbitral process was not conducted in accordance with parties' agreement or the applicable law. In addition, although this defence is rarely successful, a party may also resort to Arts. V(1)(b) and V(1)(d) NYC and seek to defy the enforcement of an award on the grounds of violation of due process or irregularity in the composition of the arbitral tribunal or arbitral procedure. In view of decision-making, arbitration also has a mechanism to guarantee the integrity of the arbitral process. The default rule that arbitrators resolve disputes in view of the facts and the applicable law, and only when explicitly authorised by parties can decide *ex aequo et bono* or as *amiable compositeur*, is an assurance that parties will benefit from the predictability of well-developed national jurisprudences, rather than facing the uncertainty of equitable principles and possible predisposition of an arbitrator toward one of the parties.

Further formalisation and judicialisation of the arbitral process, including arbitrator's vocation and conduct, may bring unnecessary constraints for both parties and arbitrators. The lack of profound regulation in many areas of international commercial arbitration is an advantage and a disadvantage, a blessing and a curse. The foundations of the system are rooted in strong and reliable principles, such as party autonomy, procedural flexibility and commercial reasonableness, leaving room to furnish each arbitration with the appropriate fittings in view of the business needs of the parties. With that regard William Park is right in his assertion that:

Modern arbitration is either blessed or plagued, depending on perspective, with a lack of fixed standards related to how arbitrators conduct proceedings. Little “hard law” exists with respect to how the specifics of how an arbitral tribunal should gather evidence and hear argument in its effort to determine the facts, interpret the contract, and apply the law governing the parties’ dispute.⁵⁰⁴

The process of judicialisation manifested through increased regulation of arbitrator’s vocation and formalisation of the arbitral process may enhance arbitration’s integrity but it also creates many pitfalls. As in other areas, the devil is in the detail.

4.1.2 Arbitrator’s Liability

Arbitral immunity is a well-established principle in international arbitration, which excludes arbitrators from certain liabilities.⁵⁰⁵ It aims to safeguard international arbitrators against frivolous lawsuits brought by parties who are dissatisfied with the merits of the arbitral award. It also seeks to uphold the administration of justice and the integrity of the system. Arbitrators’ immunity limits the opportunity for aggrieved parties to hold arbitrators personally liable and claim damages against them when disputes are not decided according to parties’ liking. It is argued that all adjudicators need to have sufficient immunity to adjudicate disputes without fear from vexatious litigation. In the opinion of one author “the integrity of international arbitration must be preserved by limiting as far as possible party claims against arbitrators based on adverse awards”.⁵⁰⁶

⁵⁰⁴ Ibid 143.

⁵⁰⁵ See e.g. Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration* (n 354) 288, 289. Also Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (2nd edn, Cambridge University Press 2012) 154 explaining that in common law countries arbitrators are granted immunity when they are acting in a quasi-judicial function, while in civil law countries arbitrators have broad immunity, though not an absolute one.

⁵⁰⁶ Eduardo Silva Romero, ‘Immunity and Liability of Arbitrators: What is the proper balance?’ in *Dossier of the ICC Institute of World Business Law: Players’ interaction in International Arbitration* (1st edn, ICC Publishing 2012) 91.

With the growing popularity of international commercial arbitration⁵⁰⁷ there is a greater focus on how justice is served in this private adjudication system. These developments lead to reconsideration of the double standard for arbitrator's independence and impartiality and increased sensitivity to potential arbitrators' misconduct. Questions related to the scope and limit of arbitrator's liability⁵⁰⁸ become very pertinent because of the relevance of those issues to the quest for fair and just arbitral process. On the one hand, a system granting full or partial exclusion of arbitrator's liability guarantees the arbitrator's immunity, independence and impartiality, however, on the other hand, it may create too much room for misconduct, particularly given the fact that arbitrators are financially motivated to be appointed in more and various arbitrations. In the words of Susan D. Franck:

⁵⁰⁷ See for example text to n 632.

⁵⁰⁸ For general or more profound analysis on arbitrator's liability and different regimes on arbitrator's immunity see Dennis R. Nolan and Roger I. Abrams, 'Arbitral Immunity' (1989) 11 *Indus. Rel. L.J.* 229–266; Andrea Mettler, 'Immunity vs. Liability in Arbitral Adjudication' (1992) 47 *Arbitration Journal* 24–35; Mark A. Sponseller, 'Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators' (1993) 44 *Hastings Law Journal* 421–447; 'Final Report on the Status of the Arbitrator' (1996) 7 'ICC International Court of Arbitration Bulletin'; Gaillard and Savage, 'The Status of the Arbitrators' (n 473); Susan D. Franck, 'The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity' (2000) 20 *N.Y.L. Sch. J. Int'l & Comp. L.* 1–59; Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration* (n 352); Matthew Rasmussen, 'Overextending Immunity: Arbitral Institutional Liability in the United States, England, and France' (2003) 26 *Fordham Int'l L.J.* 1824–1875; Yu and Shore, 'Independence, Impartiality, and Immunity of Arbitrators' (n 470); Peter B. Rutledge, 'Toward a Contractual Approach for Arbitral Immunity' (2004) 39 *Ga. L. Rev.* 151–214; Emmanuela Truli, 'Liability v. Quasi-Judicial Immunity of the Arbitrator: The Case against Absolute Arbitral Immunity' (2006) 17 *Am. Rev. Int'l Arb.* 383; Elizabeth Wilhelmi, 'How Far is Too Far? Reexamining the Continuing Extension of Arbitral Immunity to Arbitral Organizations' (2006) 1 *J. Disp. Resol.* 319–333; Jenny Brown, 'The Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion' (2009) 2009 *Journal of Dispute Resolution* 225–238; Frank-Bernd Weigand, *Practitioner's Handbook on International Commercial Arbitration* (Frank-Bernd Weigand (ed), 2nd edn, OUP 2009); Sara Roitman, 'Beyond Reproach: Has the Doctrine of Arbitral Immunity Been Extended Too Far for Arbitration Sponsoring Firms?' (2010) 51 *Boston College Law Review* 557–594; Maisner (n 470); Karl Pörnbacher, 'Liability of Arbitrators - Judicial Immunity versus Contractual Liability' in Alexander J. Bělohávek and Naděžda Rozehnalová (eds), *Czech and Central European Yearbook of Arbitration - 2012: Party Autonomy versus Autonomy of Arbitrators* (1st edn, Juris Net Llc 2012); Eduardo Silva Romero, 'Immunity and Liability of Arbitrators: What is the proper balance?' in *Dossier of the ICC Institute of World Business Law: Players' interaction in International Arbitration* (1st edn, ICC Publishing 2012); Matthew Bricker, 'The Arbitral Judgment Rule: Using the Business Judgment Rule to Redefine Arbitral Immunity' (2013) 92 *Tex. L. Rev.* 197–229; Born, *International Commercial Arbitration* (n 131); Dario Alessi, 'Enforcing Arbitrator's Obligations: Rethinking International Commercial Arbitrators' Liability' (2014) 31 *Journal of International Arbitration* 735–784.

(...) arbitration is now the preferred dispute resolution mechanism for international commercial disagreements. Unfortunately, because of perceived misconduct by arbitrators and the risk of party manipulation, the arbitration process has come under increasing attack through civil actions against arbitrators. As a result of these concerns, the issue of an arbitrator's immunity has received increased attention, and the scope of arbitrator immunity is currently a controversial issue.⁵⁰⁹

The matter of arbitrator's liability is regulated in national legislations but the statutory provisions are also complemented by applicable institutional arbitration rules or by explicit agreements between parties in dispute and arbitrators. The approaches to arbitral immunity adopted in national legislations are associated with the two main schools of thought, namely the jurisdictional and the contractual theories⁵¹⁰. Common law jurisdictions traditionally support the exclusion of liability for arbitrators on the grounds that arbitrators perform an adjudicative function, which is akin to a judicial one, while in civil law jurisdictions arbitrator's liability is determined from the perspective of the relationship between the arbitrator and parties, which is a contractual one⁵¹¹.

The association of jurisdictional theory with the judicialisation of international commercial arbitration comes to one's mind quickly but prematurely. Examining the process of judicialisation through the lens of the clash between the two concepts of arbitrator's function does not contribute much to the analysis on the driving factors

⁵⁰⁹ Franck, 'The Liability of International Arbitrators' (n 508) 1, 2.

⁵¹⁰ For more information on those theories see p 250 et seq.

⁵¹¹ In Pörnbacher (n 506) 215 the author summarises the approaches adopted by the civil law and common law jurisdictions in a similar fashion. According to him "The vast majority of national arbitration regimes seek to protect arbitrators from civil liability, again with differences as regards the extent of such protection. Only some Middle Eastern countries seem to hold arbitrators personally liable for all wrongful conduct, including negligence. As regards the dogmatic concept behind the arbitrator's immunity, common law jurisdictions seem to follow mostly a concept of judicial immunity, viewing arbitrators as functionally comparable to judges. By contrast, most civil law traditions rather focus on the contractual character and the origin of the arbitrator's appointment." See also Franck, 'The Liability of International Arbitrators' (n 506) 4: "Traditionally, civil law and several Arab countries emphasize the contractual nature of the arbitrator's *receptum arbitri* and use this as a baseline for establishing potential liability. In contrast, common law approaches tend to focus more upon the potentially tortious nature of an arbitrator's conduct as a violation of a duty of care."

and the implications of this development. The reason that each school of thought follows one or another approach does not necessarily have anything to do with the process of judicialisation, rather it is an indication of different cultural traditions. Moreover, the theory that is most widely accepted today is the mixed or hybrid school of thought according to which neither arbitrator performs a judicial function, nor is the award a contract. The followers of the hybrid theory assert that arbitral awards are a result of arbitrators performing an adjudicative function; however, contrary to the jurisdictional theory they argue that this function is exercised within the limits of the private jurisdiction created and fixed by the parties by their agreement.

Thus, analysing the process of judicialisation in international commercial arbitration by associating it with a particular school of thought does not add a lot to the debates regarding the scope and limits of arbitrator's liability. Instead of focusing too much on the conceptual framework justifying the approaches adopted by the states in national legislations, it is worth considering whether arbitration users either by express agreements or by reference to institutional arbitration rules limit or extend arbitrator's liability and why. Looking at the matter of arbitral immunity from this perspective is justifiable on two grounds. Firstly, the process of judicialisation is driven by the arbitration users rather than the national legislatures⁵¹². Regardless whether this is a conscious movement or a unintended development, i.e. judicialisation being either deliberately pursued or evolving as a by-product of the quest for fairness and justice in the arbitral process, the attitude of arbitration users to arbitral immunity shall reveal whether one could link the latter with the process of judicialisation and the pursuit of fair and justice in international commercial arbitration. And secondly, most national legislations allow for express limitation of arbitrator's liability. Whether arbitration users take advantage of this option or not will demonstrate their understanding of arbitral impartiality, independence and immunity and, consequently, of what constitutes a just arbitral process.

Arbitrator's liability can be limited either by an express agreement between parties and arbitrators or by reference to a set of arbitration rules, which contain provisions

⁵¹² If anything most states adopt an arbitration-friendly approach and national courts are reluctant to interfere with arbitration proceedings. See also Sections 5.1 and 5.2 of this thesis.

on arbitral immunity. Since analysing express agreements for limitation of arbitrator's liability is not feasible due to the confidentiality of such agreements and the lack of databases that provide the opportunity for such agreements to be searchable, the analysis will proceed in consideration of some of the widely used institutional arbitration rules.

All arbitration rules of the major arbitration institutions contain provisions limiting arbitrator's liability⁵¹³ to the extent this is permissible under the applicable national

⁵¹³ Pursuant to Art. 40 ICC Arbitration Rules 2012 "The arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the Court and its members, the ICC and its employees, and the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law."; Sections 44.1 and 44.2 DIS Arbitration Rules 1998 "All liability of an arbitrator for any act in connection with deciding a legal matter is excluded, provided such act does not constitute an intentional breach of duty. All liability of the arbitrators, the DIS, its officers and its employees for any other act or omission in connection with arbitral proceedings is excluded, provided such acts do not constitute an intentional or grossly negligent breach of duty."; Art. 46 VIAC Arbitration Rules 2013 "The liability of arbitrators, the secretary General, the Deputy secretary General, the Board and its members and the Austrian Federal economic Chamber and its employees for any act or omission in relation to the arbitration is excluded to the extent legally permissible."; Art. 45(1) Swiss Arbitration Rules 2012 "Neither the members of the board of directors of the Swiss Chambers" Arbitration Institution, the members of the Court and the Secretariat, the individual Chambers or their staff, the arbitrators, the tribunal-appointed experts, nor the secretary of the arbitral tribunal shall be liable for any act or omission in connection with an arbitration conducted under these Rules, except if the act or omission is shown to constitute intentional wrongdoing or gross negligence."; Art. 48 SCC Arbitration Rules 2010 "Neither the SCC nor the arbitrator(s) are liable to any party for any act or omission in connection with the arbitration unless such act or omission constitutes wilful misconduct or gross negligence"; Art. 43.1 HKIAC Arbitration Rules 2013 "None of the Council of HKIAC nor any committee, sub-committee or other body or person specifically designated by it to perform the functions referred to in these Rules, nor the Secretary General of HKIAC or other staff members of the Secretariat of HKIAC, the arbitral tribunal, any Emergency Arbitrator, tribunal-appointed expert or secretary of the arbitral tribunal shall be liable for any act or omission in connection with an arbitration conducted under these Rules, save where such act was done or omitted to be done dishonestly."; Art. 34.1 SIAC Arbitration Rules 2013 "SIAC, including the President, members of its Court, directors, officers, employees or any arbitrator, shall not be liable to any person for any negligence, act or omission in connection with any arbitration governed by these Rules."; Art. 31.1 LCIA Arbitration Rules 2014 "None of the LCIA (including its officers, members and employees), the LCIA Court (including its President, Vice-Presidents, Honourary Vice-Presidents and members), the Registrar (including any deputy Registrar), any arbitrator, any Emergency Arbitrator and any expert to the Arbitral Tribunal shall be liable to any party howsoever for any act or omission in connection with any arbitration, save: (i) where the act or omission is shown by that party to constitute conscious and deliberate wrongdoing committed by the body or person alleged to be liable to that party; or (ii) to the extent that any part of this provision is shown to be prohibited by any applicable law."; Art. 1.6 JAMS International Arbitration Rules 2011 "Except in respect of deliberate wrongdoing, the arbitrator or arbitrators,

law. These provisions usually stipulate that arbitrators are not liable for any act or omission in connection with the arbitration save for wilful, intentional or conscious wrongdoing, gross negligence or fraud. While AAA Arbitration Rules 2014, Art. 38 provide that arbitrators enjoy full immunity to the extent such a limitation of liability is prohibited by the applicable law, SIAC Arbitration Rules 2013 limit arbitrator's liability for any negligence, act or omission in connection with the arbitration (Art. 34.1) and HKIAC Arbitration Rules 2013 stipulate that an arbitrator is not liable for any act or omission unless such an act is done or omitted to be done dishonestly (Art. 43.1), i.e. arbitrator has acted in bad faith or fraudulently. These provisions grant relatively broad immunity to arbitrators to exercise their adjudicative function. Although arbitrators do not enjoy full immunity, the limitation of their liability as stipulated under institutional arbitration rules protects arbitrators from frivolous lawsuits brought by parties who are dissatisfied with the merits of the arbitral award. On the other hand, the lack of full immunity safeguards the arbitral process from malicious arbitral conduct and wrongdoings and upholds the integrity of the proceedings.

The approaches adopted in the cited institutional arbitration rules mirror the positions taken by legislatures and courts in arbitration-friendly states. Arbitrators are granted broad immunity to perform their adjudicative function without the threat of vexatious litigation. Thus, In England and the USA there has been a long tradition of granting arbitrators immunity from suit – in the absence of bad faith in England and full immunity undertaken in fulfilling their duties as arbitrators in the USA. The immunity of arbitrators was established by two decisions of the House of Lords in

the JIAC and JAMS International will not be liable to a party for any act or omission in connection with the arbitration.”; Art. 38 AAA Arbitration Rules 2014 “The members of the arbitral tribunal, any emergency arbitrator appointed under Article 6, any consolidation arbitrator appointed under Article 8, and the Administrator shall not be liable to any party for any act or omission in connection with any arbitration under these Rules, except to the extent that such a limitation of liability is prohibited by applicable law. The parties agree that no arbitrator, emergency arbitrator, or consolidation arbitrator, nor the Administrator shall be under any obligation to make any statement about the arbitration, and no party shall seek to make any of these persons a party or witness in any judicial or other proceedings relating to the arbitration.”; Art. 37 CEPANI Arbitration Rules 2013 “(1) Except in the case of fraud, the arbitrators shall not incur any liability for any act or omission when carrying out their functions of ruling on a dispute. (2) For any other act or omission in the course of an arbitration proceeding, the arbitrators, CEPANI and its members and personnel shall not incur any liability except in the case of fraud or gross negligence.”;

*Sutcliffe v Thackrah*⁵¹⁴ and *Arenson v Arenson*⁵¹⁵. This principle is now explicitly stated in English Arbitration Act 1996, s 29(1) “an arbitrator is not liable for anything or omitted in the discharge or purported discharge of his function as arbitrator unless the act or omission is shown to have been in bad faith”. Australian Arbitration Act, s 28(1) also follows the approach of express arbitral immunity. In Australia Arbitrators are not liable for anything done or omitted to be done in good faith in their capacity as arbitrators.

German, Austrian and Italian laws provide for implied arbitral immunity save for situations of intentional or wilful misconduct.⁵¹⁶ In Germany even though there is not a specific provision in the German Arbitration Act 1998 regulating arbitrator’s immunity, it is considered an implied term that arbitrators are liable to the parties in the same way as court judges are, namely under Section 839(2) of the BGB. According to the latter “If an official breaches his official duties in a judgment in a legal matter, then he is only responsible for any damage arising from this if the breach of duty consists in a criminal offence.” This provision, however, does not preclude the parties from expressly stipulating a term to the contrary. In addition an arbitrator may be liable for negligence under the general rules of the law of obligations. In such cases the conduct of the arbitrator will be in violation of the Civil Procedure Code or ZPO (Zivilprozessordnung), Section 1036.

Similarly in Switzerland there is no provision in Chapter 12 of the Swiss PILA, which exempts arbitrators from liability claims by the disputing parties. As such arbitrator’s liability is determined by the general rules governing contractual liability under Art. 97 of the Swiss Code of Obligations. According to the latter a party to a contract shall compensate any damages incurred by the other party if she has not performed their contractual obligations unless she proves that no fault is attributable to her. The *receptum arbitri*⁵¹⁷ is considered to be a mandate or quasi-mandate, and

⁵¹⁴ [1974] 1 All E.R. 859.

⁵¹⁵ [1975] 3 All E.R. 901.

⁵¹⁶ Franck, ‘The Liability of International Arbitrators’ (n 508) 36-40.

⁵¹⁷ According to the ‘Final Report on the Status of the Arbitrator’ (n 506) 29: “In every case, the arbitrator and the parties are bound by a specific contract. The subject matter of this *receptum arbitrii*, sometimes referred to as the ‘contract of investiture’, is the arbitrator’s performance of a very special task: to settle the dispute between his contracting parties”.

as such the arbitrator is liable for negligence or any other inappropriate conduct or omission.

French law also follows the approach of implied liability adopted by Swiss law. The general rule is that the liability of an arbitrator to the parties is a contractual one and a party can bring a claim of damages against an arbitrator under Art. 1142 French Civil Code. Arbitrator is exempted from liability for errors committed in the adjudication of the dispute or in the content of the award⁵¹⁸.

Given the aforementioned, it can be concluded that stipulations concerning arbitrator's liability incorporated by reference to specific arbitration rules does not differ much from the applicable statutory provisions, which generally grant broad immunity to arbitrators. On the one hand, as demonstrated above the immunity provisions in the arbitration rules do not provide for considerable limitation or extension of arbitrator's liability, and, on the other hand such provisions for exclusion of liability are valid to the extent they are permissible under the applicable national law. It should also be mentioned that institutional arbitration rules do not contain provisions elaborating on issues such as what constitutes gross negligence or wilful misconduct. These matters are left for clarification to the relevant national courts.

The broad immunity enjoyed by arbitrators even according to national laws, which favour the contractual school of thought, can be viewed as an implication of the process of judicialisation in international commercial arbitration. Such immunity is viewed as a mechanism to protect the impartiality and integrity of the arbitral process. Despite the availability of other built-in procedural safeguards to prevent abuses of the decision-making process, such as the adversarial nature of the process, the right of judicial review, the procedure for challenging an arbitrator, both national laws and institutional arbitration rules limit arbitrator's liability most often for wilful misconduct, fraud and gross negligence. Even more, this limitation of liability is extended to arbitration institutions to ensure that the latter will perform their functions with regard to arbitration proceedings without fear from vexatious

⁵¹⁸ See *Bompard c/ Consorts C et autres*, *Gaz. Pal.*, Tribunal de Grande Instance de Paris, 13 June 1990, 1990 II somm. Rev Arb, 1996, pp 475–476.

litigation.⁵¹⁹ Depending on the applicable law the liability of arbitration institutions can be excluded or at least reduced if the institution in question demonstrates that even had it fulfilled its duties the damage would still have been incurred. Thus, both arbitrators and arbitration institutions are protected for all actions performed in their arbitral capacity.⁵²⁰

Although the process of judicialisation can be traced to the approach taken towards arbitrator's and arbitration institutions' immunity, further extension of arbitral immunity, which is being sought by some commentators, will not support or add value to the quest for fairness and justice in international commercial arbitration and is not necessarily compatible with the latter's nature. It is also argued that "arbitrators are in much the same position as judges, in that they carry out more or less the same functions"⁵²¹, however, it has to be born in mind that arbitrators are service providers in a private system for dispute resolution, alternative to the public adjudicative system. A broad but less-than-full arbitral immunity is a safeguard for the integrity of the adjudicative process and provides the necessary balance between two contradicting principles – on the one hand, provision of professional services in exchange for remuneration, and, on the other hand, serving private/privatised justice. Still, since arbitrator's function is to render justice only between the disputing parties (i.e. the award does not bind third parties) and arbitrator's vocation is a deregulated one (unlike judges'), an absolute immunity for arbitrators may potentially do more harm than good to the arbitral process by undermining its legitimacy, trustworthiness and good standing.

⁵¹⁹ See the wording of the immunity provisions in the institutional arbitration rules cited in n 513. In all provisions arbitration institutions are expressly excluded from liability, similarly to arbitrators. In England, Arbitration Act 1996, s74 grants immunity an institution on the appointment or nomination of an arbitrator for any act or omission of that arbitrator unless the failure or omission was in bad faith. Such immunity is provided for both arbitration institutions and other organisations that offer services of an appointing authority. US courts also have held that immunity should extend to institutions in order to effectuate the policies underpinning arbitral immunity. See for example *Austern* (n 495).

⁵²⁰ See *Wally v. General Arbitration Council of the Textile and Apparel Indus.*, 630 N.Y.S.2d 627, 628 (N.Y. Sup. Ct 1995).

⁵²¹ *Sutcliffe v. Thackrah* (n 514).

Finally, the broad arbitral immunity and the limited opportunity for parties to extend arbitrator's liability⁵²² is considered to be an important mechanism for providing legal certainty to the arbitral process by ensuring arbitral awards have final and binding effect between the parties in dispute. Although there is merit in the argument that the relationship between arbitrators and parties is of a contractual nature, and, as such, the rights, obligations and liabilities are subject to agreement between them, considerations of public policy nature as to the standards for finality and legal certainty of arbitration proceedings seem to have priority. The process of judicialisation of international commercial arbitration aims to enhance those standards and ensure justice is served in fair proceedings.

4.2 Regulation of the Arbitral Process through Procedural Soft Law – A Step Towards Further Judicialisation of International Commercial Arbitration?

International commercial arbitration gained popularity as a dispute resolution method because of the flexibility and confidentiality of arbitration proceedings, the international enforceability of arbitral awards and parties' freedom to appoint arbitrators⁵²³. With the increasing use of this method and the growing number of high-stake disputes resolved by arbitration, the system of privatised justice is continuously evolving. Some of the developments take their toll on innate features of international commercial arbitration, such as time- and cost-efficiency⁵²⁴. These new trends cause heated debates in the arbitration community.

The challenges in international commercial arbitration can well be illustrated by taking a look at the topics debated at the International Council for Commercial

⁵²² See Pörnbacher (n 506) 220, para 11.26.

⁵²³ These characteristics were pointed out to be among the most valuable characteristics of international arbitration in the most current international arbitration survey, namely QMUL Survey 'Improvements and Innovations in International Arbitration' (2015), available at: <<http://www.arbitration.qmul.ac.uk/docs/164761.pdf>>

⁵²⁴ See n 601.

Arbitration (ICCA) conferences throughout the years⁵²⁵. ICCA is one of the most influential international organisations. It has official status as an NGO accredited by the United Nations and in that capacity it has participated actively in the preparation of the UNCITRAL Arbitration Rules, UNCITRAL Conciliation Rules, and UNCITRAL ML. ICCA congresses attract a large number of arbitration users from all over the world and the meetings have made significant contributions to the development of dispute resolution theory and practice.

The topics discussed at the ICCA conferences are a reflection of the most current trends in international arbitration and an indication of arbitration users' concerns⁵²⁶. For example, the second ICCA Congress in 1984 was dedicated to the UNCITRAL ML and focused on overarching issues, such as arbitration agreement, court intervention and enforceability of arbitral awards. The following two congresses were largely devoted to comparative law debates and looking for solutions to overcome regional differences. The 1990 ICCA conference was the first meeting entirely focused on issues related to preventing delays and disruption in arbitration and achieving effective arbitral proceedings. From 1990 on the questions of efficiency and due process became recurrent topics – the 1994 congress dealt with possible methods of increasing efficiency, while the discussions at the 1998 conference were focused on how to achieve efficiency without sacrificing due process and implementing measures against dilatory tactics in international arbitration. With the increasing complexity of arbitral process the debates at the

⁵²⁵ The ever-increasing complexity of arbitration proceedings and the development of international commercial arbitration as a system of privatised justice can also be demonstrated by the changes that ICCA Yearbooks undergo during the years. While the first ICCA Yearbooks were printed in slim volumes of 250 or so pages, the latest Yearbooks grew both in weight and size with the most current volumes spreading over 700 pages or even 1100 pages (available at: <http://www.arbitration-icca.org/publications/yearbook_table_of_contents.html>).

⁵²⁶ It is very interesting to observe the changes not only in the sizes of the ICCA volumes but also in the topics thereto. The first Yearbooks contained national reports on arbitration, court decisions on the NYC and updates on recent amendments on arbitration statutes, while the latest issues demonstrate the growing harmonisation of national arbitration laws and institutional arbitration rules and the continuous attempts to overcome regional cultural and legal differences. The focus of the debates has shifted from the anchoring effect of the seat of arbitration to enhancing international commercial arbitration as a transnational system of justice and encouraging further development of the international arbitration culture. Although these developments are encouraging one cannot ignore the alarming calls for decreasing the complexity of arbitration proceedings.

ICCA conferences concentrated on arbitration participants' conduct⁵²⁷, effective advocacy in arbitration⁵²⁸, rule-based solutions to procedural issues and the need for more precision in the arbitration proceedings and arbitral decision-making⁵²⁹.

The keynote address at the 2012 ICCA congress delivered by Sundaresh Menon, former Attorney General and current Chief Justice of Singapore, is the climax of arbitration users' reflections on the development and future of international arbitration. Chief Justice Menon acknowledges the positive trends in international commercial arbitration, such as the rise of institutional arbitration and the harmonisation of national arbitration laws and various sets of arbitration rules. The speaker, however, is not hesitant to concede that:

(...) [Another] major feature of arbitration today is the altogether different character and complexion of the arbitration process itself. Arbitration was once much vaunted for being faster, cheaper, less formal and more efficient than the more cumbersome court process. Arbitrators were not expected to be legal experts. Their decisions mattered only to the parties before them and more often than not, these were commercial actors who wanted a quick, final outcome to resolve their differences.

Today, arbitration is a highly sophisticated, procedurally complex and exhaustive process dominated by its own domain experts. (...) Arbitrators, mindful of the principles of natural justice and the fact that there is no appeal against their decision, are sometimes compelled to endure protracted submissions and responses to submissions on every conceivable point.

Detailed frameworks and rules with an emphasis on legal accuracy, precision and certainty have overtaken the *ad hoc* compromise-oriented system. Just as arbitration has

⁵²⁷ The 2000 ICCA congress dealt with arbitrator's responsibilities for proper conduct of proceedings, 2006 ICCA congress discussed contemporary practice in the conduct of proceedings, and the keynote address at the 2010 ICCA congress was dedicated to advocacy and ethics in international arbitration.

⁵²⁸ The 2010 ICCA congress was devoted to advocacy and ethics in international arbitration.

⁵²⁹ The 2009 ICCA congress discussed recent developments in the arbitral process and rule-based solutions to procedural issues, the 2012 conference explored in great detail evidence production, witnesses, experts and hearings, the relationship between international arbitration and regulators, and the 2014 ICCA congress focused on burden of proof and standard of proof in international commercial arbitration, document production and document management, discovery and matters of evidence in international commercial arbitration.

taken centre stage in the resolution of high value international commercial disputes, it has also become an increasingly complex and formal process burdened by formidable costs.⁵³⁰

Chief Justice Menon's speech⁵³¹ echoes the concerns raised at another global arbitration event, namely the Annual Goff Lecture, and in particular the Tenth Annual Goff Lecture delivered by Mr Fali Nariman, then President of ICCA and current President of Bar Association of India. The lecture, entitled "The Spirit of Arbitration" draws attention to the preoccupation of modern international commercial arbitration with legal accuracy and procedural complexity:

There is far too much of the 'letter [of the law]' in modern International Commercial Arbitration (ICA) as practised: there is just too much legal baggage taken on board the good ship ICA - as a result, it moves slowly and ponderously, and is unable to weather the strong seas of change. ICA has become almost indistinguishable from litigation, which it was at one time intended to supplant. And the baggage continues to increase - with law, more law, legalese, and more legalese: and much disputation about 'applicable law', 'multi-party arbitrations', 'agreements in writing', 'discovery in foreign arbitration', 'lex mercatoria', etc. etc., etc.⁵³²

Fali Nariman unequivocally links the legalisation and increasing regulation of international commercial arbitration to the process of judicialisation. Indeed, by prescribing ever more intricate rules and procedures to ensure parties' access to justice and due process, international commercial arbitration is becoming indiscernible from litigation. Even though the development of rules, guidelines, recommendations, codes of ethics, best practices, etc. aims to guarantee the fairness and justice of the arbitral process, it has become a pervasive problem itself⁵³³,

⁵³⁰ Menon (n 36) 12, 13.

⁵³¹ The speech of Chief Justice Sundaresh Menon raised some fundamental thought provoking questions on the future of international arbitration and opened a global debate. See for example "4th LSE Arbitration Debate 'Is Self-Regulation of International Arbitration an Illusion?' between Chief Justice Sundaresh Menon and Professor Jan Paulsson, moderated by Mr. Toby Landau QC", 2013 available at: <https://www.youtube.com/watch?v=_ShMaMWmHZ8>

⁵³² Nariman, 'The Spirit of Arbitration' (n 23) 262.

⁵³³ See for example Ugo Draetta, 'The Transnational Procedural Rules for Arbitration and the Risks of Overregulation and Bureaucratization' (2015) 33 ASA Bulletin 327-342; Michael Schneider, 'The Essential Guidelines for the preparation of Guidelines, Directives, Notes, Protocols and

rendering the privatised system for civil justice inflexible and rigid, just as its public counterpart:

One oft-heard criticism of procedural soft law is that it leads to the “judicialisation” of arbitration: procedural transformation of arbitral dispute resolution to resemble court litigation more closely.⁵³⁴

Thus, on the one hand, the introduction of too many airtight rules and guidelines can slow down the proceedings and cause disruptions. A formalised process characterised by procedural intricacy and necessitating the employment of refined advocacy tool kit may lead to inefficiency and ultimately delays in serving justice to the parties. On the other hand, however, the continuous development of soft law instruments aims to address the needs of the business community. Best practices and recommendations could be useful guidance when arbitrators are faced with complex international transactions with more than one international element where the lack of explicit and unequivocal rules may result in a serious potential threat of violation of due process.

While Chief Justice Menon and senior advocate Fali Nariman are concerned about the process of judicialisation and black-letter legalism in international commercial arbitration The Right Hon. the Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales advocates for an increasing court intervention. In a speech given at the BAILII Lecture in March 2016 the Lord Chief Justice Thomas criticised the restrictive grounds for appeal under the Arbitration Act 1979 and the Nema Guidelines and currently under Arbitration Act 1996, s 69. In the Lord Chief Justice’s view the diversion of more claims from the courts to arbitration does not contribute to upholding the rule of law and “reduces the degree of certainty in the law that comes through the provision of authoritative decisions of the court”⁵³⁵. The

other methods intended to help international arbitration practitioners to avoid the need for independent thinking and to promote the transformation of errors into’ in Laurent Lévy and Yves Derains (eds), *Liber Amicorum, Essays in Honor of Serge Lazareff* (1st edn, Editions A. Pedone 2011).

⁵³⁴ Park, ‘The Procedural Soft Law of International Arbitration’ (n 138) 145.

⁵³⁵ The Right Hon. The Lord Thomas of Cwmgiedd and Lord Chief Justice of England and Wales, ‘Developing Commercial Law through the Courts: Rebalancing the Relationship between the

suggested way forward is encouraging greater use of the power under section 45 to enable the court to give decisions on points of law and changing the section 69 test because “the restriction in relation to appeals where the question is one of general public importance is (...) a serious impediment to the growth of the common law.”⁵³⁶

In light of the debate about the judicialisation of international commercial arbitration the remarks made by the Lord Chief Justice Thomas are quite unsettling. They suggest a fundamental change to modern international commercial arbitration, as we know it, and reversing the privatisation of civil justice⁵³⁷. The future of arbitration as depicted by the Lord Chief Justice is one of extended court intervention, diminished efficiency and increased formality. Fundamental features of international commercial arbitration such as finality of arbitral awards and limited judicial supervision will be deeply affected if the changes suggested by the Lord Chief Justice Thomas are implemented. International commercial arbitration will cease to be an alternative to litigation and will instead become its counterpart, which champions public interest over private ones.

4.2.1 Regulated, Self-regulated or Over-regulated

The starting point in discussing whether international commercial arbitration has become “over-regulated”, and as a result “judicialised”, is to attempt to bring some clarification to the terms “regulation” and “self-regulation” within the context of international commercial arbitration. This task is of particular complexity as there are no widely accepted working definitions of “regulation” and “self-regulation” in the available literature⁵³⁸. The lack of comprehensible theories about the meaning of

Courts and Arbitration’ 2016 at 10, available at: <https://aberdeenuilaw.files.wordpress.com/2016/05/lcj-speech-bailli-lecture-201603091.pdf>

⁵³⁶ Ibid 13.

⁵³⁷ See text to n 415, 416.

⁵³⁸ With the exception of Catherine Rogers who endeavours to define self-regulation in the context of international arbitration, see Rogers, *Ethics in International Arbitration* (n 445) 221, para 6.10-6.6.30, authors use the terms regulation and self-regulation without distinguishing between their characteristics.

“regulation” and “self-regulation” in the context of international commercial arbitration could be rooted in the hybrid nature⁵³⁹ of this method of dispute resolution and the absence of a hierarchical system of norms in international arbitration. The continuously growing number of actors and the changing sociology of international arbitration⁵⁴⁰ also add to the difficulty of distinguishing between the regulators, the service providers and the users. According to Catherine Rogers “regulation is usually conceived of as a top-down, command-and-control operation; it is imposition of coercive state power through rules (...)”⁵⁴¹. Sanctioned by state power the rules have legitimacy and serve the public interest. In contrast, self-regulation in international commercial arbitration is associated with the initiative of international business community to regulate the standards of behaviour of its members, which suggests that the soft law rules are not enforced by public force⁵⁴². It is driven by arbitration institutions, international organisations and non-governmental bodies that act in industries’ interest. Rules or behavioural standards

⁵³⁹ According to the predominant theory about the foundations of international arbitration, the latter has both contractual and jurisdictional elements. Due to the hybrid nature of international commercial arbitration, the clear-cut distinction between the notions of regulation, self-regulation and harmonisation could be challenging at very least. The difficulties associated with defining those terms in the context of international arbitration as well summaries by Bernard Hanotiau “For decades, there have been debates over the juridical nature of international arbitration: is it an alternative, autonomous, method of dispute resolution, subject to self-regulation by the parties, or is it a system of delegated justice regulated by a particular national law?” in Hanotiau, ‘International Arbitration in a Global Economy’ (n 10) 91.

⁵⁴⁰ See Emmanuel Gaillard, ‘Sociology of International Arbitration’ (2015) 31 Arbitration International 1–17 where the author differentiate between the actors in international arbitration on the ground of their function putting forward the idea that international arbitration has moved from a solidaristic model to a polarised model: “Although the essential players (parties and arbitrators) remain the same, arbitration nowadays includes a host of new actors: the numerous service providers, including the ‘merchants of recognition’ that distribute legitimacy within the field of international arbitration; and the value providers who provide guidance as to the way international arbitration should develop and how arbitral social actors should behave.”

⁵⁴¹ Rogers, *Ethics in International Arbitration* (n 445) 221, para 6.01.

⁵⁴² See Fortese and Hemmi (n 426) 114, where it is argued: “Soft law norms are generally understood to be those that cannot be enforced by public force. These norms can emanate from State actors, be they legislators, governments or international organisations. These can also emanate from non-State actors, such as private institutions and professional or trade associations with an international character. (...) In spite of the lack of enforceability, the addressees of soft law norms can perceive it as binding and, even if they do not, they may choose to abide by it of their own accord. This normative weight is enhanced when soft law rules are codified.”

that result from self-regulation initiative procure legitimacy when they comply with the mandatory legal framework as defined by the state.⁵⁴³

States, which recognise international commercial arbitration as a valid method of resolving trade disputes, provide the regulatory framework, within which the arbitral tribunals exercise their delegated adjudicative function. Thus, national legislatures are the primary, external regulator of international commercial arbitration. By prescribing rules and exercising supervisory powers through the national courts, states ensure that parties' right to access to justice is not violated. These rules are found in the national systems of law, in particular, (i) in the arbitration law of the country, which is the seat of arbitration, and (ii) in the laws of the countries, in which recognition and enforcement of the arbitral award is sought⁵⁴⁴.

It is true that there was a period of increased state regulation in the 20th century, which saw the introduction of arbitration legislation in many countries. Although this might be considered as the beginning of the process of judicialisation in international commercial arbitration (i.e. national legislatures prescribed rules in order to ensure that parties' right to access to justice is guaranteed and these rules are backed up by sanctions – the non-enforceability of arbitral awards), to a great extent this development is better defined as a harmonisation process. The enactment of international conventions on arbitration (operating through the national laws of the states that have agreed to be bound by the) and the UNCITRAL ML, the recognition of the importance of international arbitration in resolving trade disputes and fostering

⁵⁴³ For additional analysis on the concepts of regulation, self-regulation and governance see Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 International Organization 421–456; Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self Regulation in a "Post-regulatory" World' (2001) 54 Current Legal Problems 103–146; Julia Black, 'Critical Reflections on Regulation' (2002) 27 Australian Journal of Legal Philosophy 1–35; Peer Zumbansen, 'Sustaining Paradox Boundaries: Perspectives on Internal Affairs in Domestic and International Law' (2004) 15 Eur. J. Int'l L. 197–211; Dupret (n 91); Kenneth W. Abbott and Duncan Snidal, 'Strengthening International Regulation Through "Transnational New Governance"' (2009) 42 Vanderbilt Journal of Transnational Law 501–578; Peer Zumbansen, 'Debating Autonomy and Procedural Justice' (n 370); Jan Klabbbers and Touko Piiparinen, *Normative Pluralism and International Law: Exploring Global Governance* (Jan Klabbbers and Touko Piiparinen (eds), 1st edn, Cambridge University Press 2013); Schultz (n 451).

⁵⁴⁴ For further analysis on the sources of law see Chapters 2 and 3.

economic development⁵⁴⁵, and the arbitration-friendly stance that many states have adopted, have brought about the modernisation and harmonisation of national laws that regulate the international arbitration process. It is indeed widely acknowledged that the adoption of UNCITRAL ML lead to displacement of the “patchwork of hitherto disparate pieces of domestic legislation”⁵⁴⁶. The enactment of UNCITRAL ML in some ninety jurisdictions worldwide⁵⁴⁷ contributed to the development of a global paradigm of minimal curial intervention by specifying restrictive grounds on which the intervention of the courts could be sought. The UNCITRAL ML provides some guidelines as to the basic tenets of the arbitral process leaving great scope for party autonomy and procedural flexibility. It would, therefore, be difficult to argue that the process of judicialisation observed in today’s international commercial arbitration is driven by that very harmonisation of national arbitration laws.

This is why instead of focusing on the regulation of international commercial arbitration through national legislatures and state courts, as analysing those regulators would not add much to the discussion relating to the causal link between the process of judicialisation and the ongoing “over-regulation” of the arbitral process⁵⁴⁸, one should question the role of “self-regulation” and the proliferation of soft laws in the over-regulation of international commercial arbitration.

⁵⁴⁵ See McConnaughay, ‘The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles’ (n 422).

⁵⁴⁶ Menon (n 36) 8.

⁵⁴⁷ See Frederic Bachand and Fabien Gelin, *The Uncitral Model Law After Twenty-Five Years: Global Perspectives on International Commercial Arbitration* (1st edn, Juris Publishing, Inc. 2013) 6.

⁵⁴⁸ For comprehensiveness of the analysis it should be pointed out that some practitioners argue that involvement of national courts in international commercial arbitration is not decreasing. For example, the Honourable Andrew Rogers QC notes that arbitration proceedings have become like national court trials and have come under greater judicial scrutiny. Hon Andrew Rogers QC cites the fact that courts in the common law system had “enlarged the permissible field of arbitrability beyond recognition”, to the point that “[a]s a result of today’s approach to arbitrability there are many problems which will require resolution by the courts” – see Andrew Rogers QC, ‘Arbitrability’ (1994) 10 *Arbitration International* 263–276, 263, 276. In addition among the forefront of international arbitration issues is the question who decides whether an arbitrator or an arbitral tribunal has jurisdiction to hear a particular case. While US courts have recently held that the issue of jurisdiction is to be decided by the courts unless parties have specifically reserved that decision for the arbitrators (see e.g. *First Options of Chicago, Inc v Kaplan* 514 U.S. 938 (1995)), the European courts have generally considered the question as one to be decided by the arbitrator/arbitral tribunal. Whether or not the arbitrability of international trade disputes has been extended with the assistance of the courts is beyond the scope of this

While defining what self-regulation means in the context of international commercial arbitration, it is worth considering whether there are merits in the claims that instead of bringing efficiency and flexibility excessive self-regulation leads to delays, disruptions and even obstruction of justice in the arbitral process. According to Pierre Lalive the causes for the over-regulation of international commercial arbitration may be rooted in the globalisation of international trade and the increasing complexity of international commercial disputes⁵⁴⁹:

International Commercial Arbitration is no longer today a simple chapter of International Business Law; for a variety reasons, it has become a complex, sophisticated and difficult subject. So much so that it is probably one of the main duties of modern specialists of Private International Law and International Trade to try to make it simpler, and to resist the complications (procedural or substantive) introduced either by State Authorities, by International Institutions, or by law practitioners themselves — whether such complications are caused by self-interest or by the modern disease of overregulation.⁵⁵⁰

In Pierre Lalive's view this general tendency to over-regulate is driven by national or international institutions that "continuously enact detailed rules or directives which are perhaps useful to assist unqualified practitioners and beginners, but are apt to

thesis. The questions regarding competence to decide jurisdiction does not fall within the objectives of this Section either.

⁵⁴⁹ That international commercial arbitration is becoming increasingly complex and that more high-stake disputes are brought to it that ever before can be illustrated by the statistics of one of the biggest and most well-respected arbitration institution, ICC. ICC has a true global reach and proven international character of its arbitrations, which is a very good representation of the international trade disputes being resolved by arbitration. Since its creation in 1923, the ICC International Court of Arbitration has administered more than 20,000 disputes involving parties and arbitrators from some 200 countries and independent territories. According to the official ICC statistics, which can be found on its website, there is a constantly increasing number of cases involving more than two parties, as well as cases with amount in dispute over \$1 million. In 1997 the cases involving more than two parties were 20% of all new requests for arbitration and the cases with amount in dispute over \$1 million were 63.30%. For the period 2004-2014, there is a steady increase in those numbers, as the cases involving more than two parties were respectively 31%, 32%, 32%, 31%, 34%, 31%, 33%, 31%, 31%, 33%, 33%, while the cases with amount in dispute over \$1 million were respectively 58.80%, 54.30%, 55.40%, 57.40%, 72.50%, 77.10%, 75.90%, 77.30%, 76.20%, 78.20%, 76.50%.

⁵⁵⁰ Lalive, 'Arbitration – The Civilised Solution' (n 424).

create new procedural complications and to diminish flexibility”.⁵⁵¹ Among the scholars and practitioners that share Lalive’s concerns of over-regulation are Ugo Draetta⁵⁵², Michael Schneider⁵⁵³, Günther Horvath⁵⁵⁴, Giorgio Bernini⁵⁵⁵, William Park⁵⁵⁶, Fali S. Nariman⁵⁵⁷, Andrew Okekeifere⁵⁵⁸, Toby Landau and J. Romesh Weeramantry⁵⁵⁹, etc.

At the 2012 ICCA Conference in Singapore Toby Landau commented that initially the regulators and codifiers were focused on the fundamental procedural components of the arbitral process, which was undoubtedly beneficial to the international business community⁵⁶⁰. However “ever-more excruciating detail has been applied to every aspect of the arbitral process” to the extent that “[r]egulation has increasingly given way to micromanagement”⁵⁶¹:

(...) as the frequency and compass of contemporary international arbitration has increased, a corresponding and exponential increase in regulatory activity has also taken place in this field. More and more – often self-appointed – organizations are now busy compiling and publishing rules, principles, codes, protocols, models, guidelines,

⁵⁵¹ Ibid 491.

⁵⁵² Draetta (n 533).

⁵⁵³ Schneider, "The Essential Guidelines for the preparation of Guidelines, Directives, Notes, Protocols and other methods intended to help international arbitration practitioners to avoid the need for independent thinking and to promote the transformation of errors into 'Best Practices'" (n 533).

⁵⁵⁴ Horvath (n 23).

⁵⁵⁵ Giorgio Bernini, ‘The Future of Arbitration: Flexibility or Rigidity?’ in Julian D.M. Lew and Loukas Mistelis (eds), *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration: Sponsored by Freshfields Bruckhaus Deringer* (Alphen aan den Rijn: Kluwer Law International 2007) 54.

⁵⁵⁶ Park, ‘The Procedural Soft Law of International Arbitration’ (n 138) 142, para 7-4.

⁵⁵⁷ Nariman, ‘The Spirit of Arbitration’ (n 23).

⁵⁵⁸ Andrew I. Okekeifere, ‘Commercial Arbitration As the Most Effective Dispute Resolution Method: Still a Fact or Now a Myth?’ (1998) 15 *Journal of International Arbitration* 81–106.

⁵⁵⁹ Toby Landau and J. Romesh Weeramantry, ‘A Pause for Thought’ in Albert Jan van den Berg (ed), *International Arbitration: The Coming of a New Age?, ICCA Congress Series, Volume 17* (1st edn, Kluwer Law International 2013).

⁵⁶⁰ Ibid 496.

⁵⁶¹ Ibid 497.

interpretations, recommendations, notes and best practices. The result is an already bewildering web of arbitral soft law norms.⁵⁶²

Ugo Draetta echoes those observations and identifies the disadvantages for international arbitration community if this trend continues:

Transnational procedural rules applicable to arbitration are being issued in such an increasing number that many have asked themselves whether the international arbitration community has placed itself on a slippery slope towards overregulation. This would definitely be a negative outcome, as it would limit the discretionary powers traditionally enjoyed by arbitrators when applying procedural rules. Such discretionary powers, when properly exercised, have proven to be one of the greatest and most attractive assets for arbitration as an institution, as they allow arbitrators to take procedural decisions tailored to the specific circumstances of the case, without having to follow one-size-fits-all solutions.⁵⁶³

It is important that international commercial arbitration preserves its uniqueness in providing flexible solutions to international trade disputes and does not fall into the inertia and complacency of providing a one-size-fits-all mechanism for managing arbitration proceedings and rendering arbitral decisions. Indeed both extensive regulation through soft law instruments and adherence to the “letter”⁵⁶⁴ could result in international commercial arbitration losing its “lightness of touch”⁵⁶⁵ and turning

⁵⁶² Ibid 496.

⁵⁶³ Draetta, (n 531) 333.

⁵⁶⁴ See Nariman, ‘The Spirit of Arbitration’ (n 23) 262 arguing that “There is far too much of the ‘letter’ in modern International Commercial Arbitration (ICA) as practised: there is just too much legal baggage taken on board the good ship ICA – as a result, it moves slowly and ponderously, and is unable to weather the strong seas of change. ICA has become almost indistinguishable from litigation, which it was at one time intended to supplant. And the baggage continues to increase – with law, more law, legalese, and more legalese: and much disputation about ‘applicable law’, ‘multi-party arbitrations’, ‘agreements in writing’, ‘discovery in foreign arbitration’, ‘lex mercatoria’, etc. etc., etc.”

⁵⁶⁵ See *ibid* noting that “Arbitration has lost that lightness of touch that characterized its early manifestations: motivated or reasoned decisions – majority, concurring *and* dissenting – are now increasingly long and turgid, and too full of legal learning. If private awards were intended for the parties alone (as they should be) they would be relatively short, the conclusions and main reasons being presented in a simple format. But some of the ‘players’ in international arbitration are increasingly tempted to address a much wider audience (...). And the hope of creating something that will form part of a body of ‘legal opinion’ inspires an even more elaborate composition. Often an award will quote or cite from other awards rendered in what is stated to

into a rigid, ponderous and ineffective system where the formalised process and the legalised approach in decision-making⁵⁶⁶ are the norm rather than the exception. It is this concern about over-regulation that made Michael Schneider ironically note that:

The principle objective of guidelines is to reduce the scope of independent thinking by their users, and to replace it by what the Guideline Producers believe the users should think or do. (...) No matter how remote or how trivial the issues, the Guideline Producers will find some reason why the users require guidance.⁵⁶⁷

When reflecting on the role of self-regulation in international commercial arbitration, commentators seem to be in agreement that self-regulation could be defined as regulation within the international community⁵⁶⁸. The latter is driven by internal regulators, i.e. the arbitral institutions, international organisations and non-governmental organisations, such as International Bar Association, American Arbitration Association, International Law Association, Association for International Arbitration, etc.

A distinction could be made between regulation of the arbitral process by means of institutional arbitration rules and through guidelines, recommendations, best practices and codes of conduct. This is because while the former hinges on implementation of rules developed by service providers by explicit agreement between the parties, and as such could be regarded as regulation by consent, the latter is an example of pure self-regulation, whereby the international community, acting through international organisations and non-governmental bodies, formulates and monitors its adherence to certain legal and/or professional standards. Thus, it seems to be appropriate to use the term “self-regulation” only when referring to the

be a similar fact-situation – ignoring the caution expressed by England's Lord Chancellor (way back in 1901), that every decision must be read as applicable to the facts proved and not as an exposition of the whole law on the subject; that every case in which expressions of law are to be found is qualified and conditioned by its own peculiar facts.”

⁵⁶⁶ See Section 2.3 Arbitral Awards as a Source of Law, particularly text to n 334, 335.

⁵⁶⁷ Schneider, "The Essential Guidelines for the preparation of Guidelines, Directives, Notes, Protocols and other methods intended to help international arbitration practitioners to avoid the need for independent thinking and to promote the transformation of errors into 'Best Practices'" (n 531) 564, 565.

⁵⁶⁸ See e.g. Chief Justice Sundaresh Menon's definition for self-regulation given at the '4th LSE Arbitration Debate' (n 566).

promotion of guidelines, recommendations, reports, practice notes, best practices, codes of conduct and other soft law instruments developed by international institutions and organisations.

Despite the fact that the primary role of international arbitral institutions remains the same, i.e. to provide international arbitration services by administering the cases decided under their auspices, the functions of international arbitral institutions have changed. Arbitral institutions have outgrown their role as mere service providers and are now among the regulators⁵⁶⁹ of the transnational system of justice that international commercial arbitration has become⁵⁷⁰. Despite the tremendous strain that the dramatic changes to the international arbitration environment have put on the arbitral institutions in the last decade or so⁵⁷¹, the latter continue to enhance the access to justice through unification of arbitration procedural practices and harmonisation of the institutional arbitration rules. As Carita Wallgren-Lindholm explains:

⁵⁶⁹ See e.g. the agreement reached between Chief Justice Sundaresh Menon and Jan Paulsson at the '4th LSE Arbitration Debate' (n 531) that the arbitral institutions should take the leading role in achieving the desired level of self-regulation in international arbitration.

⁵⁷⁰ Gaillard, 'The Present – Commercial Arbitration as a Transnational System of Justice' (n 189).

⁵⁷¹ The ever-growing caseload, the arrival of new parties, such as third-party funders, and the increasing complexity of international trade disputes have put significant pressure on both arbitral institutions and arbitrators. In today's international arbitration proceedings arbitrators face ever more delicate counterpoise between fairness and efficiency, legal certainty and procedural flexibility. While arbitrators must keep the process light and moving and conduct the arbitration in an expeditious manner (see e.g. ICC Arbitration Rules 2012, Art. 22; LCIA Arbitration Rules 2014, Art. 14.4; SIAC Arbitration Rules 2013, Art. 16.1; HKIAC Arbitration Rules 2013, Art. 13.1; SCC Arbitration Rules 2010, Art. 19(2); Swiss Rules of International Arbitration 2012, Art. 15.7), they have to allow parties to present and defend their case fully enough, so that the parties are treated fairly and equally and the proceedings are managed in a just fashion. There is, however, an inherent conflict in balancing those obligations. Efficiency and flexibility involves making the arbitral process shorter, cheaper and deregulated, but the pursuit of fairness and justice may implicate additional time and cost and require more strict regulation of the rights and obligations of arbitration users. Still, William Park argues that procedural efficiency and flexibility do not necessarily exclude fairness and justice "In arbitration, fairness requires some measure of efficiency, since justice too long delayed becomes justice denied. Likewise, without fairness an arbitral proceeding would hardly be efficient, since it would fail to deliver a key element of the desired product: a sense that justice had been respected." in Park, 'The Procedural Soft Law of International Arbitration' (n 138) 144. Unfortunate by-products of the inherent conflicts present in high-stake international arbitrations are the increased costs and the decreased speed of the arbitration proceedings.

Arbitral institutions are also important opinion leaders in the development of international arbitration and when institutions amend their rules similar trends, not unsurprisingly, can be discerned in the revision work of different institutions.⁵⁷²

Recent examples of harmonisation of procedural practices pertain to the rules concerning emergency arbitrators, joinder of parties and consolidation of arbitration proceedings. The ICDR was the first major arbitral institution to introduce emergency arbitrator provisions as part of its amended rules in 2006. Now most major arbitral institutions have adopted similar provisions. The SCC and the SIAC incorporated provisions regulating emergency arbitrators in their arbitration rules in 2010, the ICC – in 2012, the HKIAC – in 2013, and the LCIA and JAMS – in 2014. The CEPANI was among the first arbitral institutions to provide regulation of multiparty arbitrations⁵⁷³. In 2012 the CIETAC revised its arbitration rules and adopted provisions regarding consolidation of arbitrations. In 2015 it included specific provisions governing multiple contracts and joinder of parties. The ICC, HKIAC and ICDR followed the example set by the CIETAC and adopted rules on consolidation and joinder in their 2012, 2013 and 2014 Arbitration Rules respectively. The new 2016 SIAC Rules include new joinder, intervention and consolidation provisions. These examples show that arbitral institutions play an important role in developing new practices and tools to tackle complex and high-stake international trade disputes, thus safeguarding due process and parties' right to access to justice. Regardless of the changes to the international arbitration environment, the pursuit of fair and just arbitral process remains the guiding principle driving self-regulation processes in the field:

(...) it is clear that the landscape of international commercial arbitration is changing and the traditional key characteristics of the process, such as speed, cost, informality, and confidentiality, are becoming both less practical and less lucrative. It is possible that the

⁵⁷² Carita Wallgren-Lindholm, 'Ad Hoc Arbitration v. Institutional Arbitration' in Giuditta Cordero-Moss (ed), *International Commercial Arbitration: Different Forms and their Features* (1st edn, Cambridge University Press 2013) 64.

⁵⁷³ See 2005 CEPANI Arbitration Rules, Art. 12.

pursuit of fairness and justice, with its increasing desirability, will guarantee continued viability of the process without interfering with the practical feasibility of arbitration.⁵⁷⁴

Arbitral institutions also lead the way in regulating arbitrator's counsel's conduct and harmonising the professional standards applicable to parties' representatives in international commercial arbitration. For example, the CIArb promulgated The Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members in 2009. The Code imposes strict disclosure obligations upon an arbitrator that have accepted an appointment in a case administered by CIArb⁵⁷⁵. The LCIA is another pioneer in adopting provisions intended to further regulate the conduct of legal representatives. The new LCIA Arbitration Rules 2014 contain general guidelines intended to level the field for counsel appearing in LCIA arbitrations. Although the guidelines are of general character, they represent a significant development in the field of international commercial arbitration for two reasons. Firstly, together with the new rules on legal representatives⁵⁷⁶ the Guidelines emphasise the important role of arbitral institutions as regulators of counsel's conduct in international arbitration proceedings. Secondly, they vest arbitrators with explicit rights to sanction misbehaving counsel by ordering any measures necessary to guarantee the fulfilment of arbitrator's mandate. This overtly indicates the limits to party autonomy in arbitration proceedings and affirms the principal agenda in today's international commercial arbitration, namely guaranteeing every parties' right to access to justice and ensuring a fair and just arbitral process.

⁵⁷⁴ Japaridze (n 371) 1416. See also the survey conducted by Richard W. Naimark and Stephanie E. Keer the results of which demonstrated the "overwhelming relative importance of the fairness and justice of the process" compared to other traditional key characteristics of international commercial arbitration in Naimark and Keer (n 425).

⁵⁷⁵ See *Cofely Ltd* (n 498) where the Court considered the disclosure requirements under Rule 3 of the Chartered Institute of Arbitrators' Code of Professional and Ethical Conduct for Members (October 2000).

⁵⁷⁶ It should be noted that the LCIA Rules 2014 also lay the first stone in establishing legal representation as the norm in international arbitration proceedings. In contrast to Art. 18 of the LCIA Arbitration Rules 1998, the new Art. 18 is unequivocally named Legal Representation, as opposed to Party Representation. Although Art. 18.1 of the LCIA Rules 2014 does not explicitly forbid any other form of representation and, in fact, stipulates that a party "may be represented" by one or more legal representatives, the new provision conveys a strong message – international commercial arbitration is no longer the informal forum for resolution of trade disputes. Instead it has become an arena for professional players. See also the results of a survey conducted by Gerald Phillips and presented in Phillips (n 23).

The above demonstrates that international arbitral institutions are directly engaged in the self-regulation of international commercial arbitration. Given that more than 85% of the international arbitral awards are rendered through arbitral institutions⁵⁷⁷, the role of the latter in shaping trends and developments in the area of international commercial arbitration is undeniable. International arbitral institutions directly oversee the selection, appointment and challenge processed under their rules, promote new procedural tools and practices, scrutinise the quality and even the substance of arbitral awards⁵⁷⁸, and are taking steps towards disciplining and sanctioning counsel appearing in international arbitrations under their auspices. To put it short, arbitral institutions not only administer arbitration cases, but also regulate, control and intervene in international arbitration proceedings to safeguard the compliance with the principles of due process and natural justice.

The concern of many members of the arbitration community⁵⁷⁹, however, is that the international arbitral institutions and international organisation respond to the challenges in international commercial arbitration by formalising the process, introducing litigation-like practices and bringing in too many soft-law instruments⁵⁸⁰. The result is increased length and costs of arbitration proceedings, as well as proliferation of tactics aimed at circumventing the rigid rules.

That international commercial arbitration is subject to an increasing self-regulation could not be denied. One just needs to consider the frequency with which arbitral institutions are implementing new institutional rules and notes⁵⁸¹, and the rapid

⁵⁷⁷ See the results of the 2006 QMUL (n 2).

⁵⁷⁸ See for example ICC Arbitration Rules 2012, Art. 33.

⁵⁷⁹ See n 551, 552, 553, 554, 555, 556, 557, 558, 559.

⁵⁸⁰ See e.g. Paula Hodges, 'The Arbitrator and the Arbitration Procedure, The Proliferation of "Soft Laws" in International Arbitration: Time to Draw the Line?' in Christian Klausegger and others (eds), *Austrian Yearbook on International Arbitration 2015* (1st edn, MANZ Verlag Wien 2015).

⁵⁸¹ The ICC adopted revised Arbitration Rules in 2012, followed by the Note on Article 36(4) of the 2012 ICC Arbitration Rules, 2014 Note on Emergency Arbitrator Proceedings, 2016 Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration and new ICC Rules of Arbitration including the introduction of an expedited procedure for small claims will come into force on 1 March 2017. Similarly, the LCIA adopted revised Arbitration Rules in 2014, followed by the Notes for Arbitrators 2015, Notes for Parties 2015, and the Notes on Emergency

proliferation of recommendations, best practices and guidelines developed by international organisations. The revised arbitration rules contain ever more eloquent and airtight provisions⁵⁸², new litigation-like tools⁵⁸³ or even professional standards

Procedures 2015. The HKIAC updated its rules in 2013 and has promulgated the 2013 Practice Note on Tribunal Fees, Expenses, Terms & Conditions (Schedule 2), 2013 Practice Note on Tribunal Fees, Expenses, Terms & Conditions (Schedule 3), 2014 Practice Note on the Challenge of an Arbitrator, 2016 Practice Note on Consolidation of Arbitration, 2014 Guidelines on the Use of a Secretary to the Arbitral Tribunal. The SIAC is among the arbitral institutions with most revisions of its arbitration rules. It adopted updated rules in 1997, 2007, 2010, 2013 and has recently introduced its SIAC Arbitration Rules 2016, which apply from 1 Aug. 2016. The SIAC also promulgated Practice Note for Administered Cases in 2014 and Code of Ethics for an Arbitrator in 2015. Interestingly, there is an institution that has adopted rules that provide for an optional appellate review of arbitral awards. The AAA announced its Optional Appellate Arbitration Rules in 2013, which could be applied whether or not the underlying award was conducted pursuant to the AAA's or ICDR's rules. The Optional Appellate Arbitration Rules 2013 could be seen as another implication of the process of judicialisation as they undermine the principle of finality as a fundamental characteristic of international arbitration and introduce a mechanism for a comprehensive review of arbitral awards. It remains to be seen, however, how courts in other countries react to enforceability issues raised by the Optional Appellate Arbitration Rules. For example, it is questionable whether courts will refuse enforcement of the underlying arbitration award, subject to an appellate review under the Optional Appellate Arbitration Rules, if they are unaware of the review process.

⁵⁸² The implications of the process of judicialisation can be traced to the development of more detailed arbitration procedural rules. The gradual evolvement of arbitration procedural rules from sketchy and vague to more detailed and comprehensive can be illustrated by comparing the earlier versions of arbitration rules with the most recent set of rules. Thus, for example, in the ICC Arbitration Rules 1988 contain 26 articles and 3 appendices, while the 2012 Rules have 41 articles and 5 appendices. The rules of other international arbitral institutions, such as the SCC, SIAC, HKIAC and CEPANI demonstrate the same progression. The arbitral institution with the most detailed rules remains CIETAC. The 2015 version of the CIETAC Arbitration Rules contain 84 articles and 3 appendices. The language of the institutional arbitration rules is also changing. An example could be given with the revisions to Art. 18 of the LCIA Arbitration Rules 1998. In its original version Art. 18 consists of two paragraphs and states '18.1. Any party may be represented by legal practitioners or any other representatives. 18.2 At any time the Arbitral Tribunal may require from any party proof of authority granted to its representative(s) in such form as the Arbitral Tribunal may determine.' In comparison Art. 18 of the LCIA Rules 2014 has six paragraphs and introduces several significant changes. Firstly, the Rules make specific reference to legal representatives rather than party representatives. Secondly, the principle of party autonomy that allows parties to select a representative by their choice is restricted by subjecting the change or addition of legal representative following the constitution of arbitral tribunal to the approval of the arbitrators. In addition, the arbitral tribunal is granted the discretionary power to sanction misbehaving counsel that have violated the general provisions contained in the Annex to the LCIA Rules 2014. Another example could be given with the SIAC Arbitration Rules. In the SIAC Arbitration Rules 1991 the general principle that an arbitrator shall be independent and impartial is expressed in three short paragraphs of one sentence each (see SIAC Arbitration Rules 1991, Rule 10). Art. 10 of the SIAC Arbitration Rules 1991 states that an arbitrator shall remain at all times independent and impartial and shall disclose any circumstances likely to give rise to justifiable doubts as to his/her impartiality and independence. In contrast the SIAC Arbitration Rules 2013 under Art. 10 contain over seven paragraphs of detail rules governing the impartiality, qualifications, appointment and disclosure

incorporated by reference to codes of ethics⁵⁸⁴. The soft law instruments published by international organisations and non-governmental bodies are also becoming more detailed and exhaustive, which does not necessarily add to the degree of consistency and predictability to the arbitral process that they seek to achieve. Although the “soft laws” are not strictly binding, unless parties have not agreed to their applicability, arbitral tribunals and courts often refer to them when looking for suitable solutions to the situation at hand. Unfortunately, the existence of so many rules, notes, guidelines and recommendations does not necessarily speed up the arbitral process or increase the efficiency of the proceedings⁵⁸⁵. Despite the attempts of arbitral institutions to

duties of arbitrators. The SIAC Arbitration Rules 1991 also contained a provision, Rule 24, spelling out nine tribunals’ additional powers, namely the powers to determine the rules of law governing or applicable to the contract and arbitration agreement, allow joinder of third parties to arbitration, conduct enquiries, extend or abbreviate time limits, and order correction of any contract or arbitration agreement (to the extent there is common agreement between the parties and the rules of law permit such correction), document production, preservation or disposal of property, or inspection of property. In the most recent SIAC Arbitration Rules 2013 the corresponding provisions defining arbitrators’ additional powers are almost twice as many as in the earlier edition of the arbitration rules. According to Art. 24 of SIAC Arbitration Rules 2013, along with the powers already mentioned earlier, the arbitral tribunal has the power to issue an award for unpaid costs of the arbitration, order parties to provide security for legal or other costs or for any amount in dispute in the arbitration, decide issues not expressly or impliedly raised in parties’ submissions, etc. Although not all changes associated with the adoption of more detailed arbitration rules are perceived as a positive development, the amendment of provisions that reflect a newly adopted policy of transparency of the arbitral institutions is welcoming. Thus, the revision of the ICC rules on costs should be considered a move towards the right direction. See also Arthur L. Marriott, ‘Pros and Cons of More Detailed Arbitration Laws and Rules’ in Albert Jan van den Berg (ed), *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration, ICCA Congress Series, Volume 7* (1st edn, Kluwer Law International 1996) 70-71 where the author argues that “[t]here is a legitimate concern in many quarters (as was, for example, expressed at the recent conference in London on Radical Procedural Reform), that international arbitration rules and practice are becoming too rigid, formal, and legalistic, with the result that the proceedings are too protracted and too expensive. Insofar as rules contribute to this by complexity and by detailed attempts to cover every procedural eventuality, then they are to be deprecated. An illustration of an aspect of practice and policy where we may have gone too far to the detriment of arbitration, is the current concern with concepts of neutrality, impartiality and independence. Under American influence, both rules and practice have moved to adopt the criteria of American domestic litigation as to what constitutes impartiality and independence. These concepts are being increasingly extended.”

⁵⁸³ In order to deal with multi-party situations arbitral institutions have employed tools that are available in national court litigation, namely consolidation of arbitration proceedings and joinder of parties.

⁵⁸⁴ See n 575 and the text to it.

⁵⁸⁵ As arbitration users continue to experience the adverse effects of judicialisation of international commercial arbitration (the latter causing high costs and delays in arbitral process), a newly established Court of Innovative Arbitration (COIA) seeks to turn back the clock and simplify the arbitral process. In contrast to the rules of other arbitral institutions, the COIA Arbitration Rules

introduce more rules in order to tackle the challenges in modern international arbitration, the formalisation and overregulation of the proceedings add to the growing sophistication of international commercial arbitration. Commenting on the “the increasing concern over what is referred to as the ‘judicialization’ of international arbitration”⁵⁸⁶, Bernard Hanotiau argues that:

Institutions have also their part of the responsibility. The increased complexity of the internal rules that they sometimes apply for the management of their cases entails adverse consequences. The setting up of an arbitral tribunal may now require several months where in the past it was achieved in a few days. Internal procedures followed by some institutions may lead to awards being notified in certain cases several months after they have been delivered to the institution.⁵⁸⁷

The shift towards greater self-regulation is incited by the complexity of international trade disputes, the arrival of new parties (e.g. third-party funders) and the expanded role of some participants in the arbitration proceedings (e.g. legal representatives,

contain only 19 provisions. Several articles deserve attention. The Preamble sets the objectives of the COIA Arbitration Rules, namely to provide for a simple, quick and inexpensive mechanism for dispute resolution. The latter is to be achieved by *cooperation* of the parties and their counsel, which requires compliance with the short time limits and limited number of written submissions. To ensure that arbitration under the auspices of the COIA would indeed be time- and cost-efficient, the Rules stipulate that the “COIA is entitled to refuse to proceed with the arbitration if the COIA President considers that arbitration under these Arbitration Rules is not appropriate to resolve the dispute” (Art. 1.3). This is an important discretionary power that the President of the Court will exercise from the outset of the proceedings. Other measures taken by the COIA to speed up the resolution of disputes involve the default requirement for email communication with the Court (Art. 5.2); appointment of a sole arbitrator (Art. 7.1); short time limits to challenge the arbitrator (Art. 7.4); *arbitrator’s discretion* to determine the procedure in the arbitration (Art. 13.1); no document production phase, unless decided otherwise *by the arbitrator in his sole discretion* (Art. 13.2); attempt by the arbitrator to bring about settlement to the dispute, unless neither party objects (Art. 13.3); the default rule that no hearings are held (Art. 14.1); arbitrator’s right to decide the dispute *ex aequo et bono* if the parties are unable to reach an agreement on the applicable rules of law (Art. 16.2, Art. 16.3); with the exception of complex cases rendering an award within six months after payment of the initial advance on costs (Art. 17.4). For economic approach to efficiency see Robert B. Kovacs, ‘In International Arbitration: An Economic Approach’ (2012) 23 *American Review of International Arbitration* 155, Richard O. Zerbe, *Economic Efficiency in Law and Economics* (1st edn. Edward Elgar 2001), also see generally Richard A. Posner, *The Economics of Justice* (Harvard University Press 1983); Richard A. Posner, *Economic Analysis of Law* (9th edn, Aspen Publishers 2014)

⁵⁸⁶ Hanotiau, ‘International Arbitration in a Global Economy’ (n 10) 99.

⁵⁸⁷ Ibid 100.

expert witnesses)⁵⁸⁸. The need for certainty and predictability has arisen drastically, and the answers are sought in the implementation of new practices, such as joinder of third parties, consolidation of proceedings, extensive document production, and lengthy witness examinations and cross examinations, etc. Unfortunately, the result is procedural heaviness of the arbitral process, delays and increased costs. These new developments, together with the commercialisation⁵⁸⁹ of international arbitration, explain the increasingly adversarial manner, in which arbitrations are conducted, and the resort to “soft laws” aiming at bringing certainty in the arbitration proceedings and safeguarding the fairness of the arbitral process. It is the pursuit of justice and even the truth in international commercial arbitration⁵⁹⁰ that is fostering the self-regulation and judicialisation processes. Bernard Hanotiau also regards the changing attitudes or culture in international commercial arbitration as the factors driving the judicialisation of international commercial arbitration:

⁵⁸⁸ See Thomas J. Stipanowich, ‘Soft Law in the Organization and General Conduct of Commercial Arbitration Proceedings’, 2014, Legal Studies Research Paper Series, stating: “Soft Law plays an increasingly prominent role in evolving standards for organizing and conducting commercial arbitration proceedings. In recent years a wide variety of non-binding guidelines have emerged out of international discourse regarding process management and more particular concerns about cost, delay and inefficiency in arbitration. (...) The challenges have multiplied as arbitration has become increasingly complex, with growing emphasis on information exchange, motion practice and other incidents of pre-hearing process. Commercial arbitration processes have thus experienced what some have described as ‘creeping judicialization’ – a tendency to become more like litigation (and, particularly, litigation along the lines of the U.S. model) and thus increasingly lengthy and expensive.”

⁵⁸⁹ See Pierre Lalive, ‘Sur une “Commercialisation” de l’Arbitrage’ in Claude Reymond and others (eds), *Liber amicorum Claude Reymond* (1st edn, Paris LexisNexis Litec 2004); also Redfern (n 23) 25 commenting on criticisms that international arbitration has been judicialised and commercialised: “There is resentment at what is perceived to be the ‘commercialisation’ of a basically simple process of dispute resolution.” The quotation from Redfern implies that the process of commercialisation affects some inherent features of international commercial arbitration, such as the informality and flexibility of the proceedings. The term commercialisation, as used in this thesis, adds another layer to the definition used by Redfern. It is suggested that with the growth of third party funding in international commercial arbitration the arbitration process has been increasingly used not only for enforcing legal rights but also for the purpose of making a profit. This arguably has effect on international commercial arbitration proceedings by increasing the need for legal certainty and predictability. This is an area that requires further research.

⁵⁹⁰ See William W. Park, ‘Truth-Seeking in International Arbitration’ in Markus Wirth and others (eds), *Search for ‘Truth’ in Arbitration: Is Finding the Truth What Dispute Resolution Is About? - ASA Special Series No. 35* (1st edn, Juris Net 2011) 2 stating that ‘truth-seeking lies at the core of what arbitration is about, and cannot long be avoided in any serious discussion of the subject’.

[T]he arbitration process has changed from relatively informal to increasingly formal and complex. This generates extended delays and increased costs. It is generally considered that this is to be attributed to what is often referred to, rightly or wrongly, as the “Americanization” of international arbitration. (...) [I]n continental Europe, there is no duty for advocates to present to the court or the panel documents that are adverse to the position they defend. With the center of power having shifted to large multinational law firms, mostly from the common law world, the focus has also shifted to another approach to litigation: the role of the panel is now to discover the truth of the case and this implies the adoption of a procedure which resembles more and more the American courts' procedure, with a large number of witness statements, expert reports, and the production of all possible documents which might be relevant to the resolution of the dispute.⁵⁹¹

It is considered in this thesis that the “Americanisation”, legalisation, bureaucratisation, formalisation, and/or professionalisation of international commercial arbitration fall within the scope of the more general development, which is the process of judicialisation. While the former concepts present fragmentary explanations for the changes in modern arbitration proceedings, the term “judicialisation” gives a full account of the factors driving the developments in international commercial arbitration.

The judicialisation of international commercial arbitration is understood as a shift towards legalised, rule-based dispute resolution mechanism, in which procedural rules and professional standards are strictly observed and arbitrators follow a formalised process to reach a decision, namely by reasoning logically from facts, legal rules and previous decisions. A judicialised method for resolving disputes is perceived to safeguard parties' right to access to justice, the fairness of the process and the equal treatment of the parties. This is indeed what the increasing self-regulation in international commercial arbitration aims to achieve – levelling the play field, impartial and fair arbitral process, equal access to justice, and predictability. In William Park's view procedural soft law has a potential to foster a sense of equal treatment “by promoting the perception that procedure is “regular”

⁵⁹¹ Hanotiau, ‘International Arbitration in a Global Economy’ (n 10) 99.

and according to a “rule of law” principle”⁵⁹², by ensuring that similar cases are treated in similar fashion. Although the ever more detailed and airtight rules may bring some degree of certainty and greater confidence in the system of dispute resolution, they also produce unfortunate by-products, such as excessive formalisation of the arbitral process, further grounds for challenging arbitrators that dare exercise their discretion, delays and increasing costs⁵⁹³.

In order to avoid turning international commercial arbitration into a litigation-lite mechanism for resolving trade disputes, the suggested way forward is selective self-regulation as opposed to a comprehensive one. It is necessary to precisely pinpoint the aspects that would benefit from more detailed regulation and let the rest of the features evolve steadily. The main characteristics of international commercial arbitration, such as flexibility of the arbitral process, parties’ freedom to appoint arbitrators of their choice, wide discretionary powers of the arbitral tribunal to rule on evidentiary matters, should remain unchanged. In view of the latest studies conducted in the field of international arbitration⁵⁹⁴, the arbitration community needs to undertake further actions to curb the costs and delays in international arbitration

⁵⁹² Park, ‘The Procedural Soft Law of International Arbitration’ (n 138) 146.

⁵⁹³ See e.g. Michael E. Schneider, ‘President’s Message: Yet another Opportunity to Waste Time and Money on Procedural Skirmishes: The IBA Guidelines on Party Representation’ (2013) 31 ASA Bulletin 497–501.

⁵⁹⁴ 2006 QMUL Survey (n 2); 2008 QMUL Survey (n 3); 2010 QMUL Survey (n 378); QMUL Survey ‘2012 Current and Preferred Practices in the Arbitral Process’ (2012), available at: <<http://www.arbitration.qmul.ac.uk/docs/164483.pdf>>; 2013 QMUL Survey (n 15); 2015 QMUL Survey (n 521); ‘BLP International Arbitration Survey 2012 - Research Based Report on Perceived Delay in the Arbitration Process’; ‘BLP International Arbitration Survey 2013 - Research Based Report on Perceptions of Document Production in the Arbitration Process’; ‘BLP International Arbitration Survey 2014 - Research Based Report on Choice of Venue for International Arbitration’, available at: <http://www.blplaw.com/media/International_Arbitration/BLP_International_Arbitration_Survey_2014.pdf>; ‘BLP International Arbitration Survey 2015 - Research Based Report on the Use of Tribunal Secretaries in International Commercial Arbitration’, available at: <http://www.blplaw.com/media/International_Arbitration/BLP_International_Arbitration_Survey_2015.pdf>; ‘CIArb Costs of International Arbitration Survey 2011’, 2011; Tony Cole, Ilias Bantekas, Federico Ferretti, Christine Riefa, Barbara Warwas, and Pietro Ortolani, ‘European Parliament Study on Legal Instruments and Practice of Arbitration in the EU’, 2014; Thomas J. Stipanowich and Zachary P. Ulrich, ‘Commercial Arbitration and Settlement: Empirical Insights into the Roles Arbitrators Play’, 2014, Legal Studies Research Paper Series; Thomas J. Stipanowich and Zachary P. Ulrich, ‘Arbitration in Evolution: Current Practices and Perspectives of Experienced Commercial Arbitrators’, 2014, Legal Studies Research Paper Series.

proceedings. Adopting stricter rules and more transparent procedures on calculation and allocation of arbitration costs, granting arbitrators greater discretionary powers to determine the arbitration procedure and rule on evidentiary matters in absence of parties' agreement, and improving arbitrators' selection process would decrease the costs and tackle problems associated with dilatory tactics and excessive document production. It is reassuring to observe that some arbitral institutions are already taking steps in this direction⁵⁹⁵.

Another argument in favour of selective self-regulation is associated with the benefits of preserving the flexibility of arbitral process and the wide discretionary powers that arbitrators currently enjoy. Imagine the following two scenarios. In Scenario No. 1 international arbitration community and most notably arbitration institutions develop comprehensive rules to regulate various aspects of the arbitration proceedings, e.g. counsel's conduct, arbitrators' duties, evidentiary rules, conflict of interests, third party funding, etc. Parties that opt for institutional arbitration and those that explicitly agree to the application of certain soft law instruments would undoubtedly benefit from having greater certainty as to the rules applicable in the arbitral process. Such an approach, however, might unnecessarily limit arbitrator's discretionary powers and turn arbitrators into mere observers of the disputes before them. The parties would not be able to take full advantage of arbitrator's expertise and might lose the added value that comes with wide arbitrator's discretionary powers. When the dispute arises, parties might become aware that the strict provisions agreed beforehand are not well suited to the dispute at hand and do not contribute to its speedy and efficient resolution. In this scenario, in the absence of parties' consent, arbitrators would lack authority to adjust the rules applicable to the arbitral process, as they could not override provisions agreed by the parties. Such an approach suggests that any changes to the procedures can effectively be done only by way of parties' cooperation. If the control over the arbitration proceedings is entirely shifted to parties, lack of cooperation between the latter would lead to unnecessary disruptions and delays. Shifting the control over formalised proceedings to arbitrators, and international commercial arbitration becomes indiscernible from national litigation.

⁵⁹⁵ For example ICC revised the Note on Personal and Arbitral Tribunal Expenses in 2013 and adopted a Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration in 2016.

In Scenario No. 2 parties agree to more vague arbitration rules that leave enough room for arbitrators to make use of their discretionary powers. When a dispute arises and parties cannot reach an agreement on a particular procedural issue, arbitrators would have the flexibility to weigh competing views, consider the specificity of the case at hand, rely on their expertise and render a partial or final award depending on the stage of the proceedings. There is a certain unpredictability associated with this approach, however this is what makes international commercial arbitration so case-sensitive and is the key to a business-friendly dispute resolution method. The suggested shift towards more proactive arbitrators combined with selective regulation seems to be in line with what large transnational businesses need. In 2006 Michael McIlwrath and Ronald Schroeder surveyed their litigation colleagues from all branches of General Electric and presented their findings in an article⁵⁹⁶. The authors observed that:

The view that the parties can impose greater efficiency rests on a faulty premise, which is that it is easily within their power to exercise more control over the procedure once a dispute arises, including by strictly enforcing time limits. This is not, in our submission, a valid premise in most disputes. It ignores that the parties are unlikely to be in good relations, at least with respect to the subject matter in dispute, and in some instances one of them (or their lawyers) may have an interest in delaying the determination of issues, not in expediting them—to delay payment of damages or to create financial pressure on the opposing party through delay and undue expense.⁵⁹⁷

In light of the conflicting interests of the parties (and their representatives), a proactive arbitrator would bring the necessary balance and efficiency to the proceedings. On the basis of their findings Michael McIlwrath and Ronald Schroeder concluded that the improvements that would be appreciated by businesses involve development of arbitration rules that authorise and encourage tribunals to “identify at the outset of the proceedings any legal or factual issues amenable to early disposition that will narrow/focus the issues in dispute, and establish procedures for resolving

⁵⁹⁶ Michael McIlwrath and Roland Schroeder, ‘The View from an International Arbitration Customer: In Dire Need of Early Resolution’ (2008) 74 Arbitration 3–12.

⁵⁹⁷ Ibid 9.

those issues”⁵⁹⁸. In addition the authors recommend that arbitration institutions “use their monitoring role and authority to ensure that tribunals are being proactive in managing the arbitration to make it faster and as reasonably streamlined as possible (...)”⁵⁹⁹.

The two scenarios above represent the conflicts and limitations associated with strict regulation and absent or lenient regulation. William Park observes:

The very nature of legal process contains an inherent tension between generality and specificity. (...) An overly broad rule would fail by denying recognition to critical distinctions among different cases. No rule at all, however, will often detract from the parties’ sense of fairness, which is often fostered more by fidelity to pre-established standard than by the content of the standards themselves.⁶⁰⁰

To this it could be added that too rigid rules limit party autonomy, could create even more grounds for challenging procedural decisions and lead to delays and increased costs. It is illusionary to believe that those “critical distinctions among different cases”, in the words of William Park, can be achieved by regulating every aspect of the arbitral process. So far, international arbitration community has relied on arbitrators’ expertise to tip the necessary balance between specificity and generality. It is time for the former to decide whether it will adhere to this approach in order to avoid the downsides of excessive regulation. The suggested way forward is selective self-regulation that addresses only those aspects of international commercial arbitration that hamper time- and cost-efficiency but safeguard party autonomy and arbitrators’ wide discretionary powers⁶⁰¹.

⁵⁹⁸ Ibid 11.

⁵⁹⁹ Ibid.

⁶⁰⁰ Park, ‘The Procedural Soft Law of International Arbitration’ (n 138) 149 at para 7-30.

⁶⁰¹ See also McIlwrath and Schroeder (n 594) 4 where the authors argue that in order to address businesses’ frustration with current practices in international commercial arbitration, the latter has to rebalance its main objectives and shift the focus from due process to time- and cost-efficiency: “The overriding objectives generally advanced (when choosing an appropriate forum and procedure for resolving disputes) are fairness, efficiency (including speed and cost) and certainty in the enforcement of contractual rights and protections. These are complementary objectives, and to focus on one at the expense of the others leads to a result inconsistent with the expectations of the business world and denies basic commercial needs. Too often the practice of international arbitration has done just that, by focusing on perceived concepts of due process to

4.3 Litigation-Style Practices in International Arbitration

Proceedings – The Example with Discovery

The study of the process of judicialisation would be incomplete without examining in greater detail the changes in international commercial arbitration associated with the diversification of the international arbitration community, the introduction of new practices and the increasingly adversarial style of the proceedings⁶⁰². The analysis hereto is building on the propositions developed in the preceding sections, in particular the idea that the process of judicialisation is associated with the pursuit of fairness, justice and greater certainty in international commercial arbitration. Unfortunate by-products of satisfying arbitration user's aspiration to justice and search for the truth⁶⁰³ are the increasing costs, delays and procedural rigidity.

This section aims to analyse the implications of judicialising the arbitral process by introducing litigation-style practices and adversarial approach in international arbitration proceedings. In particular, the developments associated with the process of judicialisation will be assessed by considering the proliferation of litigation-lite discovery in international commercial arbitration. Although other practices, such as pre-hearing motions, witness preparation, cross-examination of witnesses and experts also contribute to the judicialisation of the arbitral process, the benefits of extensive discovery and document production practices appear to be more controversial and their implications – more far-reaching. In addition, among the objectives of this section is to compare the advantages and disadvantages of the

the detriment of efficiency, resolution and certainty. This is unfortunate, as fairness is no longer the main feature to distinguish international arbitration from court litigation in many countries. Indeed, in many international transactions, choices will exist between competing public and private adjudication systems, each of which satisfy fairness concerns.”

⁶⁰² See e.g. Hartwell (n 371) 231 arguing that the international commercial arbitration has been overwhelmed by lawyers and litigiousness as a result of that: “Although in historical time traders and experts used to act both as arbitrators and as the representatives of the parties, lawyers have come to dominate in both roles. In some specialised markets the tradition of the judgement of one's peers still holds sway, but most ordinary commercial arbitration is now conducted according to a simulacrum of the Court procedure of the State.”

⁶⁰³ See text to n 590.

adversarial and inquisitorial approaches in order to establish which one is more conducive to the fundamental characteristics of international commercial arbitration and which one fosters the process of judicialisation. Finally, the analysis on the “new litigation toolbox” aims to establish whether some practices and approaches are more compatible with international commercial arbitration than others and, building on that conclusion, to recommend a way forward.

4.3.1 Discovery

There seems to be a broad consensus among the international arbitration community that the conduct of arbitration proceedings has changed dramatically in the last decade or so. Andrew Clarke raises several concerns regarding the modern arbitral process and argues that those issues “have the potential to change fundamentally the nature of international arbitration so that it ceases to serve the purposes that has brought it such success”⁶⁰⁴. Among others these concerns include discovery, delays and costs. Other authors also comment on the evolution of international arbitration proceedings:

Many arbitration practitioners have noted, with growing concern, the tendency to import litigation procedures into the arbitration process. One example of this is constant push for a greater number of and more detailed submissions, as well as more voluminous evidence. Whereas once it was usual to try to keep submissions as simple as possible and evidence to a minimum, today it is not uncommon to have several rounds of lengthy written submissions, together with numerous witness statements, counter-witness statements in response and rebuttal witness statements, as well as expert reports on every conceivable issue.⁶⁰⁵

The explanations and possible causes of the challenges in international arbitration proceedings vary drastically and “blame” is attributed to parties⁶⁰⁶, counsel⁶⁰⁷ and

⁶⁰⁴ Andrew Clarke, ‘International Arbitration: Current Corporate Concerns’ (2009) 20 ICC International Court of Arbitration Bulletin 42–50, 46, 47.

⁶⁰⁵ Horvath (n 23) 259, 260.

⁶⁰⁶ See e.g. Esquire (n 36) 455.

arbitrators⁶⁰⁸. Some see the changes in the arbitral process, including the increased use of litigation-style practices, as an unfortunate by-product resulting from the cultural diversification in international commercial arbitration.

Arbitrators come from different cultural and professional backgrounds, which eases the proliferation of new practices and the expansion of new trends. Many arbitrators tend to sit on panels hearing from commercial, maritime and shipping cases, to insurance, consumer or grievance disputes.⁶⁰⁹ Arbitrators' experience in variety of areas might affect the way the former weigh conflicting principles or doctrines.

Furthermore there are a great number of arbitrators who have started their careers as solicitors, barristers or state judges and have changed their professional orientation afterwards. This litigation experience inevitably influences their attitude to arbitration, bringing new features to the arbitration process. Vijay Bhatia particularly focuses on the issues of discovery and cross-examination to explore the judicialisation process of international commercial arbitration⁶¹⁰. In his view:

International commercial arbitration offers an interesting site for the study of witness examination as an interdiscursive phenomenon across professional, jurisdictional, linguistic and cultural boundaries. It is contentious not only because it is shared across two rather distinct practices – i.e., litigation and arbitration, bringing together international participants, particularly stakeholders who carry their individual baggage in the form of different ethnic and cultural backgrounds and languages, as well as interdisciplinary expertise – but also because it is meant to integrate two distinct legal systems and cultures, i.e., common law culture and civil law culture.⁶¹¹

⁶⁰⁷ See e.g. Edna Sussman, 'Can Counsel Ethics Beat Guerrilla Tactics?: Background and Impact of the New IBA Guidelines on Party Representation in International Arbitration', (2013) X *Revista Brasileira de Arbitragem* 98–105.

⁶⁰⁸ See e.g. Clarke (n 38) 142.

⁶⁰⁹ See e.g. panellists specialties on JAMS International website, available at: <<http://www.jamsinternational.com/panellists/arbitrators>>

⁶¹⁰ Bhatia (n 36).

⁶¹¹ *Ibid* 15.

Indeed “individual baggage”⁶¹² and previous professional experience is capable of influence in arbitration practice. A study on securities arbitration conducted by Stephen Choi, Jill Fisch, and A. Pritchard reveals that attorney-arbitrators behave differently from their non-attorney colleagues.⁶¹³ The authors find that “attorney-arbitrators who have represented brokerage firms in other securities arbitration cases are significantly less generous with arbitration awards”.⁶¹⁴ On contrary, award size is not contingent on the fact that attorneys who have represented only investors, or both investors and brokerages houses in arbitration proceedings serve as arbitrators.⁶¹⁵

Though there is no empirical study to support the assumption, it can be argued that arbitrators who do not have legal experience might also have different approach to some aspects of arbitration in comparison with their colleagues who do have a legal qualification. For example, arbitrators who are not legal graduates might be more inclined to favour fair and equitable reasoning rather than strict legal reasoning to justify certain outcome of the case. Similar suggestion is made by Charles Moxley who contends that the ideal arbitrator is the one who can meet the clients’ expectations and the lawyer/client should choose an arbitrator depending on whether the case is primarily about the facts and technical data or the legal issues. Thus,

[i]n cases involving substantial legal or procedural issues, each side will typically want at least one lawyer. In cases involving substantial technical issues, each side will typically want at least one technical expert. Yet such predilections should not be

⁶¹² In Ray (n 470), the author acknowledges that decision-making in arbitration is influenced by arbitrators’ backgrounds. He points out that: “An abundant literature continues to remind us that decision-makers who have lived in the world at all will invariably come to a case with perspectives and beliefs and preconceptions that bear the stamp of their past experiences. This is unavoidable - nor would we prevent it if we could. ‘Interests, points of view, preferences, are the essence of living’ (author quoting *In re J.P. Linahan, Inc.* (1943) 138 F. 2d 650, 651-652 (2d Cir.) (Frank J).”

⁶¹³ Stephen J. Choi, Jill E. Fisch, and A. C. Pritchard, ‘Attorneys as Arbitrators’ (2010) 39 J. Legal Stud. 1–30.

⁶¹⁴ Ibid 2. The authors further explain the correlation between the presence of an attorney-arbitrator and the award size: “The relation appears to be primarily driven by the presence of an attorney who has represented a brokerage firm by serving as the chair of an arbitration panel. We find no significant relation between an attorney who has represented brokerage firms and award size when that attorney is not the chair of the arbitration panel. Coalition effects, nonetheless, exist. Although not important alone, other panel arbitrators with similar views reinforce the preferences of an arbitration chair.”

⁶¹⁵ Ibid.

followed on a knee-jerk basis. Attorneys need to exercise judgment based on the specific case. If their client seems more likely to win based on application of the law, perhaps an effort should be made to select an all-lawyer panel. If the client seems more likely to win based on industry practice or other non-legal considerations, perhaps a panel made up solely of industry experts should be sought.⁶¹⁶

Moxley further asserts that there is a difference in the approach in the reasoning that lawyers and non-lawyers apply to decide on the dispute:

Having participated in many deliberations on panels with lawyers and industry experts, it seems to me that industry practice is generally substantially consistent with the law and provides a fair result. Yet there are cases where law and practice conflict and where strict application of law conflicts with considerations of fairness and equity.⁶¹⁷

The lack of requirement for arbitrators to possess a legal qualification or training in order to be eligible to be elected as such, as well as the absence of harmonised regulation on the arbitrator's conduct, often have been in the scholars' focus but calls for dealing with the matter on an international level have become more and more frequent in the past couple of years.⁶¹⁸

While the proliferation of new practices in international commercial arbitration is correctly associated with cultural diversification of the pool of arbitration participants as well as natural evolution of the dispute resolution mechanism, the judicialisation process in particular is often attributed to the "Americanisation" of this field. It is argued that the large transnational law firms spread Anglo-American

⁶¹⁶ Charles J Moxley, 'Selecting the Ideal Arbitrator' (2005) 60 *Dispute Resolution Journal* 24–28, 27.

⁶¹⁷ *Ibid.*

⁶¹⁸ See Rogers, 'Fit and Function in Legal Ethics' (n 64) where the author argues that because international arbitration has endured many changes and transformations the control on the conduct of some of the participants in arbitration process should be tightened. In Catherine Rogers' opinion international arbitration has become more judicialised because it has departed from the *ad hoc* compromise-oriented process, associated with informal procedure and focus on fairness and equity. Due to expansion of arbitration as a method of dispute resolution there was a greater pressure for legal accuracy and precision, hence the use of *amiable compositeur* and *ex aequo et bono* models of arbitration has declined. Also, Rogers, 'Regulating International Arbitrators' (n 424); Paulsson, 'Ethics, Elitism, Eligibility' (n 474). Further see text to n 670.

style procedures across the globe and thus contaminate international commercial arbitration with litigiousness and adversarialism:

These large transnational law firms which dominate in international business law have also contributed to this transformation by making arbitration a specialty of their practices as part of the services they offer their big multinational clients (e.g. by representing their clients in international commercial arbitrations). This also reflects what has been referred to as the ‘americanization’ of international business law and transactions through the use of English in international business which tends to spread certain norms, ideas and principles that Anglo-American law expresses. Greater emphasis was placed on American style courtroom procedures, for example, more adversarial proceedings, exchange of pleadings, extensive pre-trial discovery of documents, examination and cross-examination of witnesses and use of expert witnesses.⁶¹⁹

For many authors increasing legalisation of the arbitration proceedings is entirely due to the “Americanisation”⁶²⁰ of international commercial arbitration. Although the link between the two developments is undeniable, to attribute the ongoing changes in the arbitral process only to its “Americanisation”, runs the risk of depicting a sketchy picture. In fact, the proliferation of litigation-lite practices in international commercial arbitration is also caused by the processes of globalisation, commercialisation⁶²¹ and judicialisation.

The rise of international commercial arbitration in the late 19th and early 20th centuries was a response to growing international trade, mainly in Europe, and the desire for an internationally enforceable, commercially sensible mechanism to resolve disputes. With the increasing popularity of international commercial arbitration the need for harmonisation became palpable. The adoption of the NYC and the enactment of the arbitration-friendly UNCITRAL ML in over 70 countries boosted the confidence in this method for dispute resolution and further fostered its development.

⁶¹⁹ Lynch (n 23) 19.

⁶²⁰ See Alford (n 28); Bergsten (n 28).

⁶²¹ See n and text to n 589.

The globalisation of international trade inevitably incited the arrival of new participants in arbitration proceedings. The increasing caseload, the growing number of high-stake disputes and the involvement of transnational law firms⁶²² and third party funders in international commercial arbitration rendered its commercialisation⁶²³ inevitable. This, of course, raised the stakes and increased the need for certainty and precision. As international commercial arbitration is no longer a club of gentlemen⁶²⁴, a self-contained and close-knit community, the direction taken to address the search for justice and predictability is by judicialising arbitration, and the arbitral process in particular – by introducing further regulation and employing practices and techniques borrowed from national litigation. Thus, the proliferation of litigation-lite practices is, on the one hand, linked to the presence of US-trained lawyers and their role in shaping international commercial arbitration as participants that carry “all the bag and baggage of (...) national litigation systems into the international arbitration room”⁶²⁵, and, on the other hand, to the judicialisation of international commercial arbitration, the latter perceived as a way to promote the rule of law.

As procedural rules and litigation practices are seen as a measurement of the fairness of the process and the justices achieved, lawyers wholeheartedly resort to them in search of the truth in international commercial arbitration. It is claimed, however, that to avoid the adverse effect of litigation-style practices in international commercial arbitration, a flexible concept of fairness is to be constructed. Fairness should be understood in its narrow meaning and should be limited to the procedural aspects of international commercial arbitration. It should guarantee parties’ access to justice but is not to be equated to accuracy and precision with regard to arbitral awards. The search for truth in international commercial arbitration is in fact the

⁶²² See Alford (n 28) 80 arguing that the US influence in international arbitration is at its high end: “The first and most significant factor in Americanization of international arbitration is demographic: the rise of the Anglo-American law firm. Just as the United States has been and will be the dominant force in economic globalization, our law firms will be the dominant force in international arbitration. The reason for this seismic demographic shift is the overwhelming success of the Anglo-American law firm in what scholars describe as the ‘soft-power game’.”

⁶²³ See n 589 and text to it.

⁶²⁴ See Martin Hunter, ‘Ethics of the International Arbitrator’ (1987) 53 *Arbitration* 219, 220.

⁶²⁵ Arthur Marriott QC, ‘Less is More: Directing Arbitration Procedures’ (2000) 16 *Arbitration International* 353–356, 353.

search for a flexible commercial solution to a particular trade dispute. Since the doctrine of precedent does not apply to international arbitral awards “the truth that arbitrators must endeavour to uncover is not an abstract truth, but the truth relating to the disputed facts on which the success of a particular claim depends”⁶²⁶. As pointed out Yves Derains:

There is no reason why the production of documents by the parties in a specific case should exceed the core bundle that they eventually use as evidence at the hearing or as a basis for their post-hearing briefs. (...) While there is no denying that, in some cases, the issues are so complex that the submissions must be correspondingly detailed, this is certainly not true in every case. In fact, in the vast majority of cases, such voluminous documentation is a hindrance rather than help.⁶²⁷

Conclusion

In light of the above it is argued that the judicialisation of international commercial arbitration proceedings is driven to a greater extent by internal factors rather than external ones. While the harmonisation of private international law, including national arbitration laws, has reinforced the primacy of party autonomy in international commercial arbitration and paved the way to its “Golden Age”, increasing self-regulation of the arbitral process and the proliferation of litigation-style practices bring formality, black-letter legalism and excessive costs.

Arbitration users are increasingly seeking fairness and justice in international commercial arbitration, which indicates changes in businesses’ expectations of arbitrators and the arbitral process as a whole.⁶²⁸ Demands for consistency and

⁶²⁶ Yves Derains, ‘Towards Greater Efficiency in Document Production before Arbitral Tribunals- A Continental Viewpoint’ in *Special Supplement 2006: Document Production in International Arbitration* (1st edn, ICC Publishing 2006) 86.

⁶²⁷ Ibid.

⁶²⁸ While there is benefit in a generalised conclusion when considering matters in a transnational context, it is to be noted that arbitration users’ expectations of the process differ based on their cultural background. See e.g. Fan Kun, ‘Cultural Dimensions, Psychological Expectations and Behavioral Patterns in Arbitration’, 2013 presented at the Brunel Centre for the Study of International Arbitration and Cross-Border Investment inaugural conference ‘The Roles of

precision in arbitral decision-making and search for the truth in arbitration proceedings create an inevitable tension between the traditional characteristics of international commercial arbitration and a judicialised approach to the arbitral process.

Thus, it is argued that the judicialisation process is a by-product rather than a consciously pursued development in the area of international commercial arbitration⁶²⁹. This conclusion together with the observation that the process of judicialisation is driven by internal forces is of importance because it suggests that the future of international commercial arbitration is the hands of arbitration users. The latter are responsible for striking a balance between the traditional characteristics of international commercial arbitration and the pursuit of fairness, justice and the truth in the arbitral process.

Psychology in International Arbitration', summary of presentation available at: <http://www.brunel.ac.uk/__data/assets/pdf_file/0008/299528/Cultural-Dimensions,-Psychological-Expectations-and-Behavioral-Patterns-in-Arbitration_Fan-Kun.pdf>

⁶²⁹ This is not necessarily the case with other branches of arbitration, such as labour and consumer arbitration, where the existence of mandatory arbitration clauses suggests public policy influence, hence external to arbitration factors.

CHAPTER 5 JUDICIALISATION OF INTERNATIONAL COMMERCIAL ARBITRATION AND THE MECHANICS OF ARBITRAL DECISION- MAKING

Objectives

This chapter aims to complete the analysis of the process of judicialisation by considering whether the judicialisation has also permeated arbitral decision-making process. In light of the conclusions reached in the previous chapters, there appears to be expectations from arbitrators to act judicially and promote consistency and precision in their decision-making process.

It is of importance to examine whether arbitrators conform to such expectations and foster the judicialisation agenda or whether they are inclined to uphold the traditional characteristics of international commercial arbitration. As arbitrators are entrusted with dissolving the tension between the pursuit of fairness and justice in international arbitration proceedings and the alternative nature of arbitration, analysing the mechanics of arbitral decision-making will suggest whether arbitrators take a quasi-judicial or industry-insider's approach when dealing with issues of fact or law.

The conclusions reached in this chapter seek to inform arbitration users as to how parties' expectations and perceptions of what arbitrator's function entails influence arbitral decision-making. This is why instead of closely examining arbitrator's decision-making process, the evolution of arbitrator's status will be used as an illustration of the mechanics of arbitrator's decision-making.

5.1 Arbitrators in the Eyes of the Public

The development of a sophisticated framework of international instruments, national legislation, arbitration rules and soft laws has not only strengthened the role of the rule of law in international commercial arbitration, but has also enhanced the legitimacy of this method for dispute resolution in the eyes of the public, the arbitrators and the institutions. As already discussed in Parts 2 and 3, the growing body of arbitral law safeguards parties' fundamental rights and aims at providing the necessary certainty and predictability. The emphasis on due process in arbitration proceedings is considered to ensure parties' right to access to justice. In addition, the party's right to appoint an arbitrator coupled with the double standard for arbitrator's impartiality and independence give businesses control over the arbitral process, while also warranting a fair dispute resolution process and, in most cases, an accurate arbitral award.

It is fair to say that given the evolution of international commercial arbitration, today's arbitrators are not perceived as mere service providers but as adjudicators who administer justice and act judicially. Arbitrators compete to preside over the largest, most high profile and complex cases, and this is often reflected in the elaborate reasoning of their awards⁶³⁰. The new generation of international arbitrators is in stark contrast to the "small, intimate group of European 'grand notables' or 'Grand Old Men'"⁶³¹ in the era of "rough-hewn, Euro-centric, and equity-driven"⁶³² international arbitration, arbitrators who were trusted for their shared sense of duty. The dominant opinion of the pioneers of arbitration was that "arbitration should not be a profession: 'Arbitration is a duty, not a career'"⁶³³. The

⁶³⁰ See Julia A. Martin, 'Arbitrating in the Alps Rather Than Litigating in Los Angeles: The Advantages of International Intellectual Property-Specific Alternative Dispute Resolution' (1997) 49 Stanford Law Review 917–970, 967. Julia Martin argues that one of the disadvantages of the ICC arbitration is the way arbitrators' fees are set as it has an effect on the reasoning of the arbitral awards. According to the author, since arbitrators' fees under the ICC Rules are set based on "the complexity of the case, as reflected in the award", arbitrators have "an incentive to write unnecessary elaborate opinions".

⁶³¹ Rogers, *Ethics in International Arbitration* (n 445) 61.

⁶³² Ibid.

⁶³³ Dezalay and Garth, *Dealing in Virtue* (n 23) 34.

arbitrators of yesteryear were often “commercial men”⁶³⁴ and had a paternalistic role in the arbitral process, as they frequently acted as *amiables compositeurs*. They decided disputes based on the factual context and avoided application of substantive rules of law⁶³⁵. In the modern sophisticated international arbitration, however, arbitrator’s vocation is seen less as a noble duty fulfilled in a self-contained process⁶³⁶ and more like a professional occupation carried out in a transnational system of law. The new generation of arbitrators operate in a complex, globalised economic and legal environment⁶³⁷:

As the nature and range of disputes have expanded and diversified, arbitrators have adjusted to the new environment. The new generation of arbitrators can no longer invoke “grand principles of law” or vague notions of equity with the same innate sense of legitimacy on which the earlier generation relied. Instead, they have adopted a more technocratic and procedurally rigorous approach to arbitral decision-making. This more technocratic and managerial approach appeals to modern parties, who are drafting increasingly complex and detailed contracts, which they want enforced with legal precision.⁶³⁸

Indeed legal accuracy and efficient case management are the most highly regarded qualities of the new generation of arbitrators. Both scholars and arbitration users seem to be in agreement that justice in international commercial arbitration is served when there is a proper truth-seeking process in place guarantying not only a timely resolution of the dispute but also an accurate one. In the words of William Park:

⁶³⁴ Craig (n 10) 6.

⁶³⁵ Brunet, ‘Replacing Folklore Arbitration with a Contract Model of Arbitration’ (n 23) 42.

⁶³⁶ Craig (n 10) 7.

⁶³⁷ See Maxi Scherer, ‘The Globalization of International Commercial Arbitration’ (2010) 2 *Revue des Juristes de SciencesPo* 64–69; Lynch (n 23); Kaufmann-Kohler, ‘Globalization of Arbitral Procedure’ (n 446); Hanotiau, ‘International Arbitration in a Global Economy’ (n 10); Böckstiegel, ‘Past, Present, and Future Perspectives of Arbitration’ (n 41); Leahy and Bianchi (n 1).

⁶³⁸ Rogers, *Ethics in International Arbitration* (n 445) 64. Prof Rogers’s conclusion is based on the analysis carried out by Dezalay and Garth, *Dealing in Virtue* (n 23) were among the first to argue that arbitration was “becoming too much like litigation” (Dezalay and Garth, *Dealing in Virtue* (n 23) 38). The debate about the role of arbitrators in an “over-technical”, “over-proceduralized or over-judicialized” arbitration is continued in Thomas Schultz and Robert Kovacs, ‘The Rise of a Third Generation of Arbitrators? Fifteen Years after Dezalay and Garth’ (2012) 28 *Arbitration International* 161–172.

Although justice delayed can mean justice denied, a sense that truth matters remains vital to a perception that justice is being done. Arbitration becomes a lottery of inconsistent and unpredictable results without some investment of the time and money required for a rigorous search for facts and law in which litigants receive a meaningful opportunity to present their cases. (...) An arbitrator's main duty lies not only in dictating a peace treaty, but in delivery of an accurate award that rests on a reasonable view of what happened and what the law says.⁶³⁹

Accuracy, precision and consistency are characteristics that businesses involved in high-stake arbitrations cherish and seek. Arbitrators providing their services on the global competitive market must respect those values if they want to be appointed on a case. Shared by the whole arbitration community those values become social norms that affect arbitral decision-making. They also trigger the processes of professionalisation⁶⁴⁰ and judicialisation of international commercial arbitration.

⁶³⁹ Park, 'Arbitrators and Accuracy' (n 372) 27.

⁶⁴⁰ See Ralf Michaels, 'Roles and Role Perceptions of International Arbitrators' in Walter Mattli and Thomas Dietz (eds), *International Arbitration and Global Governance: Contending Theories and Evidence* (1st edn, OUP 2014) 60-61 where the author argues that the increasing professionalisation is directly linked to the judicialisation of international commercial arbitration. The latter, however, is not simply a response to the increased complexity of trade transactions and contracts. It is contended that "the judicialization of international arbitration proceedings, the introduction of US-style procedures, and the tendency toward a more adversarial process" were not incidental but rather "that complexity was in part produced deliberately because it invited devices used to specifically enhance the competitiveness of US practitioners." Although it is true that the introduction of litigation-like techniques and the increasingly adversarial style of arbitration proceedings can be linked to the process of judicialisation, claims that the latter are the result of a plot orchestrated by US practitioners in order to get a piece of the pie are somewhat far-fetched. The judicialisation of international commercial arbitration can only be described as a "deliberate" process to the extent that "deliberate" means "not self-driven" as opposed to "intentional". The Americanisation of international commercial arbitration is rooted in the globalisation of the markets, the commercialisation of arbitration and the fact that arbitrators and counsel come to arbitration with their cultural and legal background. Multiple legal and social norms amalgamate in this system in order to give rise to new norms that shape the culture of transnational commercial arbitration. William Park gives the following example of this process: "Just as international arbitration has been 'Americanized,' arbitration in the United States has to some extent begun to reflect the European emphasis on written testimony and reasoned awards. Perhaps the most striking examples can be found in the new American standard for arbitrator ethics. Traditionally, party-appointed arbitrators in the United States were considered partisan and thus permitted *ex parte* communications with their appointers. Ultimately, however, American arbitration came into line with global standards, imposing a presumption of independence for all arbitrators, regardless of how they were selected." in Park, 'Arbitrators and Accuracy' (n 372) 37, 38.

Thus it is argued that both professionalisation and judicialisation curb the arbitral decision-making process⁶⁴¹.

The “professionalisation (...) creates specific communication-forms in regard to the application and interpretation of law”⁶⁴², which affect the way the arbitral process is managed. The result is arbitration proceedings that are much more formalised and legalised. The process of judicialisation, on the other hand, is about creating norms that guarantee parties’ access to justice, while also meet their expectations as to how justice is served.

The ongoing professionalisation of international arbitration raises debates about the roles of both arbitrators and counsel and whether the status quo meets public

⁶⁴¹ The judicialisation of international commercial arbitration is driven by the will of the arbitration users. As businesses preferences shift, the arbitrator’s conduct follows the trend and this inevitably has an effect on the whole arbitral process, including arbitrator’s decision-making. Prof Catherine A. Rogers suggests that there may also be a sociological factor having bearing on arbitrator’s conduct and the “product of international arbitrators’ work”, i.e. justice (Rogers, ‘The Vocation of the International Arbitrator’ (n 464) 984): “[t]his (arbitration) market has come under increased pressure in recent years because the number of arbitrators and arbitration proceedings has increased sharply and their work product has come under greater scrutiny. At least partially in response to these pressures, arbitrators have begun to display a ‘professional impulse,’ meaning efforts to present themselves as a profession. Sociological accounts of the professions tell us that in seeking to present themselves as a profession, international arbitrators are inevitably seeking to express what has developed as a shared identity, as well as to obtain certain benefits associated with professionalization, such as added prestige, exclusivity, and regulatory autonomy.” (in ‘The Vocation of the International Arbitrator’ (n 464) 960-961). Prof Rogers further argues that with the professionalisation of international arbitration arbitrators regard their vocation “as a primarily entrepreneurial venture” and as a consequence “international arbitrators are less constrained by shared traditions or by an inherent sense of obligation, which means that they are less subject to the informal social controls that operated when the community was still comprised of an elite in-group” (Rogers, ‘The Vocation of the International Arbitrator’ (n 464) 966-967). Despite the shift in arbitrator’s perception as to their vocation, arbitrators are still subject to informal social controls that moderate their conduct and decision-making. With the growing popularity of international arbitration arbitrators are in the spotlight of public attention. The greater the public attention to international arbitration is, the bigger the pressure is on arbitrators to render services to a very high standard. In psychology and social science this is known as the priming effect. Evidence of priming studies suggests that a “reminder of being watched prodded people into improved behaviour” (Daniel Kahneman, *Thinking, Fast and Slow* (2nd edn, Penguin Books 2012) 58, 50-58). In addition, the new generation of arbitrators renders its services in a highly competitive and sophisticated market. As a result arbitrators are even more susceptible to parties’ expectations and the projections of the public for the arbitrator’s role.

⁶⁴² B. Landheer, ‘The Evolution of Sociological Thinking about International Society and International Law’ in Hague Academy of International Law (ed), *Collected Courses of the Hague Academy of International Law (Volume 091)* (1st edn, Brill Nijhoff 1957) 29.

expectations. The calls for ethical codes are a clear indication that arbitrators have stopped being simply service providers and that arbitrator's vocation has become a profession in its own right⁶⁴³.

Several recent surveys illustrate how arbitral decision-making is curtailed by the professionalisation of arbitrators and parties' agreement. The studies also demonstrate that the most important characteristics of the third generation of arbitrators are knowledge of the law and experience with the arbitration practice. This supports the assumption that users' satisfaction with arbitration is dependent on the way arbitrators administer justice. Never before has Redfern and Hunter's dictum "[p]robably the most important qualification for an experienced arbitrator is that he [or she] should be experienced in the law and practice of arbitration"⁶⁴⁴ held so true.

Thus, in the 2013 QMUL study, respondents considered arbitrator's expertise to include (1) commercial understanding of the relevant industry sector; (2) knowledge of the law applicable to the contract; and (3) experience with the arbitration process.⁶⁴⁵ It comes as no surprise that one of the highly valued features of today's international commercial arbitration is, in fact, arbitrator's knowledge of the sources of law and experience in applying the law. The significance of the latter can be appreciated when considering the growing number of the sources of law in international commercial arbitration, as well as the complexity of issues pertaining to the definition of "the source of law" in international commercial arbitration, ascertainment of the binding force, weight and persuasiveness of the sources of law⁶⁴⁶, and application of the doctrines of precedent, *lis pendens*, *res judicata*⁶⁴⁷, etc.

⁶⁴³ According to Ralf Michaels "the much-described professionalization of international arbitration is really, at its roots, a change in the roles of arbitration practitioners" (Michaels, 'Roles and Role Perceptions of International Arbitrators' (n 640) 49). The author continues: "The professionalization of international arbitration has led to an alignment at least of the function of the arbitrator to that of a judge. Contemporary arbitration procedures are frequently so adversary in nature that the common interests of the parties, which could define a service, are difficult to identify." (Michaels, 'Roles and Role Perceptions of International Arbitrators' (n 640) 70).

⁶⁴⁴ Redfern, Hunter, Blackaby, and Partasides, *Law and Practice of International Commercial Arbitration* (n 117).

⁶⁴⁵ See 2013 QMUL Survey (n 15).

⁶⁴⁶ See for example Strong, *Research and Practice in International Commercial Arbitration: Sources and Strategies* (n 131) 11, para 2.07 where it is pointed out that distinction between the legal authorities in the context of international commercial arbitration is not an easy task because

In a different study Thomas Shultz and Robert Kovacs were interested in finding out “how the required characteristics for being a successful arbitrator have changed between the first half of the nineties and today”⁶⁴⁸. The assumption that prompted the authors to conduct the survey was that “changes in the global practice of arbitration seem likely to reflect on what people expect today from arbitrators”⁶⁴⁹. The results confirmed that public expectations have changed and revealed that the most highly regarded attributes for arbitrators were specialisation in the law and practice of arbitration and management abilities. Somewhat surprisingly, given the heated discussions about the increasing costs and delays in international arbitration, the ability to encourage settlement between the parties and the cost of arbitrator⁶⁵⁰ were not considered an essential characteristic of the new generation of arbitrators.

Given that modern international commercial arbitration is shaking off its conciliatory features and is turning into a process that values precision over equity, and due process over efficiency, the arbitrators of today are perceived as adjudicators that render justice in a transnational system of law. As Prof Lalive unequivocally stated, international commercial arbitration “can no longer be seen as a simple and cheap domain reserved to a few distinguished amateurs”⁶⁵¹. This method for dispute resolution has evolved and with it the public expectations of arbitrators and their role in the arbitral process have changed too:

[u]ntil about twenty years ago, international arbitration was an *ad hoc* compromise-oriented process characterized by its informality and emphasis on fairness. Arbitral decisions were not revered so much for their legal accuracy or precision as much as for their sense of fairness and practical wisdom. (...) The arbitrator was expected to render

some of the sources of law contain mandatory provisions, while others promote general principles of law with mere persuasive effect.

⁶⁴⁷ See Chapter 3.

⁶⁴⁸ Schultz and Kovacs (n 635) 164.

⁶⁴⁹ Ibid.

⁶⁵⁰ Ibid.

⁶⁵¹ Pierre Lalive, ‘Irresponsibility in International Commercial Arbitration’ (1999) 7 Asia Pacific Law Review 161–176, 162.

a just and equitable result, even if that sometimes meant disregarding the express terms of the contract or the clear provisions of chosen law.⁶⁵²

While:

[t]oday, arbitration is a highly sophisticated, procedurally complex and exhaustive process dominated by its own domain experts. The lack of an avenue of appeal, coupled with minimal curial intervention, was meant to simplify things. Instead, these factors have given rise to the realization that there is little room for error in arbitration. The modern era of arbitration is characterized by insulated arbitral decision-making with minimal review. For our clients, arbitration has become a one-strike proposition leading to the escalation of costs, as parties inevitably chase the best arbitrators and the best lawyers to give themselves the best chance of winning their case.⁶⁵³

It should be noted that the professionalisation of arbitrators of today goes hand in hand with the institutionalisation of international commercial arbitration. Many of the prominent arbitrators are often members of institutional courts of arbitration⁶⁵⁴ or affiliated with arbitration associations and non-governmental organisations, such as Association for International Arbitration (AIA), International Council for Commercial Arbitration (ICCA), etc. Those organisations seek to promote ADR, collaborate with other ADR institutions, encourage scholarship and publication, and organise training and educational activities. Often those organisations are open to membership, fellowship and/or affiliation. Some even offer professional courses and grant certificates to those who successfully pass specifically tailored assessments. This demonstrates aspiration to professionalise the vocation of international arbitrators and guarantee that it is performed to a professional standard.

Back in 1985 Jan Paulsson spotted the side effects of the success of international commercial arbitration:

⁶⁵² Rogers, 'Fit and Function in Legal Ethics' (n 64), 350 *et seq.*

⁶⁵³ Menon (n 36).

⁶⁵⁴ See for example SIAC Court of Arbitration, available at <<http://siac.org.sg/2014-11-03-13-33-43/about-us/court-of-arbitration>>, ICC Court of Arbitration, available at: <<http://www.iccwbo.org/About-ICC/Organization/Dispute-Resolution-Services/ICC-International-Court-of-Arbitration/List-of-Current-Court-Members/>>, LCIA Court of Arbitration, available at: <<http://www.lcia.org/LCIA/the-lcia-court.aspx>>, etc.

The age of innocence has come to an end for international commercial arbitration. (...) Once the delightful discipline of a handful of academic *aficionados*, somewhere on the fringes of private international law, it has become a matter of serious concern for great numbers of professionals determined to master a process because it is essential to their business. They labour, but not for love. (...) The days of genial artisans are gone; international arbitration has become a serious industry not only for businessmen and lawyers, but also for arbitrators, and indeed for the proliferating institutions that seek to maintain, increase, or establish a caseload of important arbitrations. (...) ⁶⁵⁵

The incisive observations of Prof Paulsson regarding the professionalisation of arbitrators and the arbitral process remain valid even today:

(...) international arbitral process shows signs of becoming more formalistic, more court-like; French speakers refer to *la juridictionnalisation de l'arbitrage*. Litigants become more sophisticated, and come up with more difficult procedural stratagems. Practising lawyers represent client, not ideals – and they often represent defendants. The result is that the arbitrator's much-vaunted freedom to adopt procedures as he sees fit is cramped by the vehemence of the parties' procedural arguments; in order not to appear biased, arbitrators more and more often prefer to justify procedural rulings by reference to pre-existing rules rather than their own discretion. Accordingly, the *law* of arbitration, grist for the academic mill and once the dominant if not the only great subject of international arbitration, must now share at least equal time with more mechanical matters: the *practice* of arbitration. ⁶⁵⁶

Today international commercial arbitration is dominated by arbitration institutions and professional arbitrators. According to the 2006 QMUL Survey ⁶⁵⁷ businesses have a clear preference for institutional arbitration as opposed to *ad hoc* arbitration, with 76% of corporations opting for institutional rather than *ad hoc* arbitration. In the 2008 QMUL Survey ⁶⁵⁸ the number of respondents that have used institutional arbitration was even higher, namely 86% of awards were rendered by arbitration

⁶⁵⁵ Jan Paulsson, 'Introduction' (1985) 1 *Arbitration International* 2–5, 2.

⁶⁵⁶ *Ibid* 3.

⁶⁵⁷ 2006 QMUL Survey (n 2).

⁶⁵⁸ 2008 QMUL Survey (n 3).

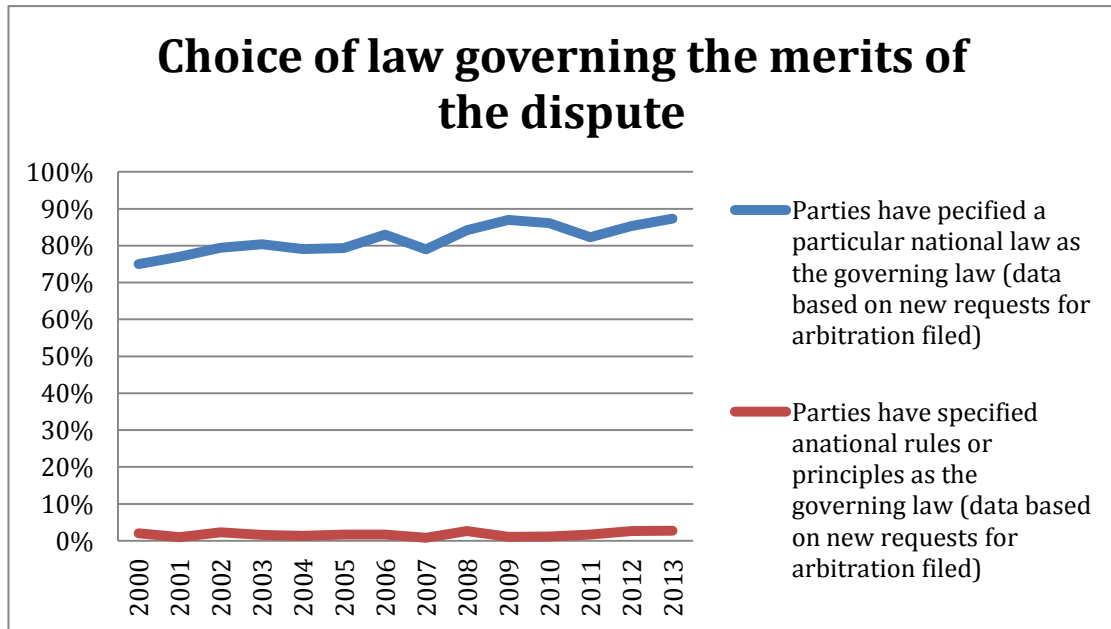
institutions rather than through *ad hoc* arbitration. Statistical reports released by arbitration institutions confirm this trend. The popularity of institutional arbitration, as opposed to *ad hoc* arbitration, is steadily growing. The official statistics of Arbitration Institute of the SCC, for example, show that 168 cases of the 2015 caseload were administered under the SCC Rules or the SCC Rules for Expedited Arbitrations, while only in 12 cases, or nearly 7% of all cases, parties requested SCC's administrative services as appointing authority in *ad hoc* arbitrations. Although *ad hoc* arbitration has the potential to be more flexible, cost efficient and expedient than institutional arbitration it is rarely chosen by the parties.⁶⁵⁹

As mentioned above, the professionalisation of arbitrator's vocation is driven by arbitration users' regard for legal accuracy and certainty. The expectations of the public that an arbitrator will render a decision by applying the law and observing the arbitration practice, as opposed to invoking equitable principles, are engraved in the choice of law provisions in the arbitration agreements. By agreeing that a particular national law will govern the merits of the dispute, parties limit arbitrators' power and curtail arbitral decision-making by favouring legal certainty and predictability over flexibility and equity. Studies demonstrate that there is a steady increase in the percentage of contracts that include express choice of law clauses in the last 15 years (see Figure 4). While in 2000 about 77% of the contracts relating to new ICC cases contained a choice of law clause, this percentage was 90% in 2013⁶⁶⁰. Explicit choice of law clauses leave little room for the application of *lex mercatoria* and trade usages. They also indicate parties' preference for a legalistic approach to the sources

⁶⁵⁹ Among the reasons for the preference of institutional arbitration is the fact that *ad hoc* arbitration can often result in deadlocks. *Ad hoc* arbitration depends on the cooperation between the parties, particularly in cases when the dispute has already arisen and the parties have not agreed the terms of arbitration. In such situations it proves helpful to have an institution that supervises the appointment and impartiality of arbitrators, the compliance with procedural deadlines and the neutrality of the whole process. Negotiating a full set of rules that meet parties' needs may require more time than arbitrating a dispute under the auspices of arbitration institution with well-established rules. The uncertainties associated with *ad hoc* arbitration make this form of alternative dispute resolution undesirable and unsuitable for high stake disputes and multiparty arbitrations. Given that in the last 15 years about 30% of the new requests for ICC arbitration involve more than 2 parties and between 50% to 75% of the new cases involve disputes over \$1 million, it is not surprising that businesses prefer the expertise of the arbitration institutions and the degree of certainty that comes with the pre-set institutional arbitration rules over the flexible but unpredictable *ad hoc* arbitration.

⁶⁶⁰ Statistics based on data from the ICC Bulletins and ICC website.

of law, since parties are reluctant to take advantage of the flexibility that application of *lex mercatoria* offers. In fact, such an approach is also endorsed by the arbitrators, who in the absence of a choice of law provision would not hastily apply *lex mercatoria*.⁶⁶¹



(FIGURE 4: Data collected from the ICC Bulletins and ICC website)

The 2010 QMUL Survey⁶⁶² further highlights the importance of the choice of law clauses to businesses and sheds some light on parties' attitudes to choosing the law governing the substance of the dispute. The study reveals that 68% of the corporations have a dispute resolution policy and almost all of those that have a policy also have a position on the preferred law to govern the substance of the dispute (94%).⁶⁶³ In fact, the law governing the substance of the dispute is of such importance to businesses that 51% of the respondents pointed out that they usually select it first when negotiating an arbitration clause.⁶⁶⁴ According to the same survey

⁶⁶¹ See text to and following n 369. See also ICC Case 13129, award rendered in 2005 in Jean-Jacques Arnaldez, Yves Derains, and Dominique Hascher (eds), *Collection of ICC Arbitral Awards 2008-2011* (1st edn, Kluwer Law International 2013) 337 where the arbitrator noted: "I have reservations as to the real existence of anything that can be described as *lex mercatoria*. (I am of course aware of the extremely learned debate that has continued on this topic for the past quarter-century or more.)"

⁶⁶² 2010 QMUL Survey (n 380).

⁶⁶³ *Ibid* 5.

⁶⁶⁴ *Ibid* 8.

considerations about the neutrality and impartiality of the legal system, the appropriateness of the law for the type of contract in question, and the familiarity with the particular law influence businesses' choices as to the law governing the substance of the disputes.⁶⁶⁵ These findings can be explained by the fact that the certainty and commercial soundness that come with the selection of a particular national law are of great value to arbitration users. The study further suggests that even when parties want to limit the impact of the governing law, they prefer negotiating an extensively drafted contract instead of choosing anational rules of law or transnational principles to govern the merits of the dispute.⁶⁶⁶

Although anational rules and transnational principles have the potential to be universal and equitable, they are more uncertain in terms of their content. This could explain the reluctance of business parties to use transnational laws or rules to govern their disputes. 81% of the respondents in the 2010 QMUL Survey pointed out that they have never used determination *ex aequo et bono* or as *amiable compositeur*, and 51% have never used general principles of law, commercial practices or fairness and equity.⁶⁶⁷ Still, some 26% of the participant in the study said they "sometimes" use general principles of law, commercial practices or fairness and equity, while 16% use them "often".⁶⁶⁸ It should be noted, however, that the interviewees often used the transnational rules as supplementary or definitional concepts alongside a governing national law rather than as a law that solely regulates all aspects of the contractual relationship between the parties.⁶⁶⁹ Indeed such an approach is more in line with the statistics gathered from arbitration institutions.

In the great majority of contracts businesses have explicitly agreed on a particular national law as the law governing the merits of the dispute. Only in about 2-3% of the cases the choice of law clauses specifies anational rules or transnational

⁶⁶⁵ Ibid 11-12.

⁶⁶⁶ Ibid 16. According to 29% of the respondents an extensively drafted contract can limit the impact of the governing law "to a great extent" and 53% thought it could limit it to "some extent". Only 15% considered that a type of contract often referred to as a "regulatory" can limit the impact of the governing law to a limited extent only.

⁶⁶⁷ Ibid 15.

⁶⁶⁸ Ibid.

⁶⁶⁹ Ibid.

principles as the governing law. This insignificantly small percentage is in stark contrast with the historically high number of arbitration cases. It demonstrates a change in businesses' attitude to choice of law clauses, namely an overwhelming regard for certainty and predictability. According to the ICC Statistical Reports in 2003 there were 580 new requests for arbitration and only 2 underlying contracts referred to rules or bases for deciding the dispute, such as equity, *ex aequo et bono* or amiable composition; in 2004 and 2007 there were no such references; in 2009, 2010 and 2011 when the ICC had a record high number of new requests for arbitration only 1 or 2 contracts authorised the tribunals to decide *ex aequo et bono*.⁶⁷⁰

The above attitudes and practices show that arbitration users carefully negotiate their arbitration agreements and make deliberate choices that favour certainty and foreseeability. By choosing institutional over *ad hoc* arbitration and by incorporating choice of law clauses in their contracts businesses express their preference for rules of law that are accessible, clear, predictable and intelligible. This inevitably influences the perceptions about arbitrator's role and how arbitrators administer justice. There is added pressure that not only party's agreement will be respected but also the law will be applied accurately.

5.2 Arbitrators in the Eyes of the Institutions

The implementation of the UNCITRAL ML in many national arbitration laws has marked an era of limited curial intervention in international commercial arbitration. This policy of minimum court interference is not tolerance towards injustice⁶⁷¹ but

⁶⁷⁰ In Ahmet Cemil Yildirim, 'Amiable Composition in International Arbitration' (2014) 24 Journal of Arbitration Studies 33–46, 34 the author observes that while doing his research he encountered *ex aequo et bono* awards from the 1950's and 1960's. He then argues that "the awards by *amiable compositeur* arbitrators were intensified in the 1970's and 1980's", however "the number of this kind of arbitral awards decline in late 1980's and early 1990's" to reach the point when today "the publication of the awards by *amiable compositeur arbitrators* is quite rare".

⁶⁷¹ In *Bandwith Shipping Corporation v. Intaari* [2007] EWCA Civ 998 Waller LJ stated: "In my view the authorities have been right to place a high hurdle in the way of a party to an arbitration seeking to set aside an award or its remission by reference to section 68 and in particular by

respect for the autonomy of contracting parties. In *GreCon Dimter Inc. v. J. R. Normand Inc.*⁶⁷² the Supreme Court of Canada held that recognition of the principle of party autonomy “goes hand in hand with the legislature’s tendency toward recognizing the existence and legitimacy of the private justice system, which is often consensual and is parallel to the state’s judicial system.”⁶⁷³

International commercial arbitration is widely accepted as a legitimate form of dispute resolution, while arbitrators are considered to perform a quasi-judicial function. In Case No. 10 of 127j⁶⁷⁴ it was held that “the arbitrator’s duty is in harmony with the judicial function”. In a different case the Supreme Court of the United Kingdom considered the “general international legal understanding of the nature of an arbitrator’s engagement” and endorsed the view expressed in Gary Born “International Commercial Arbitration” (2009), namely that the functions of an arbitrator are judicial in nature.⁶⁷⁵ Reversing the Court of Appeal’s decision, the UK Supreme Court found it surprising that the Court of Appeal concluded that arbitrators were employees of the parties given that:

(...) as long ago as 1904 (RGZ 59, 247), the German Reichsgericht identified the particular nature of an arbitral contract, in terms which (...) have a relevance to arbitration generally, when it said (in translation): “It does not seem permissible to treat the arbitrator as equivalent to a representative or an employee or an entrepreneur. His office has ... an entirely special character, which distinguishes him from other persons

reference to section 33. Losers often think that injustice has been perpetrated when their factual case has not been accepted. It could be said to be “unjust” if arbitrators get the law wrong but if there is no appeal to the court because the parties have agreed to exclude the court, the decision is one they must accept. It would be a retrograde step to allow appeals on fact or law from the decisions of arbitrators to come in by the side door of an application under section 33 and section 68.” (at [38]) See also *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd “The MV Pamphilos”* [2002] EWHC 2292 (Comm) 681 at 687: “In many cases, such as this, the arbitrators have been appointed because of their professional legal, commercial or technical experience and the parties take the risk that, in spite of that experience, errors of fact may be made or invalid inferences drawn without prior warning. It needs to be emphasized that in such cases there is simply no irregularity, serious or otherwise. What has happened is simply an ordinary incident of the arbitral process on the arbitrator’s power to make findings of fact relevant to the issues between the parties.”

⁶⁷² [2005] 2 SCR 401.

⁶⁷³ Ibid at [38].

⁶⁷⁴ Court of Appeal of Cairo, Commercial Arbitration, 4 January 2011.

⁶⁷⁵ *Jivraj v Hashwani* [2011] UKSC 40 at 77.

handling the affairs of third parties. He has to decide a legal dispute in the same way as and instead of a judge, identifying the law by matching the relevant facts to the relevant legal provisions. The performance expected from him is the award, which constitutes the goal and outcome of his activity. It is true that the extent of his powers depends on the arbitration agreement, which can to a greater or lesser extent prescribe the way to that goal for him. But, apart from this restriction, his position is entirely free, freer than that of an ordinary judge.”⁶⁷⁶

It was further held by the Supreme Court judges that:

The arbitrator is in critical respects independent of the parties. His functions and duties require him to rise above the partisan interests of the parties and not to act in, or so as to further, the particular interests of either party. As the International Chamber of Commerce (the ICC) puts it, he must determine how to resolve their competing interests. He is in no sense in a position of subordination to the parties; rather the contrary. He is in effect a ‘quasi-judicial adjudicator’.⁶⁷⁷

The decision in *Jivraj v Hashwani*⁶⁷⁸ followed the Court of Appeal’s position in *K/S Norjarl A/S v. Hyundai Heavy Industries Co Ltd*⁶⁷⁹. In the latter case it was found that the arbitration agreement is a bilateral contract between the parties to the main contract and by accepting the appointment the arbitrator becomes a third party to the arbitration agreement. Although the source of the arbitrator’s obligation to *resolve a dispute or disputes*, which have arisen or *may* arise in respect of a defined *legal relationship* between the parties⁶⁸⁰, is contractual, the function of the arbitrator is a quasi-judicial one:

Under that trilateral contract, the arbitrator undertakes his quasi-judicial functions in consideration of the parties agreeing to pay him remuneration. By accepting

⁶⁷⁶ Ibid 76.

⁶⁷⁷ Ibid 41.

⁶⁷⁸ Ibid.

⁶⁷⁹ [1992] QB 863.

⁶⁸⁰ See Arbitration Act 1996, s 6; German Arbitration Act 1998, Section 1029; Singapore International Arbitration Act with 2012 amendments, Art. 2A. Also *Methanex Motonui Ltd, Methanex Waitara Valley Ltd v. Joseph Spellman* [2004] 1 NZLR 95. Those characteristics of arbitration distinguish the role of an arbitrator from the one of a mediator, conciliator, certifier, valuer, etc.

appointment, the arbitrator assumes the status of a quasi-judicial adjudicator, together with all the duties and disabilities inherent in that status.⁶⁸¹

The view that arbitrators perform a judicial or quasi-judicial function appears to be widely accepted⁶⁸². The High Court of South Africa held in *Johan Louw Konstuksie*

⁶⁸¹ *K/S Norjarl A/S v. Hyundai Heavy Industries Co Ltd* [1992] QB 863 at 885.

⁶⁸² See *Venezuela No. 2, Tanning Research Laboratories, Inc. v. Hawaiian Tropic de Venezuela C.A.*, Juzgado Sexto de Primera Instancia, Caracas, 2 August 2006 (as translated in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration 2008 Volume XXXIII*, *Yearbook Commercial Arbitration*, Volume 33 (1st edn, Kluwer Law International 2008) at 1228-1239: “The power to administer justice emanates from the citizens and is exercised in the name of the Republic by authority of the Law.’ Hence, the parties themselves can either submit their claims to the organs of the State (the courts) and grant them the power to decide on their disputes, or choose a different path – that is grounded in the same popular power – and submit their claim to a different organ, e.g., the arbitrators.” Also *Astivenca Astilleros de Venezuela, C.A. v. Offshore Oceanlink III AS*, Supreme Court (Constitutional Court) of Venezuela, No. 1067/2010; *Clarence Frere, et al. v. Orthofix, Inc. and others*, US No. 352, United States District Court for the Southern District of New York, 99 Civ. 4049 (RMB) (MHD), 6 December 2000; *Total Support Management (Pty) Ltd and Another v. Diversified Health Systems (South Africa) (Pty) Ltd and Another* (457/2000) [2002] ZASCA 14 (25 March 2002); *TCL Air Conditioner (Zhongshan) Co Ltd v. Castel Electronics Pty Ltd* [2014] FCAFC 83; *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960) where it was stated that an arbitrator does not have a general duty to administer justice, which transcends the parties; *ADG and another v. ADI and another matter*, Supreme Court of Singapore, High Court, 15 April 2014; *Sea Containers Ltd v. Ict Pty Ltd* [2002] NSWCA 84 (18 April 2002) at 11: “Parties choose and appoint arbitrators from candidates who are entrepreneurs engaged in practice as barristers or solicitors or in other fields of endeavour. (...) But once appointed, an arbitrator is no longer an entrepreneur so far as the parties are concerned. The arbitrator accepts a quasi judicial position governed by law. Like a judge, not only must the arbitrator be impartial, the arbitrator must not give the appearance of bias. In *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Limited* [1981] AC 909 at 980 Lord Diplock observed that the concept of “arbitration” as a method of settling disputes carried with it by necessary implication that the person appointed as arbitrator to decide the dispute should be and should remain throughout free from all bias for or against any of the parties.” The double standard of impartiality and independence is another characteristic that arbitrators and judges share and has an impact on arbitrator’s decision-making: See Section 3.1.1; *AMEC Construction Pty Limited v. Coal and Allied Operations Pty Limited* (Unreported, Supreme Court of NSW, Cole J, 29 April 1993) “There is a problem latent in every arbitration. An arbitrator, par excellence, is in a quasi-judicial position. He must avoid both the reality and the appearance of bias. The receipt by a judge of money or other benefits is the classic example of conduct which is unacceptable since, at its lowest, it raises the possibility of bias. Yet an arbitrator is paid by the parties.”; *Austern* (n 495) where it was held that judicial immunity is extended to arbitrators because they perform quasi-judicial functions; “the functional comparability of the arbitrators’ decision-making process and judgments to those of judges ... generates the same need for independent judgment, free from the thread of lawsuits.”; Parties not indicated, Court of Appeal of Tunis, Case No. 25825, 13 March 2012: “The arbitrator exercises a judicial task, even if the task is incidental to the dispute. The same fundamental qualities required of a judge are also required of an arbitrator, being the neutrality and the independence to ensure justice between individuals and integrity when sentencing. Whether the

(*Edms*) *Bpk v. Mr Mitchell, Another (unnamed in the judgment)*⁶⁸³ that an arbitrator performs a judicial function and is expected to observe and apply the fundamental rules governing judicial proceedings. This does not mean that arbitrators are governed by the technical procedural rules applicable to judges in national courts. On contrary, arbitrators enjoy great procedural flexibility within the limits of fundamental procedural rules more often referred to as the rules of natural justice⁶⁸⁴:

By submitting their dispute to arbitration the parties have manifested a wish to have their dispute determined judicially, with the natural justice that that entails. They have an open choice in this regard. They can dispense with natural justice by referring their dispute to expert determination rather than arbitration (...). Opting for arbitration rather than expert determination is synonymous with adopting natural justice safeguards.⁶⁸⁵

matter is related to state justice or private justice, the goal is the same i.e. the achievement of justice and the protection of individual rights.” (As cited in 7(1) International Journal of Arab Arbitration 2015, 53-73, 62); *Not Indicated v. Not Indicated*, Higher Regional Court of Thuringia (Thüringer Oberlandesgericht or Thüringer OLG), 4 Sch 3/06, 8 August 2007; *Not indicated v. Not indicated*, Corte Suprema de Justicia (Supreme Court of Argentina), 11 November 1997 (as reported in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration 2000 Volume XXV, Yearbook Commercial Arbitration, Volume 25* (1st edn, Kluwer Law International 2000) 443-534; *Not Indicated v. Not Indicated*, Cairo Court of Appeal, Seventh Commercial Circuit, 72/117, 8 January 2002.

⁶⁸³ High Court of South Africa, Cape Provincial Division, 6748/2000, 10 December 2001.

⁶⁸⁴ Note also the words of Turner L.J. in *Haigh v. Haigh* (1861) 5 L.T. 507 at 508: “...Arbitrators, like other judges, are bound, when they are not expressly absolved from doing so, to observe in their proceedings the ordinary rules which are laid down for the administration of justice; and this court, when called upon to review their proceedings, is bound to see that those rules have been observed.” (As quoted in David St. John Sutton, Judith Gill, and Matthew Gearing, *Russell on Arbitration* (24th edn, Sweet & Maxwell 2015) at 180); *ONGC v. Western Geco*, Supreme Court of India, Civil Appeal No. 3415/2007, 4 September 2014; *Not Indicated*, Cairo Court of Appeal (n 682): “(...) impartiality, the very substance of the principle of autonomy of the courts, is not confined to judicial work. It is equally necessary in arbitration proceedings because the arbitrator, who, like a judge, performs the fundamental function of settling disputes, must also follow judicial procedure by observing the right of due process and the right of defense when verifying the allegations and examining the parties' claims, and must settle the dispute either by applying the provisions of the law or on the basis of the principles of fairness and equity. The arbitrator's function is of an objective, not a personal, nature.” (As cited in (2010) 2(2) International Journal of Arab Arbitration 124-128, 125.

⁶⁸⁵ *Methanex Motonui Ltd* (n 680) at [46].

The principle that arbitrator's function is subject to natural justice safeguards has gained universal approval⁶⁸⁶. In *ADG and another v. ADI and another matter* Vinodh Coomaraswamy J held:

The core concept of natural justice as it has been developed in administrative law no doubt applies to a tribunal. But one must remember that an arbitral tribunal's powers over the parties spring from their consent and not from the coercive powers of the state or of a public body.⁶⁸⁷

The dichotomy between the notions that arbitrator's power is rooted in parties' agreement but an arbitrator nevertheless performs a quasi-judicial function is resolved by the imposition of the natural justice safeguards. On the one hand, arbitrators are subject to the flexible procedure agreed between the parties. Such procedural rules are usually tailored to suit the needs of the parties and meet their expectations of arbitration as a dispute resolution process.⁶⁸⁸ The flexible arbitral procedure is also often a manifestation of arbitrator's knowledge of the industry and professional experience.⁶⁸⁹ On the other hand, as arbitrators are entrusted to adjudicate disputes and perform a judicial function they must adhere to the concepts of due process and the rules of natural justice. In fact, arbitrator's obligation to abide by the principles of natural justice is the justification of the judicial philosophy of minimal curial interference with the arbitral process.⁶⁹⁰

It must be noted that the balance in the abovementioned dichotomy is tipped towards party autonomy and parties' expectations of international commercial arbitration as a dispute resolution mechanism.⁶⁹¹ This is why the rules of natural justice should not

⁶⁸⁶ *ADG and another* (n 682); *Anwar Siraj v. Ting Kang Chung* [2003] 2 SLR 287; *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* [2007] 3 SLR 86; *Premium Brands Operating GP Inc. v. Turner Distribution Systems Ltd.*, British Columbia Court of Appeal, CA038214, 18 February 2011.

⁶⁸⁷ *ADG and another* (n 682) at [113].

⁶⁸⁸ *Ibid.*

⁶⁸⁹ Similarly to judges arbitrators are also entitled to use their general knowledge and experience to influence their assessment of the reasonableness and appropriateness of a claim: see *VV, Another v. VW* [2008] SGHC 11.

⁶⁹⁰ *Soh Beng Tee* (n 686) at [60].

⁶⁹¹ *ADG and another* (n 682) at [113], where a claim for breach of natural justice was brought on the grounds that the party's right to be heard has been violated. The Court found that: "The right

be construed rigidly but they are dependent on their context.⁶⁹² When a court accesses whether an arbitral tribunal has complied with the rules of natural justice, the former has to take into account the consensual nature of arbitration, the structure of the decision-making body and the nature and purpose of the tribunal's decision itself.⁶⁹³

Subject to the standards set by the rules of natural justice and empowered by the arbitration agreement, arbitrators make procedural decisions and render final awards “after weighing the competing considerations” and arguments put forward by the parties⁶⁹⁴. The autonomy and flexibility in the arbitrators' decision-making process are not restrained by technical rules of evidence, but they nevertheless have their limits. Arbitrators, much like judges, are not exempt from taking into account relevant and probative evidence and have to base their decisions on such evidence:

These technical rules of evidence, however, form no part of the rules of natural justice. The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value (...).⁶⁹⁵

to be heard as it is applied in arbitration is much less concerned with protecting the vulnerable against arbitrary governmental or quasi-governmental action and much more concerned with achieving practical results which fulfil the parties' expectations of arbitration as a dispute resolution process. A further reason in international commercial arbitration is that one of its goals is for businesses to achieve precisely the expeditious, economical and final determination that the SIAC Rules mandate. It is for that reasons that the parties consciously agree to the Tribunal's procedural flexibility and consciously accept the limited rights of recourse under the IAA.”

⁶⁹² *ADG and another* (n 682) at 118; *Premium Brands Operating GP Inc.* (n 686) at 43.

⁶⁹³ *ADG and another* (n 682) at 118.

⁶⁹⁴ *Ibid* 112.

⁶⁹⁵ *R v Deputy Industrial Injuries Commissioner, ex parte Moore* [1965] 1 QB 456 at 488. See also *AQU v. AQV* [2015] SGHC 26, Supreme Court of Singapore, High Court, Originating Summons No 133 of 2014, 30 January 2015 at 18 where the court followed the rationale in *R v Deputy Industrial Injuries Commissioner* and held that “(...) it is clear that the principles of natural justice are not breached just because an arbitrator comes to a conclusion that is not argued by either party as long as that conclusion reasonably flows from the parties' arguments.” Also in

Since arbitrators are bound by the rules of natural justice, they “act judicially” when resolving disputes brought to arbitration. The compliance with the rules natural justice is considered to be the essence of the judicial function and the duty to act judicially⁶⁹⁶. Fairness, impartiality and even independence can be binding on an architect or an engineer, who has been employed to act as a valuer or certifier because of their skills and experience, but the engineer or the architect cannot be bound by the rules of natural justice⁶⁹⁷:

The rules of natural justice are formalised requirements of those who act judicially. Compliance with them is required of judges and arbitrators and those in equivalent

TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd [2013] 4 SLR 972 the High Court stated that the arbitrators can make findings not argued for by the parties “[i]f an unargued premise flows reasonably from an argued premise” (at [65]). However, in *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 the High Court accepted that it would be a breach of natural justice for an arbitrator to disregard submissions and arguments made by parties without considering the merits thereof (at [31], [32] and [39]). It would equally be a breach of natural justice for an arbitrator to have regard to the submissions and arguments of the parties without really trying to understand them (*TMM Division Maritima SA de CV* at [89]).

⁶⁹⁶ In *The Vimeira* [1984] 2 Lloyd's Rep 66, at 76 Ackner LJ explains what the function of an arbitrator entails: “The essential function of an arbitrator (...) is to resolve the issues raised by the parties. The pleadings record what those issues are thought to be and, at the conclusion of the evidence, it should be apparent what issues still remain live issues. If an arbitrator considers that the parties or their experts have missed the real point (...) then it is not only a matter of obvious prudence, but the arbitrator is obliged, as a matter of natural justice, to put the point to them so that they have an opportunity of dealing with it (...).” See also *Zermalt Holdings SA* (n 457) at 15 where Bingham LJ stressed that: “If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission, then again it is his duty to give the parties a chance to comment. If he is to any extent relying on his own personal experience in a specific way, then that again is something that he should mention so that it can be explored. It is not right that his decision should be based on specific matters which the parties never had the chance to deal with, nor is it right that a party should first learn of adverse points in a decision against him. That is contrary both to the substance of justice and to its appearance (...).”

⁶⁹⁷ See *Hounslow London Borough Council v Twickenham Garden Developments Ltd.* [1971] Ch. 233 at 260, Megarry J “For the rules of natural justice to apply, there must (...) be something in the nature of a judicial situation”. Also *Canterbury Pipe Lines v The Christchurch Drainage Board* (1979) 16 BLR 76 at 98 “(...) the Engineer, though not bound to act judicially in the ordinary sense, was bound to act fairly and impartially. (...) In relation to persons bound to act judicially fairness requires compliance with the rules of natural justice.”

positions, but not of an engineer giving a decision under clause 66 of the ICE conditions.⁶⁹⁸

The significance of natural justice in arbitral proceedings is demonstrated by the fact that the rules of natural justice are part of a state's public policy. An arbitral award can be refused recognition and enforcement if it would be contrary to the public policy of the country where enforcement is sought according to Art. 2(b) of the NYC.⁶⁹⁹ The great emphasis on the standards set by the rules of natural justice, due process, fairness and impartiality aims at ensuring private parties' access to justice. As the Supreme Court of Canada held in *Michelle Seidel v. TELUS Communications Inc.*⁷⁰⁰:

Access to justice (...) no longer means access just to the public court system. Historically, judges were reluctant to relinquish their grasp on dispute resolution, and they even viewed alternative dispute resolution as antithetical to the parties' interests. This era is gone. (...) ⁷⁰¹

Indeed there is now a dramatic change in the courts' approach to international commercial arbitration and arbitrator's vocation in particular. Arbitrators are now widely appreciated as service providers who administer justice in the private system of law. The acknowledgement of the quasi-judicial function of arbitrators, as manifested in the judicial philosophy of minimal curial intervention, has contributed to the evolution of international commercial arbitration. In the last 20-30 years international commercial arbitration has made an enormous leap in its development. It has ceased to be an informal, lawless⁷⁰², *ad hoc* mechanism of dispute resolution

⁶⁹⁸ *Amec Civil Engineering Ltd v. Secretary of State for Transport* [2005] EWCA Civ 291, 17 March 2005 at 46.

⁶⁹⁹ See for example *TCL Air Conditioner* (n 682) where it was held that "No international arbitration award should be set aside for being contrary to Australian public policy unless fundamental norms of justice and fairness are breached" at [111].

⁷⁰⁰ *Michelle Seidel v. TELUS Communications Inc.*, Supreme Court of Canada, 33154, 18 March 2011 at [54].

⁷⁰¹ Ibid.

⁷⁰² See Drahozal, 'Is Arbitration Lawless?' (n 134); Abraham and Montgomery (n 417); McConnaughay, 'The Risks and Virtues of Lawlessness' Arbitration' (n 134); Lee (n 417).

and has been transformed into an institutionalised, professionalised, hierarchical⁷⁰³ system – a kind of “offshore litigation”⁷⁰⁴. International commercial arbitration is now often referred to as a “transnational legal order”⁷⁰⁵, “transnational system of justice”⁷⁰⁶ and a “form of global governance”⁷⁰⁷, while arbitrators are perceived not only as service providers but adjudicators and “system builders”⁷⁰⁸:

(...) international arbitration has become increasingly institutionalized, professionalized, and judicialized. At the same time, it has gained significance beyond specific disputes or disputing parties. International arbitration has become an institution that contributes to the shaping of law. (...) International arbitrators are therefore not only transnational adjudicators, but they also contribute to the progressive development of transnational law.⁷⁰⁹

The change in institutions’ perceptions to arbitrators’ functions is further demonstrated by the shift in the theoretical justifications of the foundation of international commercial arbitration. Legislatures and courts now adopt the view that arbitrators are neither agents, nor employees of the parties⁷¹⁰. Instead the most

⁷⁰³ Renner, ‘Towards a Hierarchy of Norms in Transnational Law?’ (n 62); Alexis Mourre, ‘Arbitral Jurisprudence in International Commercial Arbitration: The Case For A Systematic Publication Of Arbitral Awards In 10 Questions...’, 2009.

⁷⁰⁴ Dezalay and Garth, *Dealing in Virtue* (n 23) 34.

⁷⁰⁵ Ibid; Schultz (n 451); Paulsson, ‘Arbitration in Three Dimensions’ (n 61).

⁷⁰⁶ See Gaillard, ‘The Present – Commercial Arbitration as a Transnational System of Justice’ (n 191); Emmanuel Gaillard, ‘The Emerging System of International Arbitration: Defining “System”’ (2012) 106 *American Society of International Law. Proceedings of the Annual Meeting* 287–297.

⁷⁰⁷ See Mattli and Dietz (n 419); Eduardo Zuleta, ‘International Jurisprudence, Global Governance, and Global Administrative Law’ in David D. Caron and others (eds), *Practising Virtue: Inside International Arbitration* (1st edn, OUP 2015); Alec Stone Sweet, ‘The New Lex Mercatoria and Transnational Governance’ (2006) 13 *Journal of European Public Policy* 627–646; Webster and Bühler (n 249).

⁷⁰⁸ See Stephan W. Schill, ‘International Arbitrators as System-Builders’ (2012) 106 *Proceedings of the Annual Meeting (American Society of International Law)* 295–297.

⁷⁰⁹ David D Caron, Stephen W. Schill, Abby Cohen Smutny, and Epaminontas E Triantafilou, ‘An Introduction’ in David D. Caron and others (eds), *Practising Virtue: Inside International Arbitration* (1st edn, OUP 2015) 2.

⁷¹⁰ Under the agent theory arbitrators are believed to be agents of the parties. Thus, until recently in US arbitrations the party-appointed arbitrators were partisan representatives of the appointing sides and each was expected to compete for the vote of the presiding, neutral arbitrator (see *Astoria Med. Group v. Health Ins. Plan of Greater N.Y.*, 182 N.E.2d 85, 89 (N.Y. 1962); *Sunkist Soft Drinks v Sunkist Growers* 10 F.3d 753 (11th Cir. 1993), cert. denied, 513 U.S. 869 (1994).

widely accepted theory today is the hybrid theory, which has been developed on the basis of the contractual and jurisdictional theories. Gary Born outlines the reasons for the overwhelming support for the hybrid theory:

Arbitration manifestly exhibits attributes of contractual relations, albeit of an unusual type. (...) At the same time, arbitration also manifestly involves attributes of jurisdictional authority and adjudicative decision-making, different from other forms of contractual relations. The arbitration agreement does not produce a typical “commercial” bargain, but instead results in a particular kind of dispute resolution process, where the decision-maker must be impartial and independent and must apply adjudicatory procedures in reaching a decision.⁷¹¹

The support of one or another theory of the foundation of international commercial arbitration has a direct impact on the arbitrator’s functions and arbitrator’s decision-making by extension. For example, the endorsement of the jurisdictional and contractual theories compel adherence to national case law as a source of law in international commercial arbitration, while the proponents of the autonomous theory favour a flexible approach whereby the autonomous nature of international commercial arbitration is recognised.

The autonomous theory takes a functional approach to determining the foundations of international arbitration. The supporters of the autonomous theory argue that the character of international arbitration is to be decided by considering its use and purpose.⁷¹² Following this approach international arbitration is elevated to a supra-national level and recognised as an autonomous legal order. This representation accepts that international arbitration is rooted in a distinct transnational legal order, rather than in one or several national legal systems:

In the field of international business relations, it is the convergence of national legal orders that, through their widespread acceptance of arbitration, legitimizes its existence. By conferring to the arbitrators the power to adjudicate international business disputes when the parties so wish, and by recognizing the result of the arbitral process, *i.e.* the

⁷¹¹ Born, *International Commercial Arbitration* (n 131) 216, 217.

⁷¹² Yu (n 198) 278.

award, without reviewing the merits of the dispute, the international community has granted arbitration true autonomy.⁷¹³

According to the autonomous theory the legitimacy of international arbitration is rooted in the will of all states that have joined or adhere to international conventions and other international instruments governing the conduct of international arbitration, such as the NYC, UNCITRAL ML, etc⁷¹⁴. By exercising their adjudicative function arbitrators clarify existing and produce new transnational rules, thus contributing to the formation of “truly international and universally applicable public policy”⁷¹⁵. Where a national law, and by extend national case law, violates transnational public policy, the former should not be applied and arbitrators are free to disregard parties’ agreement in favour of body of national or a-national rules of law that comply with transnational public policy.⁷¹⁶

In contrast, those that support the jurisdictional theory contend that the adjudicative function and mandate of arbitrators oblige them to strictly apply the rules of law:

The jurisdictional function of an arbitral tribunal requires it to decide what rules of law cover the facts of the case, and having done so, it must, in the same manner as a national court, determine whether and to what extent the parties have respected, or failed to comply with them. When it adjudicates upon the claims and defences in the dispute, it grants to the successful party or parties such relief and remedies as are specified in the relevant rules of law and have been requested by such party, by assessing for example the extent of any loss or damage suffered, and the amount of any compensation due in respect thereof⁷¹⁷.

⁷¹³ Emmanuel Gaillard, *Legal Theory of International Arbitration* (1st edn, Martinus Nijhoff Publishers 2010) 59.

⁷¹⁴ Gaillard, ‘The Present – Commercial Arbitration as a Transnational System of Justice’ (n 191) 68.

⁷¹⁵ Paris Court of Appeal, May 25, 1990, *Fougerolle v Procofrance*, Rev. crit. DIP, 1990, p 753, as translated by Emmanuel Gaillard in Gaillard, *Legal Theory of International Arbitration* (n 713) 60.

⁷¹⁶ Pierre Mayer, ‘Reflections on the International Arbitrator’s Duty to Apply the Law’ (2001) 17 *Arbitration International* 235–247, 239.

⁷¹⁷ Jean-Louis Delvolvé, Jean Rouche, and Gerald Pointon, ‘Arbitrators and the Law’ in *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration* (2nd edn, Kluwer Law International 2009) 131.

Application of the rule of law includes not only compliance with the national and international laws but also adherence to national judicial precedents to the extent that court decisions are given binding effect in the state jurisdiction in question. The proponents of the jurisdictional theory maintain that:

(...) arbitrators resemble judges of national courts because the arbitrators' powers are drawn from the states by means of the rules of law. As with judges, arbitrators are required to apply the rules of law of a specific state to settle the disputes submitted to them. (...) Moreover, an arbitrator is required to carry out the arbitration proceedings in accordance with the will of the parties' to the extent that the *lex fori* allows.⁷¹⁸

This view also is strongly supported by Julian Lew, who argues that:

(...) the arbitrator, like the judge, draws his power and authority from the local law; hence the arbitrator is considered to closely resemble a judge. (...) The only difference between judge and arbitrator is that the former derives his nomination and authority directly from the sovereign, whilst the latter derives his authority from the sovereign but his nomination is a matter for the parties.⁷¹⁹

Thus, arbitrators are granted a special status by the states and they perform their function in public interest in its broad sense – it is in public interest to permit private individuals to decide disputes between parties when the latter have agreed so⁷²⁰. Since arbitrator's role is seen as a quasi-judicial one “an arbitrator, similar to a

⁷¹⁸ Yu (n 198) 259; see also Samuel, ‘The Nature of Arbitration’ (n 268).

⁷¹⁹ Julian D. M. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards* (Oceana Publications 1978) para 66.

⁷²⁰ Born, *International Commercial Arbitration* (n 131) 1978: “Arbitrators do not merely provide the parties with a service, but also serve a public, adjudicatory function, possessing binding adjudicatory powers and immunities from suit and liability, that cannot be equated with the provision of service in a commercial relationship. The proper analysis is therefore to regard the arbitrator's contract as a sui generis agreement specifying the terms on which this adjudicative function, requiring independence from the parties, is to be exercised vis-à-vis particular parties and on particular terms.” See also Michaels, ‘Roles and Role Perceptions of International Arbitrators’ (n 640) 70-71 stressing that “party autonomy is charged with more and more social expectations: By enforcing the will of the parties, the arbitrator is thought to fulfil a role for the wider society, which is allegedly interested in private dispute resolution. (...) The arbitrator's private role in dispute resolution thus becomes a public role as well; private interests dissolve into public interests, or are at least congruent with them”.

judge, is also required to follow the law”⁷²¹ in order to settle the dispute between the parties.

The contractual theory supports similar approach to the binding effect of judicial case law in international commercial arbitration proceedings. The reasoning is not derived from arbitrator’s adjudicative function rather it is based on the principle of party autonomy and the supremacy of parties’ expectations⁷²².

The basic premise of the contractual theory is the dominion of the agreement between the parties. Arbitrators’ decision-making process is dependent on parties’ agreement and their expectations. Where parties have explicitly selected a national law to apply to the dispute, arbitrators are obliged to follow the applicable national law, including court decisions, as this is in compliance with parties’ agreement and does not go against their expectations. Failing to find an express or implied choice of law arbitrators may have to follow the conflict of laws rules of the *lex arbitri* to determine the proper law. However, because of the contractual nature of arbitration, and distinct from jurisdictional theory, the parties have also the freedom to choose any laws, including a-national rules of law as the law applicable to the dispute.⁷²³ Apart from parties’ freedom to select a-national or transnational rules of law as the substantive law, most modern institutional arbitration rules explicitly grant arbitrators the power to apply rules of law which they determine to be appropriate, in the absence of express parties’ agreement.

Another distinction between the contractual and the jurisdictional theories is the contractualists’ contention that whole arbitration process is based on agreements, including arbitrator’s mandate to resolve the dispute between the parties. Thus, the nature of the arbitrator’s brief is of private rather than a public character and is

⁷²¹ Yu (n 196) 262.

⁷²² See *TCL Air Conditioner* (n 682), Federal Court of Australia, New South Wales District Registry, VID 1042 of 2012, VID 1043 of 2012, VID 1044 of 2012, 16 July 2014 where it was held that “The system enshrined in the Model Law was designed to place independence, autonomy and authority into the hands of arbitrators, through a recognition of the autonomy, independence and free will of the contracting parties.” para 109.

⁷²³ Yu (n 198) 274.

drawn from the parties' agreement, which allows arbitrator to judge.⁷²⁴ According to Emmanuel Gaillard and John Savage the origins of the arbitrator's mandate are contractual because the latter is based on two agreements – the arbitration agreement between the parties and the contract binding the parties to the arbitrators.⁷²⁵ The two authors further explain that the rights and obligations of the arbitrators “are not covered in any depth by the traditional sources of international arbitration law such as national legislation, arbitral case law and international conventions” but are “largely a matter for private rules and ethical codes”.⁷²⁶

The contractual theory, however, fails to provide satisfactory answers about arbitrator's immunity and the difference of the arbitrator's adjudicative function from the conciliatory function of mediators and conciliators. This is why some proponents of the contractual theory concede that:

(...) [The] judicial power is the principal characteristic of their [arbitrators'] role and enables arbitration to be distinguished from superficially similar concepts such as expert proceedings, conciliation and mediation. This appears clearly in a recent decision of the European Court of Justice, which held that ‘the services of an arbitrator are principally and habitually those of settling a dispute between two or more parties’ and could not therefore be assimilated to the representation of a party and the defense of its interests, services performed by lawyers.⁷²⁷

As already hinted at above, the shortcomings of the contractual and the jurisdictional theories lead to the creation of the hybrid theory, which is now the prevailing theory of the foundations of international commercial arbitration. The hybrid theory is premised on a supposition, widely shared by the national courts, namely that:

(...) arbitrators are decision-makers and perform a quasi-judicial function without exercising any (state) judicial power, as there is no act of delegation of state power:

⁷²⁴ Ibid 268.

⁷²⁵ Gaillard and Savage, ‘The Status of the Arbitrators’ (n 473) 557.

⁷²⁶ Ibid 556.

⁷²⁷ Ibid 559-560 citing ECJ Case C-145/96, *von Hoffmann v. Finanzamt Trier*, 1997 E.C.R. 1-4857, and the opinion of the advocate general N. Finelli; 1998 REV. ARB. 166; 125 J.D.I. 562 (1998), and observations by M. Aurillac.

they resolve disputes and their decisions may be given state judicial power at the time and place of enforcement. Hence the arbitration function is equivalent to the function of a judge, but not of a particular state's judge. While a judge is vested in principle with state power, the arbitrator's decision is only in effect vested with the same power. This was recognised by the European Court of Justice in *Nordsee v Reederei* where it stated that only state courts exercise state power.⁷²⁸

Under the hybrid theory, the constitution of arbitration and the powers of the arbitrator are based on the parties' agreement, while the validity of the agreement and enforcement of the arbitral award are decided in conformity with public policy or mandatory rules of the relevant laws.⁷²⁹ Thus, the hybrid theory acknowledges the adjudicative functions of arbitrators within the scope of parties' agreement, the connection between arbitration proceedings and the place where tribunal has its seat, and the effect of arbitral awards, which resembles the effect of court decisions.

What this means about the mechanics of arbitrators' decision-making and the way arbitrators apply the law is that arbitral tribunals are obliged to honour parties' express choice of law and in absence of explicit provisions to resort to the conflicts of law principles to determine the relevant rules of law. Unless the parties have explicitly stated that they opt for *amiable compositeur* arbitration, arbitral tribunal should respect parties' agreement and apply the law chosen by the parties. Any applicable national law should be interpreted in the way that is customary in the state at hand. As it is arbitrators' duty to respect parties' choice and to act with due care, it would be reasonable to expect that an arbitral tribunal will depart from a long-standing line of reasoning only where the latter is inapplicable to the case or irrelevant. Such an approach favours legal certainty and predictability in the application of the law and cares for parties' will and expectations.

In the light of the above it could be argued that both the judicial approach to arbitrators' functions and the prevailing theory of the foundations of international commercial arbitration compel arbitrators to consider not only their contractual mandates but also their adjudicative or quasi-judicial role when performing their

⁷²⁸ Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration* (n 354) 80.

⁷²⁹ Yu (n 196) 276, 277.

duties. Arbitrators are service providers and their mandates are rooted in the arbitration agreement, however with the increasing emphasis on arbitrators' impartiality and independence, and the standard to which they conduct arbitrations, there is a growing demand for reassessing arbitrators' role as administrators of justice. In this spirit Lord Neuberger maintains that as:

(arbitrators) administer justice, and they must therefore act in accordance with the law and be seen to act in accordance with the law. (...) (In addition) given that arbitration is the remedy of choice for many commercial parties, there is a powerful case for saying that arbitration should be held to the same high standard we hold the court process, and that must include its rule of law credentials.⁷³⁰

5.3 Arbitrator's Own Perception of Their Function

The preceding two sections demonstrate that the evolution of the system of international commercial arbitration in the last 20-30 years have led to some changes in the institutional and public perceptions of arbitrators' functions. In order to understand whether those changes have had an impact on arbitrator's decision-making it is important to analyse whether there has also been a development in the way arbitrators apprehend their mission.

It has indeed been maintained for many years that due to the *ad hoc* justice that international commercial arbitration serve and the contractual character of this dispute resolution mechanism arbitrator's mandate differs from the judicial, particularly with regard to the rigidity with which the rules of law should be followed. Some arbitration users contend that "if an arbitrator is tempted to stretch the law in order to achieve what is perceived to be a more 'just' result, he has greater freedom to do so".⁷³¹ Back in 1989 Alan Redfern, a distinguished English arbitrator,

⁷³⁰ Lord Neuberger (n 421).

⁷³¹ Dezalay and Garth, 'Fussing about the Forum' (n 431) at 285, 295; Charles Kaplan, 'Brief Reflections on the Application of Norms by International Arbitrators' in Miguel Ángel Fernández-Ballesteros and David Arias (eds), *Liber Amicorum Bernardo Cremades* (1st edn, Wolters Kluwer España 2010) 672; Franck, 'The Role of International Arbitrators' (n 425) 505:

unequivocally supported the view that arbitral tribunals are much more concerned with meeting parties' expectations than with the consistency of their decisions:

By its whole nature and constitution, an arbitral tribunal is far more ready, and far freer, than a conventional judicial tribunal to deal with the actual case in front of it. An arbitral tribunal is usually established to deal with a particular case. Once it has pronounced its decision, its function is over. In such cases, there is less need to be concerned with consistency of decisions. There is more scope for tailoring the award to the particular merits of the dispute, and there is generally no court of appeal to ensure uniformity of arbitral decisions.⁷³²

There is a wide consensus that despite some similarities judges and arbitrators have inherently different functions especially in relation to the rule of law credentials⁷³³.

Professor Pierre Mayer summarises those differences as follows:

"Historically, arbitration awards were not revered so much for their legal analysis, but more for their sense of fairness and industry knowledge."; Rogers, 'Fit and Function in Legal Ethics' (n 64) 417; Rogers, 'Regulating International Arbitrators' (n 426) 55; Rogers, *Ethics in International Arbitration* (n 445) 61.

⁷³² Redfern, 'International Commercial Arbitration: Winning the Battle' (n 222) 11-1 et seq.

⁷³³ This section attempts to look at the arbitrator's vocation through the eyes of arbitrators, however for more detailed analyses on arbitrator's status, rights and obligations by renown commentators and practitioners see: Born, 'Chapter 13: Rights and Duties of International Arbitrators' ; James H. Carter, 'The Rights and Duties of the Arbitrator: Six Aspects of the Rule of Reasonableness' in *The Status of the Arbitrator*, ICC Pub. No. 564 (1st edn, ICC Publishing 1995); Allan Philip, 'The Duties of an Arbitrator' in Lawrence W. Newman and Richard D Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (2nd edn, Juris Publishing, Inc. 2008); Alessi, 'Enforcing Arbitrator's Obligations: Rethinking International Commercial Arbitrators' Liability' ; 'Final Report on the Status of the Arbitrator' ; Lévy and Derains, *Is Arbitration only As Good as the Arbitrator? Status, Powers and Role of the Arbitrator, Dossiers of the ICC Institute of World Business Law, Volume 8* ; Gaillard and Savage, 'The Status of the Arbitrators' ; Park, 'The Predictability Paradox - Arbitrators and Applicable Law' ; Klaus Peter Berger, 'To What Extent Should Arbitrators Respect Domestic Case Law? - The German Experience regarding the Law on Standard Terms' in *Dossier of the ICC Institute of World Business Law: The Application of Substantive Law by International Arbitrators* (1st edn, ICC Publishing 2014); Richard M Mosk, 'Deliberations of Arbitrators' in David D. Caron and others (eds), *Practising Virtue: Inside International Arbitration* (1st edn, OUP 2015); J. William Rowley and Robert Wisner, 'Party Autonomy and Its Discontents: The Limits Imposed by Arbitrators and Mandatory Laws' (2011) 5 *World Arbitration & Mediation Review* 321-335; Philipp Peters, 'The Arbitrator and the Arbitration Procedure - Presiding Arbitrator, Deciding Arbitrator: Decision-Making in Arbitral Tribunals' in Christian Klausegger and Peter Klein (eds), *Austrian Yearbook on International Arbitration 2011* (1st edn, Manz'sche Verlags- und Universitätsbuchhandlung; Manz'sche Verlags- und Universitätsbuchhandlung 2011); Antonias Dimolitsa, 'The Equivocal Power of the Arbitrators to Introduce Ex Officio New Issues of Law' (2009) 27 *ASA Bulletin* 426-440; Schill, 'International Arbitrators as System-Builders' ; Guillermo Aguilar Alvarez, 'To

A judge's mission and obligations are clear: they consist in rendering justice, *i.e.* in defining the respective rights of the parties as they result from the applicable law. This is all that the parties themselves expect of the judge. They do not expect him to upset the established order so as to impose, in breach of the law, what he subjectively considers as fair. The position of an international arbitrator is very different. (...) [H]e owns no duty of obedience. His only obligations arise from what can be considered as the mission of an arbitrator.⁷³⁴

Professor Mayer continues with reflections on what the arbitrator's mission entails. According to him there is a lot of uncertainty as to what standpoint an arbitrator should adopt, particularly with regard to parties' expectations and arbitrator's own conception of their responsibility. This differentiates an arbitrator from a judge. An arbitrator must have regard to conflicting considerations arising out of the applicable rule of law, on the one hand, and, on the other hand, the search for a fair solution, which most closely conforms with the true will of the parties.⁷³⁵ Considerations about the legitimate expectations of the parties guide arbitrators in reconciling the never-ending dichotomy between law and equity and law and contract and they are what distinguish arbitrators from national judges.

What Extent Do Arbitrators in International Cases Disregard the Bag and Baggage of National Systems?' in Albert Jan van den Berg (ed), *ICCA Congress Series No. 8 (Seoul 1996)* (1st edn, Kluwer Law International 1998); Rogers, 'The Vocation of the International Arbitrator' ; Onyema, *International Commercial Arbitration and the Arbitrator's Contract* ; Phillip Landolt, 'Arbitrators' Initiatives to Obtain Factual and Legal Evidence' (2012) 28 *Arbitration International*; Mayer, 'Reflections on the International Arbitrator's Duty to Apply the Law' ; Michaels, 'Roles and Role Perceptions of International Arbitrators' ; Pierre A. Karrer, 'Responsibility of Arbitrators and Arbitral Institutions' in Lawrence W. Newman (ed), *The Leading Arbitrators' Guide to International Arbitration* (2nd edn, Juris Publishing, Inc. 2008); Sigvard Jarvin, 'The Sources and Limits of the Arbitrator's Powers' (1986) 2 *Arbitration International* 140–163; Cindy G. Buys, 'The Arbitrators' Duty to Respect the Parties' Choice of Law in Commercial Arbitration' (2005) 79 *St John's L Rev* 59–96; Franck, 'The Role of International Arbitrators' ; Jan H. Dalhuisen, 'International arbitrators as equity judges' in Peter H. F. Bekker and others (eds), *Making Transnational Law Work in the Global Economy Essays in Honour of Detlev Vagts* (1st edn, Cambridge University Press 2010); Ray, 'On Integrity in Private Judging' ; Dezalay and Garth, *Dealing in Virtue: International Commercial Arbitration And The Construction Of A Transnational Legal Order (Language & Legal Discourse)* ; Patrik Schöldström, *The Arbitrator's Mandate: A Comparative Study of Relationships in Commercial Arbitration under the Laws of England, Germany, Sweden and Switzerland* (1st edn, Stockholm: Jure, 1998 1998); James Allsop, 'The Authority of the Arbitrator' (2014) 30 *Arbitration International* 639–660.

⁷³⁴ Mayer, 'Reflections on the International Arbitrator's Duty to Apply the Law' (n 716) 240, 241.

⁷³⁵ Ibid 241.

The “will of the parties” or the principle of party autonomy is the guiding general principle in international commercial arbitration. Arbitrators recognise that their authority is based on the arbitration agreement and that the principle of party autonomy “prevails almost universally”⁷³⁶. According to one tribunal:

It is a fundamental principle that any arbitration must be founded on the consent of all the parties thereto and the consent must be recognized as such by law. Especially in an international arbitration (...) the consent of each party must be unambiguously demonstrable if any resulting Award is to be safely enforceable.⁷³⁷

The principle of party autonomy, subject only to public policy rules and mandatory laws, has permeated the whole arbitration process. Arbitrators are aware of the primacy of the will of the parties more than ever before⁷³⁸. They perform their obligations with due care and serve the type of justice that parties want and expect. The foundations of arbitrator’s mandate remain unchanged – to resolve parties’ dispute taking into account parties’ agreement and expectations. This suggests that since arbitrator’s mission is very tightly linked to parties’ will arbitrators are inclined to see themselves as service providers that should respect the primacy of party autonomy⁷³⁹.

⁷³⁶ ICC Case 7920 of 1993 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration 1998 - Volume XXIII, Yearbook Commercial Arbitration, Volume 23* (1st edn, Kluwer Law International 1998) at 80 [1].

⁷³⁷ ICC Case 7453 of 1994 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration 1997, Volume 22* (1st edn, Kluwer Law International 1998) at 107 [10].

⁷³⁸ See Donahey (n 472) 42 stating that “party autonomy gives the parties the flexibility necessary to structure the procedure in a way best suited to their needs. It is this flexibility that has led to the success of commercial arbitration and made it the preferred means of resolving international commercial disputes.”

⁷³⁹ Arbitrators largely acknowledge the triumph of party autonomy and consider the wishes of the parties congruent with the principles of the arbitral system. Interviews with arbitrators conducted by Joshua Karton reveal that arbitrator’s decision-making is constrained by party autonomy both with respect to procedural decisions and decision on the merits of disputes (in Karton, ‘Norms Arising from the Values Shared by International Commercial Arbitrators’ (n 138) 87-89). One arbitrator pointed out that arbitrators are reluctant to decline changes to the timetable when both parties request the latter, even though this may lead to additional delay and costs. Another arbitrator expressed caution about raising issues that the parties have not addressed. Given the considerations of the interviewed arbitrators it could be argued that besides the mandatory rules of law it is up to the parties to decide how much justice and what kind of process they want. Arbitrators seem to share this perspective. For example, with regard to the debate whether the

As a question of law, conflict of law issues and contract construction give an interesting insight into arbitrator's perception of their function. They represent a particularly suitable research topic because they confront arbitrators with conflicting choices, i.e. either to follow a formalistic approach to the conflict of law issues in conformity with the rules of *lex fori* or *lex arbitri*⁷⁴⁰, or to apply a more flexible method for ascertaining the applicable law and parties' stipulations. Where arbitral tribunals take the first route they will be seen to act as judges, the implication being that they see their function as a quasi-judicial one. On the other hand, if arbitrators give highest consideration to parties' expectations and make use of their widely-recognised discretion to select rules of law that are most suitable to the legal relationship between the parties, they will demonstrate that they consider their mandate to be in service of the parties. This is so because aside from instances when a mandatory provision contains a rule of qualification or compels arbitrators to apply certain conflict of law rules, arbitral tribunals are not obliged to comply with conflict of law rules⁷⁴¹. Since arbitrators have no *lex fori*⁷⁴² they are free to select the rules of

iura novit curia rule or the foreign-law-as-fact rule apply in international commercial arbitration proceedings, Gabrielle Kaufmann-Kohler suggests the following approach: "The parties shall establish the contents of the law applicable to the merits. The arbitral tribunal shall have the power, but not the obligation, to conduct its own research to establish such contents. If it makes use of such power, the tribunal shall give the parties an opportunity to comment on the result of the tribunal's research." (in Gabrielle Kaufmann-Kohler, "The Governing Law—Fact or Law?"—A Transnational Rule on Establishing its Contents' in M. Wirth (ed), *Best Practices in International Arbitration, ASA Special Series No. 26* (1st edn, Basel: ASA 2006) at 181). Similar views are shared by Jeffrey Waincymer, 'International Arbitration and the Duty to Know the Law' (2011) 28 *Journal of International Arbitration* 201–242 and Julian D. M. Lew, 'Proof of Applicable Law in International Commercial Arbitration' in Klaus Peter Berger and others (eds), *Festschrift für Otto Sandrock zum 70. Geburtstag* (1st edn, Verlag Recht und Wirtschaft GmbH Heidelberg 2000).

⁷⁴⁰ See Bruno Zeller and Camilla Baasch Andersen, 'Discerning the Seat of Arbitration – An Example of Judicialization of Arbitration' (2015) 19 *Vindobona Journal* 2.

⁷⁴¹ Julian D. M. Lew, 'Relevance of Conflict of Law Rules in the Practice of Arbitration' in Albert Jan van den Berg (ed), *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration, ICCA Congress Series, 1994 Vienna* *Efficient Arbitration Proceedings: The Law Applicable in International Arbitration, ICCA Congress Series, 1994 Vienna Volume 7* (1st edn, Kluwer Law International 1996) 448; Redfern, Hunter, Blackaby, and Partasides, *Law and Practice of International Commercial Arbitration* (n 117) 124; Šarčević (n 371) 137–139. Although UNCITRAL ML contains a reference to conflict of laws rules in Art. 28 (2) many national laws and arbitrations rules explicitly specify that failing an express agreement by the parties, arbitrators shall decide the dispute by applying rules of law which they consider most appropriate – see e.g. French Code of Civil Procedure, Art. 1496; ICC Rules 2012, Art. 21(1). See also ECICA, Art. VII(1).

law they consider to be most appropriate for the dispute at hand⁷⁴³. By applying *lex fori* or *lex arbitri* in the above scenario arbitrators will take a legalistic approach, which will not necessarily correspond with parties' expectations, the transnational nature of international commercial arbitration and the function of arbitrators. In contrast, if arbitrators consider the true will of the parties when characterising the relations between the disputants, they will demonstrate a more flexible approach that distinguishes them from national courts. As one commentator argues, the more transnational one arbitration is in terms of having various connecting factors to different states, the more appropriate it becomes to resolve any conflict issues by reference to transnational standards derived from international customs and trade practices rather than by having recourse to conflict of law rules.⁷⁴⁴ It should be born in mind, however, that arbitrators would rarely be faced with the difficulty to ascertain the law applicable to the merits of the dispute as current trends show that nearly 9 in 10 contracts contain a choice of law provision⁷⁴⁵.

Indeed, many of the older awards take a formalistic approach by applying the conflict of law rules of the *lex fori*, while a more pragmatic and flexible approach that corresponds with the legitimate expectations of the parties have been

⁷⁴² ICC Case 1422 of 1966 and ICC Case 4132 of 1983 in Sigvard Jarvin and Yves Derains (eds), *Collection of ICC Arbitral Awards 1974-1985 / Recueil des Sentences Arbitrales de la CCI 1974-1985* (1st edn, Kluwer Law International 1994) 186 and 164 respectively.

⁷⁴³ According to the Austrian Code of Civil Procedure Section 603 the arbitral tribunal has to decide the dispute according to the rules of law that the parties have chosen and in the absence of parties' agreement, the tribunal is free to apply the laws of a state it considers appropriate. Similar provisions can be found in the Dutch Arbitration Act 2015 (Art. 1054), French Code of Civil Procedure (Art. 1511), Belgian Judicial Code (Art. 1710 – the designation of the law of a given state shall be construed, unless otherwise expressed, as directly referring to the substantive law of that state and not to its rules of private international law); Chinese Law on Application of Laws to Foreign-Related Civil Relations (Art. 41 – where parties have made no choice of law, the tribunal shall apply the laws of the habitual residence of the party whose performance of obligations best reflects the characteristics of the contract or other laws having the most significant relationship with the contract); German Code of Civil Procedure (Section 1051(2)) and the Swiss Private International Law Act (Art. 187(1) – where there is no choice of law, the tribunal applies the substantive law that has the closest connection to the dispute); However, note English Arbitration Act 1996, s 46(3) according to which absent any choice by the parties, the tribunal will determine the applicable law according to the conflict of law rules it considers applicable in the given case. See also ICC Cases 2585 of 1976, 2558 of 1976, 2886 of 1977, and 3880 of 1983 in Jarvin and Derains, *Collection of ICC Arbitral Awards 1974-1985* (n 741).

⁷⁴⁴ Veijo Heiskanen, 'And/Or: The Problem of Qualification in International Arbitration' (2010) 26 *Arbitration International* 441–466, 455.

⁷⁴⁵ See p 234.

increasingly adopted in more recent arbitral decisions. In a series of awards the arbitral tribunals applied a legalist approach by ascertaining the applicable law through reference to the conflict rules of the *lex fori*. In ICC Case 5607⁷⁴⁶ a dispute arose between an Italian company (Claimant) and a Turkish company (Respondent) after parties' joint application for a tender was accepted. Respondent initiated discussions with Claimant on the implementation of the project and sent an order to Claimant described as "final and firm". Claimant signed and returned the order but Respondent subsequently halted the negotiations arguing that no contract had been made between the parties. Claimant contended that having prepared to perform the services under the order it was entitled under Austrian law to receive the full amount it would have received had it performed the services. In addition, Claimant requested compensation for the substantial losses it suffered on account of Respondent's conduct. The arbitral tribunal noted that a contract containing an explicit choice of law provision existed between the parties but, given that Respondent had not signed the terms of reference under the then Art. 13 of the ICC Rules, it had to engage in interpretation of the will of the parties. The arbitrators held that there were no reasonable grounds to suppose that the reference to Austrian law was meant to have effects going beyond the simple *prorogatio fori*, since the dispute had no other connection with Austria other than the seat of arbitration. Thus, the parties did not intend to provide for the application of Austrian substantive law to their relations – whether contractual or extra-contractual. Despite this conclusion, however, the tribunal held that parties intended the application of Austrian civil procedure and *Austrian conflict of law rules*. Such inference did not really take into account Section 603 of the Austrian Code of Civil Procedure. The latter states that any agreement as to the law or the legal system of a given state shall be construed, unless the parties have expressly agreed otherwise, as directly referring to the substantive law of the state and not to its conflict of laws rules. By relying on *lex fori* to characterise the contract between the parties as a contract for work (Werkvertrag) the tribunal took a legalistic approach very much like the one applied by national judges.

⁷⁴⁶ ICC Case 5607, award rendered in 1989 in (2002) 13(2) 'ICC International Court of Arbitration Bulletin' 55.

Another arbitral case criticised for resorting to *lex fori* is ICC Case 8175⁷⁴⁷. The seat of arbitration between two Canadian Claimants and an Indian Respondent was Paris. The dispute between the parties concerned the proper meaning and application of the price variation formulae contained in the contract, the latter being governed by Indian law. Claimants contended that they were entitled to additional sums and sought interest on the principal sums claimed, while Respondent argued that, in fact, it overpaid one of the Claimants and no interest was due. The tribunal held that French conflict rules should be applied in order to determine Claimants' entitlement to interest and the interest rate. Luckily this decision did not lead to some injustice. As French conflict rules treat questions relating to interest as a substantive issue, the tribunal applied Indian law to these matters.

The conflict rules of the *lex fori* were also followed in ICC Case 5731⁷⁴⁸, ICC Case 5460⁷⁴⁹, ICC Case 4504⁷⁵⁰, ICC Case 6476⁷⁵¹ and ICC Case 9415⁷⁵². In the latter case an Indian purchaser and a Turkish seller entered into a purchase and sale contract. Claimant terminated the contract on account of Respondent's failure to supply the contracted quantity in accordance with the contract specifications. Respondent contended the validity of the termination and raised counterclaims based on tort. The contract did not contain a choice of law provision and parties were in disagreement as to which law should apply to the merits of the dispute. After noting that the seat of arbitration was in the Netherlands, the tribunal held that the starting point for the determination of the applicable law was Art. 1054(2) Dutch Arbitration Act 1986, according to which, where parties have failed to specify the applicable

⁷⁴⁷ ICC Case 8175, award rendered in 1996 in (2004) 15(1) 'ICC International Court of Arbitration Bulletin' 83.

⁷⁴⁸ ICC Case 5731, award rendered in 1989 in (1992) 3(1) 'ICC International Court of Arbitration Bulletin' 18. The place of arbitration was in England and the tribunal found that not only its power to award interest but also the determination in respect to interest was to be assessed in view of the English conflict of laws rules. Thus, it was held that the question of liability to pay interest was governed by the law of the contract under which the obligation arose (i.e. the New York law), while the amount of interest was to be determined by English law.

⁷⁴⁹ ICC Case 5460, award rendered in 1987, Albert Jan van den Berg (ed), *ICCA Yearbook Commercial Arbitration – Volume XIII* (1st edn, Kluwer Law International 1988) 104.

⁷⁵⁰ ICC Case 4504, award rendered in 1986 in (1986) 113 'Journal du Droit International' 1118.

⁷⁵¹ ICC Case 6476, award rendered in 1994 in (1994) 7(1) 'ICC International Court of Arbitration Bulletin' 86.

⁷⁵² ICC Case 9415, award rendered in 1998 in (2002) 13(2) 'ICC International Court of Arbitration Bulletin' 82.

law, the arbitral tribunal shall make its award in accordance with the rules of law, which it considers appropriate. In an interim award it was held that in determining the applicable law the tribunal will apply both Dutch conflict of law rules and the conflict of law rules generally applied by international arbitrators in similar cases.

Although in arbitrators' opinion the outcome accorded with the legitimate expectations of the parties and contained a pragmatic element of applying only one system of law to the contractual and extra-contractual claims, the decision strikes with its legalistic approach. The latter is manifested both in the outline of the award and its reasoning. The tribunal laid out a route map for ascertaining the applicable law in four steps, namely: (i) step 1 – considering the *lex arbitri*, (ii) step 2 – considering the institutional arbitration rules, (iii) step 3 – following the route contained in the institutional arbitration rules, and (iv) step 4 – determining which substantive law applies. The map was applied both to the contractual and extra-contractual claims, even though the Respondent had not formulated the precise tort that Claimant was alleged to have committed. In a minority dissenting opinion a member of the arbitral tribunal criticised the findings with respect to the tort alleged by Respondent pointing out that arbitrator's mandate has its important limitations, namely to render a decision on the grounds of the claims and counterclaims put forward by the parties, rather than to build a case for either of the parties:

(...) the Arbitral Tribunal is not called upon to decide a hypothetical question as to what would be the law applicable to the Tort which the Respondent might specify until that is done. The function of the Arbitral Tribunal is to decide the questions which arise before it and discuss the law in so far as it is necessary for that purpose. It is not a part of our function to lay down the law in the abstract or on a hypothetical footing with a view to guide either party.⁷⁵³

Thus, the justice that arbitrators administer is a truly *ad hoc* one. It is limited to the particular parties and the specific facts of the case. As explained in ICC Case 3267 “[t]he arbitral tribunal is a conventional court and its jurisdiction is *per se* not

⁷⁵³ Ibid.

defined by law but by contract.”⁷⁵⁴ Even arbitrator’s interpretation of the law has a defined function and should serve an idiosyncratic purpose. The letter of the law should be invoked only when necessary, i.e. if the legal issue could not be settled by contract interpretation. When “all legal issues in (an) arbitration depend on the construction and system of the contractual documents”⁷⁵⁵, then arbitrator’s mandate will be fulfilled with settlement of the dispute according to the interpretation of the contractual provisions. Thus, in ICC Case 9117⁷⁵⁶ the arbitral tribunal pointed out that the applicable legal provisions were to be applied only when matters and issues which had not been contractually agreed between the parties could not be determined by having regard to trade usages:

For the Tribunal it is clear that, in the first instance, the contractual terms as agreed by the Parties in the framework of their contractual relationship shall be looked at and applied to determine the disputed issues. In case of ambiguity and to the extent necessary, contractual terms may have to be interpreted by the Tribunal. In addition to the foregoing, the Tribunal has to have regard to the relevant usages of the trade (...). Regarding any further issues which might come up and which are not governed by any of the foregoing, the Tribunal will have to determine the proper law of contract according to the so-called “objective approach”.⁷⁵⁷

Such more flexible approach in ascertaining the *proper law* of the contract that corresponds with this perception of arbitrator’s vocation was also taken in ICC Case 12494⁷⁵⁸. The case concerned a contract concluded between a manufacturer of goods in an Eastern European state (Respondent) and a buyer in a South Asian state (Claimant). After noting that under the relevant institutional arbitration rules and *lex*

⁷⁵⁴ ICC Case 3267, award rendered in 1984 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration 1987 - Volume XII* (1st edn. Kluwer Law International, 1987) 87-96, in which the tribunal noted that even when acting as *amiable compositeur*, its authority is limited to what had been agreed by the parties in their contract or in the Terms of Reference. Although the arbitrators did not reject the view that as a matter of principle an *amiable compositeur* may go beyond certain solutions deriving from the applicable legal rules, the tribunal cannot extend the boundaries of its jurisdiction when faced with specific provisions of a contract.

⁷⁵⁵ Ibid.

⁷⁵⁶ ICC Case 9117, award rendered in 1998 in (1998) 10(2) ‘ICC International Court of Arbitration Bulletin’ 96.

⁷⁵⁷ Ibid.

⁷⁵⁸ ICC Case 12494, award rendered in 2004 in (2008) 19(1) ‘ICC International Court of Arbitration Bulletin’ 126.

arbitri the arbitral tribunal was not required to use any particular conflict of laws rules in order to ascertain the applicable law, the arbitrators engaged in careful examination of the nature and purpose of the underlying contract between the parties. The tribunal determined that the contract was for sale of equipment and relied on the agreed CPT Incoterm to establish when delivery of the goods took place. The arbitrators then had regard to “the relevant international conventions as evidence of trade usages and internationally recognized principles applicable to conflict of law issues”⁷⁵⁹ and pointed out that although parties had relied on those conventions in their submissions, the conventions had inherent limitations. Finally the tribunal held that the contract was governed by the law of state Y, the latter being the most closely connected with the characteristic performance of the contract.

It is now widely recognised⁷⁶⁰ that the centre of gravity or the connection test is a choice of law principle that better reflects commercial practices and parties’ legitimate expectations than a mechanical application of the conflict rules of the *lex fori*. This more direct and flexible approach takes into account the specifics of the legal relations between the parties and the variety of the connecting factors that may exist. That international arbitrators respect parties’ will and aim to deliver the type of justice that disputants want is demonstrated by arbitrators’ careful consideration when employing their discretion to apply the rules of law that are most appropriate to the specific contractual relationship at hand rather than as a general principle or hypothetical.

In ICC Case 7319⁷⁶¹ a French supplier (Claimant) and an Irish distributor of products (Respondent) had entered into a distribution agreement on a non-exclusive basis, but at a very early stage in the commercial relationship, the Respondent contested the quality of the products and refused to pay the amounts due to Claimant under the

⁷⁵⁹ Ibid.

⁷⁶⁰ See ICC Case 5717 (n 387); ICC Case 7585, award rendered in 1992 in (1995) 6(2) ‘ICC International Court of Arbitration Bulletin’ 60; ICC Case 7250, award rendered in 1992 in (1996) 7(1) ‘ICC International Court of Arbitration Bulletin’ 92; ICC Case 7117, award rendered in 1993 in (1996) 7(1) ‘ICC International Court of Arbitration Bulletin’ 89; ICC Case 8672, award rendered in 1996 in (2001) 12(1) ‘ICC International Court of Arbitration Bulletin’ 117; ICC Case 9102, award rendered in 1998 in (2005) 16(1) ‘ICC International Court of Arbitration Bulletin’ 95; ICC Case 9117 (n 756); ICC Case 11754 (n 387).

⁷⁶¹ ICC Case 7319 (n 387).

contract. The choice of law clause in the contract stated that the agreement was to “be constructed in accordance with and governed by laws and regulations applying to members of the European Economic Community”. Although Claimant argued that by not choosing any particular national law the parties wanted to refer to an international system of law, similar to *lex mercatoria*, the sole arbitrator rejected the contention that anational rules of law should govern the merits of the dispute. In arbitrator’s opinion the facts demonstrated that the intention of the parties was not to refer to anational rules and to exclude any national law rather than after eliminating by mutual agreement the national laws of both parties, the latter were unable to agree on a particular national law. The arbitrator was reluctant to supplant parties’ intentions and introduce uncertainty in the contractual relations by applying anational rules of law:

the failure of the parties to agree on the law governing the Agreement cannot, in the sole arbitrator's opinion, be interpreted as an implied reference to some vague international legal or trade principles. Such reference must be made expressly and, if not expressly, then in an implied manner which gives reasonable certainty to the arbitrators or the courts, respectively, that the parties indeed agreed to submit their dispute to anational law or international trade principles, particularly considering the fact that such anational laws and principles, if not properly defined, are difficult if not impossible to assess.⁷⁶²

The above does not suggest that arbitrators are generally unwilling to apply anational rules of law in international commercial arbitrations but that they carefully consider the particularities of the case in order to deliver the type of dispute that parties want and have opted for. Thus, by holding parties’ will and legitimate expectations in a very high regard and by tailoring both the procedural rules but also the substantive rules to the individual case arbitrators administer not only procedural but also substantive justice. Indeed, arbitrators enjoy a greater flexibility in application and interpretation of the substantive law than national judges and the fact that they select and apply the rules of law that are most suitable to a particular case speaks of their important function as adjudicators. Maybe somewhat paradoxically but precisely

⁷⁶² Ibid.

because arbitrators administer *ad hoc* justice, they manage to deliver a fair and just decision suited to the dispute at hand.

The above considerations were taken into account in ICC Case 7110⁷⁶³, in which the arbitral tribunal was faced with a dispute arising out of a number of contracts covering the sale, supply, modification, maintenance and operation of equipment, and other support services. The contracts between the parties contained choice of law provisions making references to “amicable resolution by the parties”, settlement “according to natural justice” and “to the laws of natural justice”. Claimant argued that there was no evidence of explicit or implied choice of law by the parties as the latter did not expressly agree on the applicable law and that the references to natural justice were too vague. Thus, Claimant contended that the tribunal should follow the applicable conflict of law rules. Respondent’s position was that the arbitral tribunal should resort to the *voie indirecte* and as a result apply English law. In the alternative Respondent argued that general principles of private international law regarding contracts for the international supply of goods or services should apply. In addition Respondent contended that the expressions “natural justice”, “the laws of natural justice” and the “rules of natural justice” referred to principles of procedural fairness and did not have any bearing on the law applicable to the substance of the contracts. If those expressions had a substantive meaning, which Respondent maintained was not present in this case, it could be interpreted to be a reference to the principles of equity and morality; however, such meaning could not be reconciled with the fact that the tribunal was called to decide a commercial dispute by application of the law and not in equity.

Firstly, the tribunal had to decide whether there was an express or implied choice of law by the parties. Indications as to the applicable law were to be construed both on the basis of an objective test revealing what the parties’ reasonable intentions and expectations regarding the applicable law as evidenced by all circumstances surrounding the negotiations of the contracts would have been, as well as through a contextual approach applied to the contractual terms likely to evidence the applicable law. The arbitrators examined and discussed at length the terms “natural justice”,

⁷⁶³ ICC Case 7110 (n 387).

“laws of natural justice” and “rules of natural justice”, the negotiation process between the parties, the nature and characteristics of the contracts, the latter held to be state contracts, as well as the considerations of the parties with regard to the neutrality of the applicable law. It was also pointed out that parties could opt for localised or delocalised international commercial arbitration and by including references to “natural justices” and “rules of natural justice” the parties expressed their intentions to delocalise the state contracts and remove them from national legal systems, and to detach the arbitral process from the seat of arbitration. Most interesting, however, were tribunal’s findings in relation to the notion of justice in international commercial arbitration. The arbitrators unequivocally stated that international commercial arbitration is a system that is concerned with and renders not only procedural but also substantive justice and by opting for international commercial arbitration parties agree to have access to this type of justice, which is not necessarily the same as the one that would be obtained from national courts:

An obvious confirmation that notions of justice in international commercial arbitration are not merely procedural but are also substantive is that the majority of national statutes dealing with international arbitration, international conventions regarding arbitration not just concerned with the recognition and enforcement of arbitral agreements and awards, and international arbitration rules contain procedural provisions and choiceoflaw provisions, i.e. provisions pointing to choiceoflaw solutions only becoming relevant because the dispute has been submitted to international commercial arbitration and which may well differ from those that would have been otherwise obtained had the decision of the case been left to municipal courts and their private international law systems.⁷⁶⁴

Thus it was held that although the parties excluded the application of any particular national legal system to the contracts, they indicated their intention that the contracts be governed by general legal rules and principles adapted to the needs of international transactions and enjoying wide international consensus. Since in the tribunal’s view the UNIDROIT Principles primarily reflected such widely accepted general rules and principles they were to be applied to the contracts.

⁷⁶⁴ Ibid.

The above arbitral award is of interest because it demonstrates arbitrator's unique role in ascertainment of the governing law, application of the legal rules and interpretation of the contractual provisions. Of paramount importance for arbitrators seems to be the true intent of the parties, which influences the substantive justice that parties obtain. In the decision in question the arbitral tribunal distinguished between the two approaches to determine the applicable law, namely either by resorting to the "supposedly choice of law neutral and dispassionate criteria, such as a talismanic notion of the localization of the characteristic obligation or an amorphous grouping of contracts or the closest connection noticeable in some national legal systems"⁷⁶⁵ or by "taking into account the parties' concerns and expectations as to substantive justice, including neutrality as to the applicable law"⁷⁶⁶. This flexible approach to ascertaining the applicable law and interpreting parties' intentions is in contrast with the more objective method employed by national courts. As argued by one distinguished arbitrator the "usual way" of deciding cases in international commercial arbitration is "exclusively on the interpretation of contracts and relevance of trade usages, so that very little depends on the question of the applicable law"⁷⁶⁷.

A recent study on the role of arbitrators in adjudicating the merits of international commercial disputes⁷⁶⁸ supports these conclusions. Karton observes that although international arbitral tribunals do generally interpret contracts in a manner consistent with the governing law, their primary interpretative task is discerning the true common intention of the parties.⁷⁶⁹ In this way arbitrators do not always actually *apply* the rules of interpretations in the governing law⁷⁷⁰ but resolve parties' claims by "interpreting and applying the provisions of the Contract (...) in the normal way, i.e. by looking at the Contract from the point of the view of the parties and by giving

⁷⁶⁵ Ibid.

⁷⁶⁶ Ibid.

⁷⁶⁷ Karl-Heinz Böckstiegel, *Arbitration and State Enterprises: Survey on the National and International State of Law and Practice* (1st edn, Kluwer Law International 1984) 27.

⁷⁶⁸ Joshua D. H. Karton, 'The Arbitral Role in Contractual Interpretation' [2015] *Journal of International Dispute Settlement* 4–41.

⁷⁶⁹ Ibid 15.

⁷⁷⁰ Ibid. It must be acknowledged, however, that there are many arbitral awards, which follow a more legalistic approach to contract construction – see e.g. ICC Case 15254, partial award in 2010 in (2014) 25(1) 'ICC International Court of Arbitration Bulletin' 67.

the words used by them a plain and ordinary meaning so as to arrive at their presumed intentions”⁷⁷¹. Even when faced with a question of law, as “ultimately, matters of interpretation are legal questions for the arbitral tribunal to decide”⁷⁷², arbitrators often seek solutions from commercial practice⁷⁷³ and trade usage and refer to transnational law, soft law instruments and other “optional” sources of authority⁷⁷⁴. However, the increasing tendency to adopt a legalistic approach to issues of law in order to comply with parties’ and court’s expectations⁷⁷⁵ should not be underestimated.

The unique contract construction applied by arbitrators in international commercial disputes appears to be considerably consistent⁷⁷⁶. At the centre of the arbitral interpretative approach lie considerations about the true intentions of the parties rather than strict observance of a particular method of interpretation. In the absence of a choice of law clause arbitrators are not obliged to adopt a legalistic approach to matters of interpretation by reference to a national law or arbitral case law. Instead they are encouraged to seek a flexible solution in consideration of parties’ manifest intentions. Thus in ICC Case 13129⁷⁷⁷ the sole arbitrator expressed their “reservations as to the real existence of anything that can be described as lex

⁷⁷¹ ICC Case 13898, award rendered in 2009 in (2014) ‘ICC International Court of Arbitration Bulletin’.

⁷⁷² Ibid.

⁷⁷³ In many of the arbitral awards reviewed for the analysis in this section, arbitrators make sure that their conclusion is “consistent with arbitral practice” (ICC Case 12035, procedural order of 6 June 2003 in *Special Supplement 2010: Decisions on ICC Arbitration Procedure A Selection of Procedural Orders issued by Arbitral Tribunals acting under the ICC Rules of Arbitration* (1st edn, ICC Publishing 2010)) or “the practice of international tribunals with special regard for ICC awards” (ICC Case 9415 (n 752)), etc.

⁷⁷⁴ Karton, ‘The Arbitral Role in Contractual Interpretation’ (n 768) 17.

⁷⁷⁵ See e.g. *Oil Basins Ltd v BHP Billiton Ltd & Ors* [2007] VSCA 255 at [50] where the court held in relation to arbitrator’s obligation to give reasons that: “the requirement is for reasons sufficient to indicate to the parties why the arbitrator has reached the conclusion to which he or she has come. To that extent, the requirement is no different to that which applies to a judge”.

⁷⁷⁶ See Karton, ‘The Arbitral Role in Contractual Interpretation’ (n 768) 19: “The analysis of published awards above shows that arbitrators tend to follow a relatively consistent interpretive approach, regardless of the governing law. This approach is characterized by invocation of the subjective intention of the parties, an emphasis on reading the contractual text in its commercial context and an inclusive approach to extrinsic evidence of the parties’ intentions.” In another article Lévy and Robert-Tissot reach largely the same conclusions – see Laurent Lévy and Fabrice Robert-Tissot, ‘L’interprétation Arbitrale’ (2013) *Revue de l’Arbitrage* 861–952.

⁷⁷⁷ ICC Case 13129 (n 661) 329.

mercatoria” and applied ordinary principles of contractual construction. The arbitrator noted that “[a] strict, legalistic approach is not helpful when the interpretation of a contract such as this is in question” because “[t]his contract is typical of many contracts negotiated between trades whose main concern is to do the deal, who are not lawyers and who do not rely on lawyers to draft their contracts(...)”⁷⁷⁸. In view of those considerations the arbitrator refused to follow the “last shot” approach when interpreting the parties’ exchanges and correspondence as “to hold otherwise would (...) fly in the face of parties’ manifest intentions”.⁷⁷⁹

As Lévy and Robert-Tissot argue, by favouring the true intentions of the parties over a strict interpretative approach arbitrators favour the predictability of the performance of the contract rather than legal security⁷⁸⁰. While some arbitrators and scholars criticise this flexible method of law ascertainment and contract construction and take a “pro-accuracy” position⁷⁸¹, others applaud it for revealing parties’ true intentions in a commercial context: “Done properly, reaching solutions by interpreting the parties’ intentions rather than by sophisticated judicial reasoning deserves praise (...)”⁷⁸².

The extensive research of arbitral awards that has been undertaken in the light of this section indicates that arbitrators take either a flexible or legalistic approach not only with relation to law ascertainment but also in consideration of issues of fact. A highly judicialised arbitral decision-making process is characterised by a legalistic approach to the sources of law and weight of evidence. Arbitrators employing a formalistic approach to questions of facts rely heavily on documentary evidence and often follow the so-called “best evidence rule”⁷⁸³. In contrast, when arbitrators resort to their professional experience and common logic to decide issues of fact they

⁷⁷⁸ Ibid 339.

⁷⁷⁹ Ibid 338.

⁷⁸⁰ Lévy and Robert-Tissot (n 775) 868: “L’arbitre privilégie ainsi la prévisibilité dans l’exécution du contrat plutôt que la sécurité du droit”.

⁷⁸¹ See e.g. Park, ‘Arbitrators and Accuracy’ (n 372).

⁷⁸² Lévy and Robert-Tissot (n 775) 886 as translated by Joshua Karton in Karton, ‘The Arbitral Role in Contractual Interpretation’ (n 768) 19.

⁷⁸³ Redfern, Hunter, Blackaby, and Partasides, *Law and Practice of International Commercial Arbitration* (n 117) 298.

behave like industry insiders and take a flexible approach to deliver commercial justice. To demonstrate the difference between the two approaches several arbitral awards that discuss the application of trade usages to parties' contract will be discussed.

It is a well-established principle that parties to a commercial contract are bound by usages that are widely observed in international trade.⁷⁸⁴ Arbitrators are equally obliged to take into account such usages in their decision-making process.⁷⁸⁵ Ascertaining what constitutes a trade usage, however, is a difficult and challenging question. Arbitrators approach this issue in two ways – either legalistically by relying on expert evidence, arbitral awards and sources of codified practices, such as the UNIDROIT Principles, CISG, INCOTERMS, UCP, etc., or as industry insiders by referring to their own experience and applying common logic when assessing the weight of the evidence.

A legalistic ascertainment of trade practices is demonstrated in a number of ICC awards. In ICC Case 7903⁷⁸⁶ the arbitral tribunal applied INCOTERMS 1990 “as an indication of international trade usage, and because neither party has provided evidence of a different definition of ‘delivered duty paid’”. A similar approach was adopted in ICC Case 8502⁷⁸⁷ where the tribunal made reference to the CISG and UNIDROIT Principles, “as evidencing admitted practices under international trade law.” In ICC Case 11976⁷⁸⁸ the sole arbitrator considered several ICC awards and scholarly materials, which were found to be an illustration of *lex mercatoria* and usages of international trade.

⁷⁸⁴ See e.g. UNIDROIT Principles, Art. 1.9; CISG, Art. 9, etc.

⁷⁸⁵ See e.g. ICC Rules 2012, Art. 21(2); HKIAC Rules 2013, Art 35.3; Swiss Rules of International Arbitration 2012, Art. 33(3), etc.

⁷⁸⁶ ICC Case 7903, award rendered in 1995 in (2010) 21(2) ‘ICC International Court of Arbitration Bulletin’ 74.

⁷⁸⁷ ICC Case 8502, award rendered in 1996 in (1999) 10(2) ‘ICC International Court of Arbitration Bulletin’ 72.

⁷⁸⁸ ICC Case 11976 (n 387).

A much more lenient approach to commercial practices, as well as contract interpretation, was adopted in ICC Case 16816⁷⁸⁹. The arbitrator relied on common sense rather than codified trade usages in finding that a party is subject to implied obligations, in particular the obligation of reasonable care and skill:

I agree that such an obligation would arise, as a matter of both common sense and necessary implication, in a case where one party places itself in the hands of another professing ability and expertise in relation to the tactics required for performing the task with which it is entrusted.⁷⁹⁰

Common sense and commercial logic were also applied in ICC Case 9483⁷⁹¹ where the sole arbitrator considered relevant trade regarding interest payment. The arbitrator noted that a yearly interest of 21.6% as applied to US dollars could not reasonably be regarded as a trade usage as it was too high in view of equity and commercial practice. Instead the interest rate should be adapted with regard to the evolution of commercial circumstances.

However, despite a few arbitral awards, which follow a flexible approach to fact-finding and evidentiary weight, it seems that the majority of awards adopt a more formalistic method. Arbitrators seek to rely on binding authority as opposed to their own experience as industry insiders⁷⁹² and they often subject parties' claims to a high standard of proof⁷⁹³. Arbitrators are mindful of the fact that there is no appeal

⁷⁸⁹ ICC Case, 16816, award rendered in 2011 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration 2015 - Volume XL* (1st edn, Kluwer Law International 2015) 236-293.

⁷⁹⁰ Ibid 272.

⁷⁹¹ ICC Case 9483, award rendered in 1998 in (2007) 18(1) ICC 'International Court of Arbitration Bulletin' 86.

⁷⁹² See e.g. the wording in ICC Case 10166, award rendered in 2000 in (2011) 22(2) 'ICC International Court of Arbitration Bulletin' 64: "In the absence of binding authority I hold and adjudge that the Respondents have failed to prove to my satisfaction that the testimony of [A] is inadmissible in evidence".

⁷⁹³ See e.g. ICC Case 11976 (n 387), as opposed to "the balance of probability standard" (*Desert Line Projects L.L.C. v. The Republic of Yemen*, ICSID Case ARB/05/17 at [158]; WIPO Case No. D2001-0201 *Rogers Cable Inc. v Arran Raja Lal*, Administrative Panel Decision at [7.1]), "the inner conviction of an arbitrator standard" (Bernard Hanotiau, 'Satisfying the Burden of Proof: The Viewpoint of a "Civil Law" Lawyer in the Standards and Burden of Proof of Proof in International Arbitration' (1994) 10 *Arbitration International* 345) or "the standard of comfortable satisfaction" (CAS 2013/A/3256 *Fenerbahçe Spor Kulübü v. UEFA*, Award, para. 277; CAS Case 2001/A/343 *Union Cycliste Internationale (UCI) v H.*, Award, para. 20).

against their decisions and they aim at administering private justice that meets parties' expectations, while confirming to the general standard to act judicially⁷⁹⁴. This includes not only ensuring that parties are given a fair and reasonable⁷⁹⁵ opportunity to present their cases but also that parties' agreements will be respected and substantive justice will be delivered. When parties have agreed a choice of law provision, arbitrators are expected to respect and follow the national court decisions and promote consistency and predictability⁷⁹⁶. By applying the sources of law in predictable way arbitrators do, on the one hand, uphold the rule of law and foster the judicialisation agenda, and, on the other hand, respect parties' legitimate expectations.

It follows from the above that since arbitrator's mandate is contingent on party autonomy the substantive justice that arbitrators serve is influenced by parties' will⁷⁹⁷. As Roy Goode observes the choice of arbitration has an impact on the

⁷⁹⁴ See n 697.

⁷⁹⁵ *ADG and another* (n 682).

⁷⁹⁶ It is argued that the success of international commercial arbitration is rooted in the notion that as a dispute resolution mechanism it provides greater certainty and predictability because of the neutrality of the forum, the impartiality of the arbitrators and the primacy of the principle of party autonomy. As one arbitral tribunal put it: "It could hardly be otherwise, since arbitration clauses have become an essential guarantee to ensure the flow of international trade and serve the needs of transnational businessmen. They are more indispensable than in domestic contracts, because in international undertakings it is absolutely necessary to ensure in the event of disputes a neutral jurisdiction, whose perceived impartiality cannot be put in doubt. Arbitral clauses therefore, in the terms of the U.S. Supreme Court have become "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction". (U.S. Supreme Court, *Scherk v. Alberto-Culver*, 417 U.S. 506, 517 (1974))" (*Parties from Brazil, Panama and U.S.A. v Party from Brazil*, Interim Award, ICC Case No. 4695, November 1984 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration 1986 - Volume XI* (1st edn, Kluwer Law International 1986) 149-158 at 157).

⁷⁹⁷ According to Robert B. von Mehren, a former partner at Debevoise & Plimpton LLP currently acting as an arbitrator in major international arbitrations: "The arbitrator is in essence an *ad hoc* private judge appointed by the parties to decide a particular matter. His authority derives from the parties and both his authority and his tenure disappear when he renders his final award. The judge, on the other hand, derives his authority from the state, his tenure is not measured by the individual case and his rulings and decisions can be enforced by the power of the sovereign. These differences require, or at least strongly suggest, that arbitrators should not conduct arbitrations in the same manner as a judge would conduct a court case. For example, arbitrators should give considerable weight to the desires of the parties. If the parties want to have formal direct and cross-examination, rather than the presentation of direct testimony by witness statements followed by cross-examination, an arbitrator would usually accept their choice; a judge would proceed in the accustomed manner irrespective of the parties' wishes." (in Robert

determination of substantive rights in international disputes.⁷⁹⁸ While arbitrators are tempted to decide as much as possible by construing the contractual provisions, however, they are also well aware of the limitations of the interpretative methods. As one tribunal explains “A court or tribunal should not, in the guise of construction, interpretation or implication, add or excise terms; nor distort the meaning of those used and thereby make a new contract for the parties”⁷⁹⁹. This demonstrates willingness on the side of arbitrators to tackle issues unresolved by interpretation on the basis of the applicable law.

Conclusion

The analysis of the mechanics of arbitral decision-making demonstrates that arbitrators appreciate the uniqueness of their mandate by upholding the primacy of party autonomy, while acting judicially nevertheless. Due to this inherent dichotomy in arbitrator’s mandate, arbitrators are susceptible to judicialisation. In their capacity of service providers arbitrators are influenced by arbitration users’ expectations and needs, while as adjudicators they are subject to institutional perceptions as to what the arbitrator’s vocation entails.

While some level of judicialisation ensures that arbitrators guarantee parties’ access to justice and endorse general principles like due process and fair and equal treatment, expectations of arbitrators to behave like judges and approach questions of law legalistically, make arbitrator’s decision-making process rigid and formalistic. If international commercial arbitration is to continue to be a successful alternative to litigation arbitrators should be encouraged to rely on their expertise and common sense to deliver the commercial justice that arbitration users value so much.

B. von Mehren, ‘An International Arbitrator’s Point of View’ (1999) 10 *Am. Rev. Int’l Arb.* 203–214, at 209).

⁷⁹⁸ Goode (n 32).

⁷⁹⁹ ICC Case 15610, award rendered in 2010 in (2014) 25(1) ‘ICC International Court of Arbitration Bulletin’ 70.

CHAPTER 6 CONCLUSION

The objective of this thesis was to examine the process of judicialisation in international commercial arbitration and the extent to which it has permeated both the arbitration proceedings and arbitral decision-making. The purpose of this concluding chapter is not to repeat all conclusions made in the body of the study, rather to link them together and emphasise areas of further research. In addition, this chapter is a reflection on the advantages and disadvantages of the process of judicialisation in international commercial arbitration.

International commercial arbitration is consensual by nature, however, in order to have real effect it has to be recognised and endorsed by a national legal system, which places this dispute resolution mechanism within the normative system. This suggests that some degree of judicialisation is unavoidable, since the alternative nature of international commercial arbitration has its limits. As Chapters 2 and 3 demonstrate, the judicialisation phenomenon in international commercial arbitration is further propagated by a formalistic approach to the sources of law and their classification.

Empirical research is required to determine the benefits of applying a formalistic approach to the classification of the sources of law in international commercial arbitration. In view of the discussions in Chapters 2 and 3, however, it is suggested that such an approach brings legalism and judicialisation in the law-ascertainment process and contractual interpretation. Furthermore, by distinguishing between the sources of law in international commercial arbitration through their classification, a development of a hierarchical system of norms is encouraged. On the one hand, this supports the legitimacy of international arbitration proceedings in the eyes of the institutions and the public, but, on the other hand, it contributes to the judicialisation of this dispute resolution mechanism. Some authors even contend that the establishment of a hierarchy of norms in the “private justice system” demonstrates a

move towards self-constitutionalisation.⁸⁰⁰ This is an area that deserves further research.

The judicialised approach to the sources of law is not entirely consistent with the flexibility that is traditionally enjoyed by arbitrators, as it gives rise to a propensity for a strict adherence to the letter of the law. Instead it is argued that arbitrators should follow a flexible approach to the sources of law and contractual interpretation. One of the perceived benefits of international commercial arbitration is the commercially minded problem-solving approach of arbitrators when interpreting the contract and determining the applicable rules of law. In contrast to common law judges⁸⁰¹ who take a contract to be an objective record of parties' intentions⁸⁰², arbitrators, much like civil law judges, are prompt to reveal the subjective intention of the parties⁸⁰³ or even the "true intent" of the parties. To do so arbitrators should not be quick to apply any given rules of law but should firstly carefully consider the facts of the case and parties' legitimate expectations.

In cases where the parties have designated a particular national law to govern their contractual relationship, arbitrators' approach to the sources of law, i.e. their binding force and authoritativeness, is to be determined according to the applicable law. Similarly, if parties have agreed a choice of law provision, arbitrators should interpret the contract by following the chosen law's rules of interpretation⁸⁰⁴. Where there is no choice of law provision, however, arbitrators are encouraged to adopt a flexible approach to the sources of law and contractual interpretation having regard

⁸⁰⁰ See generally Moritz Renner, 'Private Justice, Public Policy: The Constitutionalization of International Commercial Arbitration' in Walter Mattli and Thomas Dietz (eds), *International Arbitration and Global Governance* (1st edn, OUP 2014).

⁸⁰¹ The decisive factor for contractual interpretation is the way a reasonable person would interpret the agreement. The plain-meaning rule excludes all extrinsic evidence in the case of a clear wording of the contract. Under the parol evidence rule evidence outside the contract, whether oral or written, may not be used in its interpretation. See e.g. *Proforce Recruitment Limited v The Rugby Group Limited* [2006] EWCA Civ 69 in which the Court of Appeal rules that it was arguable that pre contractual negotiations were admissible as part of the relevant background to the interpretation of a contract as well as to prove that the parties had negotiated on the basis of an agreed meaning of particular words.

⁸⁰² See e.g. *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50.

⁸⁰³ See the French Code Civil, Art. 1188; CISG, Art. 8.

⁸⁰⁴ Karton, 'The Arbitral Role in Contractual Interpretation' (n 768) 37, 38.

to the nature of the contract and the particular circumstances of the dispute. The more transnational the case is, i.e. the more foreign elements it involves, the more appropriate it is for an arbitrator to apply a comparative law analysis in ascertaining the applicable rules of law and interpreting the contract rather than to follow a formalistic approach to the sources of law.

The analyses in Chapters 3 and 5 indicate that while the above method is appreciated by commentators⁸⁰⁵ and employed by some arbitrators⁸⁰⁶, many arbitral tribunals adopt a legalistic approach to the sources of law and the applicable rules of law. The judicialised approach is often preferred in view of policy consideration such as legal certainty, consistency and the public interest. While the latter are to be promoted when possible, it is to be noted that policy considerations do not play a significant role in international commercial arbitration. Arbitrator's function is to deliver *ad hoc* justice, which does not transcend the contractual relationship between the parties. The evolving concept of arbitral jurisprudence and the endorsement of the notions of *lis pendens* and *res judicata*, however, demonstrate the increasing judicialisation of international commercial arbitration.

With the growing popularity of transnational arbitration as the preferred dispute resolution mechanism for international commercial transactions⁸⁰⁷, it becomes difficult, and frankly futile, to argue that the concepts of *lis pendens* are not applicable to international commercial arbitration. In order to endorse the legitimacy of international commercial arbitration and uphold the rule of law this aspect of judicialisation should be acknowledged but its scope should be carefully considered. While, ILA has made recommendations on the issues of *lis pendens*⁸⁰⁸ and *res judicata*⁸⁰⁹ in international commercial arbitration, further research in this area is strongly encouraged.

⁸⁰⁵ See e.g. text to n 226.

⁸⁰⁶ See e.g. text to n 763.

⁸⁰⁷ See the speech by The Right Hon. The Lord of Thomas of Cwmgiedd, Lord Chief Justice of England and Wales 'Developing Commercial Law through the Courts' (n 535).

⁸⁰⁸ See Filip de Ly and Audley Sheppard, 'ILA Final Report on Lis Pendens and Arbitration' (2009) 25 *Arbitration International* 3–34; see also Section 2.3.

⁸⁰⁹ See de Ly and Sheppard, 'ILA Final Report on Res Judicata and Arbitration' (n 241); see also Section 2.3.

Apart from the approach to the sources of law and their classification, this thesis finds evidence of the judicialisation process in both the arbitration proceedings themselves and the arbitral decision-making process. As suggested in Chapters 3, 4 and 5 there are various factors driving the judicialisation in international commercial arbitration, namely: considerations of legal certainty and consistency in arbitral decision-making, the pursuit of fair and just process, increasing regulation of international arbitration proceedings, proliferation of litigation-style practices, globalisation of international trade, professionalisation of arbitrator's vocation and the commercialisation⁸¹⁰ of international commercial arbitration. In view of the statistics cited in this thesis⁸¹¹, the role and effect of the process of commercialisation⁸¹² on the judicialisation of international commercial arbitration deserves particular attention and is identified as an area, which would benefit of further research.

In conclusion, the analyses in Chapters 4 and 5 demonstrate that the process of judicialisation is driven mainly by internal factors, particularly the professionalisation of arbitrator's vocation and the pursuit of the truth in the arbitral process. It is suggested that, in order to maintain the alternative nature of international commercial arbitration, arbitration users and arbitration institutions should rethink the effect that the over-regulation and due process "paranoia" have on the arbitration proceedings and arbitral decision-making. While Chapter 5 considers the mechanics of arbitral decision-making, a more detailed analysis on the effect of arbitration procedure on the substantive rights of the parties is welcome.

⁸¹⁰ See n 589 and text to it.

⁸¹¹ See e.g. n 549.

⁸¹² See n 589 and text to it.

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